STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BLAU PAR CORPORATION AND HENRY J. RICCA, AS OFFICER	:	DECISION DTA No. 807585
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1984 through August 31, 1987	:	

Petitioners Blau Par Corporation and Henry J. Ricca, as officer, 53 Orangeburg Road, Orangeburg, New York 10962 filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through August 31, 1987. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber and Kevin A. Cahill, Esqs., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioners' request for a conciliation conference was timely filed.

FINDINGS OF FACT

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

Petitioner Blau Par Corporation d/b/a Bubbles ("the corporation") operated during the period in question as a bar/lounge offering food, drink and entertainment in the form of topless dancers. Petitioner Henry J. Ricca is the president of the corporate petitioner.

In or about February of 1987, the Division of Taxation commenced a field audit of the operations of the corporate petitioner. As a result ofits audit, the Division determined that a sales and use tax liability existed and the issuance of assessments to reflect the same was recommended.

Introduced in evidence were three notices of determination and demands for payment of sales and use taxes due, indicating the taxpayer to be Blau Par Corporation d/b/a Bubbles with an address at Route 303, Blauvelt, New York 10913. These notices are all dated (on their face) June 10, 1988 and reflect the following information:

Notice Number	Period	Tax	Penalty	Interest
S880610007L	3/1/84-8/31/87	$77,768.61	$20,197.50	$26,131.96
S880610008L	9/1/87-2/28/88	12,470.92	1,683.79	580.36
S880610009L[1]	6/1/85-2/28/88	--	6,253.02	--

Also introduced in evidence were two additional notices of determination and demands for payment of sales and use taxes due, indicating the taxpayer to be Henry J. Ricca, as president of Blau Par Corp. d/b/a Bubbles, with an address at 6 Sierra Vista, Valley Cottage, New York 10989. These notices are each dated (on their face) June 10, 1988 and indicate the following information:

Notice Number	Period	Tax	Penalty	Interest
S880610005L	12/1/85-2/28/88	$51,870.00	$11,755.91	$8,390.18
S880610006L[1]	12/1/85-2/28/88	--	5,187.01	--

Also introduced in evidence were return receipts for certified mailings by the Division of Taxation. The first of these return receipts indicates a mailing by certified mail addressed to the

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[1] This notice represents the assessment of omnibus penalty only.

corporate petitioner at its Route 303, Blauvelt, New York address. The receipt reflects a June 16, 1988 delivery date; the signature of the person accepting delivery on behalf of the corporation is illegible. The second return receipt for certified mailing indicates a mailing by certified mail addressed to petitioner Henry J. Ricca, as president of the corporate petitioner, at his 6 Sierra Vista, Valley Cottage, New York address. This return receipt reflects a June 15, 1988 delivery date. Again, the signature of the person accepting delivery is illegible.

On April 6, 1989, a letter was submitted to the Division of Taxation's Bureau of Conciliation and Mediation Services ("BCMS") seeking a conference. This letter provides as follows:

"SUBJECT: Blau-Par Corp. Assessment - Sales Tax Audit

Ref.: Request for an informal or formal hearing

TO.: Mediation and Conciliation Bureau in the latter part of 1987 or early part of 1988.

The original audit by your sales tax examiner indicated a liability of $40,000.00. We agreed to this, but it was boosted to 140,000.00 by his subervisor [sic] for lack of records indicating an arbitrary assessment.

I then indicated to my accountant Mr. Jackson and in a memo to Mr. Derrico before a 90 day period could elapse, to protest and ask for an informal hearing.

An appearance before your referee was in vain, he informed me he had no letter.

My accountant indicated he had send [sic] it out, but did not register it. I deem it unfair to deny me a hearing because my accountant was careless or my letter was lost in the mail somewhere.

The assessment is based on 1988 prices and the audit is projected to 1985, when prices were at least 50% less.

A hearing should be granted in fairness to me." (Emphasis added.)

Attached to the items submitted as part of the above-quoted conference request was a copy of a letter from the auditor to petitioner Henry Ricca. This letter, dated May 12, 1988, indicates that as of its date, the audit was to be updated to include periods beyond the original audit period of March 1, 1984 through November 30, 1986. A handwritten notation at the bottom of the auditor's May 12, 1988 letter provides as follows:

> "I have a power of attorney to include period. The enclosed is a conciliation form filed by my client on time. This is for the entire period. You did not grant me a conference at all."

This handwritten notation is signed "Alexander", presumably being petitioner's former accountant and representative in these matters, one Alexander Jackson.

On June 9, 1989, an order was issued by BCMS dismissing petitioner's request for conciliation conference. This order states that the conciliation request was denied as not filed within 90 days from the issuance date of the statutory notices of determination. More specifically, the order indicates that the notices were issued on June 10, 1988, but the request for conference was not mailed until April 8, 1989.[2]

Petitioners timely filed a petition with the Division of Tax Appeals challenging the conciliation order as issued. This petition asserts that the Commissioner of Taxation and Finance erred by "failing to properly notify petitioners of the assessments," and alleges that "no assessment notice or demand was ever properly served on petitioners".

The audit report in this matter includes the auditor's "action sheets", a contemporaneously completed handwritten log listing, in summary comments, the auditor's contacts with the taxpayer (or representative), and detailing the various actions undertaken by the auditor throughout the case. In addition to the written audit report the auditor, one Arye Wolkowiski, appeared and testified at the hearing.

Introduced in evidence was an envelope addressed to Alexander Jackson at 2 Sharon Drive, New City, New York 10956, as well as a certified mail return receipt card attached to the back thereof. This envelope bears a U.S. Postal Service postmark of June 14, 1988 and indicates on its face that the same was returned to the Department of Taxation and Finance as "unclaimed". This envelope also contains on its face a U.S. Postal Service list indicating a "first notice" (presumably first delivery attempt) date of June 15, 1988, a "second notice" date of

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[2] The April 8, 1989 date indicated on the face of the conciliation order appears to be in error, with the actual date of mailing of the request for conference being the April 6, 1989 U.S. Postal Service postmark date stamped on the envelope in which the conciliation request was mailed.

June 21, 1988 and a "returned to sender" (the Division) as "unclaimed" date of July 1, 1988. Also included in evidence was a return receipt for certified mailing indicating a certified mailing to Alexander Jackson, 2 Sharon Drive, New City, New York 10956. This return receipt reflects the signature "Alexander" and "8-5-88" (presumably the date of delivery). This return receipt is stamped as received back by the Division of Taxation at its Westchester District Office, Sales Tax Section, on August 10, 1988.

The auditor's action sheets list entries for August 3, 1988 which read as follows:

> "Copies of assessment to Jackson at 2 Sharon Drive, New City was [sic] returned from the Post Office 'unclaimed'."
>
> "Spoke to Jackson and scheduled appointment for this office on 8/31/88 at 9:30 A.M. Also asked him why he didn't accept certified letter to him. He gave no answer -- told him I will resend assessment. Sent assessment certified mail to Jackson."

A subsequent entry, dated August 10, 1988, reads "return receipt from Jackson received."

The auditor's action sheets also include an entry on June 14, 1988. This entry, in the handwriting of and made by the auditor's supervisor, one Helen McCarthy, reads as follows:

> "Notice Numbers S880610005L and 06L mailed in one envelope to Ricca and 07L, 08L and 09L mailed in one envelope to Corp. Notice Numbers S880610005L, 06L, 07L, 08L, and 09L, mailed in one envelope to Jackson P/O/A."

This entry bears the initials "H. Mc".

The May 12, 1988 letter, referred to above, is specifically referenced on the auditor's action sheets as having been sent to Henry J. Ricca on May 12, 1988. Each of the return receipts in evidence (see, above) bear the name Wolkowiski (the auditor) as the person to whom they should be directed upon return.

The audit documents in evidence include validated waivers with respect to the period of limitations on assessment, the latest of which allows assessment for the period in question to be made at any time on or before June 20, 1988. The audit report also indicates that the assessments in question were issued by the Westchester District Office on June 14, 1988, with such date being handwritten in place of the June 10, 1988 date initially typed on the report.

The auditor testified during the first hearing that it is the practice of his office (the Division's Westchester District Office) to mail all assessments against a single taxpayer in one envelope. The auditor also testified that he directed the assessments in question to be prepared and that the only reason that he did not mail them personally was because he was out of the office on leave for two weeks due to the birth of his daughter. The auditor testified he believed the signatures on the return receipts were made by petitioner Henry J. Ricca, based upon his comparison of the signatures on the return receipt cards to signatures on the above-noted waivers extending the statute of limitations as well as on a power of attorney executed by Mr. Ricca. The auditor testified that due to his absence from the office for the two-week period, his supervisor Helen McCarthy had to handle the mailing of the assessments in question.

Petitioner Henry J. Ricca testified during the first hearing as follows:

"Question: Did you ever personally receive any of the notices of assessment that are on this table, that have been marked in evidence, by certified mail?

Answer: No sir."

Petitioner Henry J. Ricca further testified at the continued hearing that during the period June 1988 through September 1988 he was in ill health, suffering from a bad back, and that he was working for the corporate petitioner on an "on and off" basis at such time. He was ultimately hospitalized in October 1988 for back problems.

At the conclusion of proceedings on the second hearing date, the Division's representative, after responding "No" to a question as to whether he wished to provide additional documents or witnesses, went on to state that he wanted to submit an affidavit, after conclusion of the hearing, from the person (presumably the auditor's supervisor, Ms. McCarthy) who allegedly mailed the assessments. Petitioner's counsel objected and the Division's request was denied by the Administrative Law Judge upon the basis that the Division had already been afforded sufficient time between the initial hearing date and the continued hearing date to decide whether to produce either the proposed affiant for testimony at the continued hearing date or, alternatively, to prepare and submit an affidavit.

OPINION

The Administrative Law Judge determined that the notices of determination were properly mailed to petitioners and their then-appointed representative. This determination was based on the testimony of the auditor, the certified mail return receipts, and various entries in the auditor's action sheets, which rebutted petitioners' bare assertion that they never received the assessments. Therefore, the filing of the request for a conciliation conference, some 10 months after the issuance of the notices, was held untimely by the Administrative Law Judge.

On exception, petitioners assert that the notices of determination were jurisdictionally defective because they failed to adhere to the relevant statutory requirements. The alleged defect was the Division of Taxation's (hereinafter the "Division") failure to "check the box" on the notices of determination, thereby failing to inform the taxpayer that the amount assessed was estimated. Because of this defect, petitioners assert that the notices are invalid, and the taxes, interest and penalties assessed should be abated. Petitioners further assert that, because the notices are invalid, petitioners' request for a conciliation conference should not have been denied, as the time for such request has not yet commenced.

In opposition, the Division states that an analysis of whether the audit findings conform to the information on the face of the notices of determination requires an examination of the facts and that petitioners' failure to make a timely response precludes an analysis of these facts. Therefore, the validity of the alleged jurisdictional defects cannot be addressed. In the alternative, if petitioners' failure to respond in a timely fashion is not fatal per se, the Division asserts that errors in statutory notices are not fatal unless it is shown that the error was related to the impairment of the taxpayer's rights. As the Division's failure to "check the box" was not the cause of petitioners' late filing, the error should be deemed excusable.

We affirm the determination of the Administrative Law Judge.

We deal first with the Division's assertion that because the petition was untimely, the Division of Tax Appeals was without jurisdiction to reach the merits of petitioners' claim that the notices were invalid. This issue has been recently addressed by this Tribunal in Matter of

Cheakdkaipejchara (Tax Appeals Tribunal, April 23, 1992). In that case, we held that it was proper for the Tribunal to review the validity of notices of determination which were the basis of petitions which appeared to be late-filed. This conclusion was based upon the decision in Shelton v. Commissioner (63 TC 193) which stated:

> "[w]hen at any time and in any manner it is represented to the Court that it does not have jurisdiction, the Court should examine the grounds of jurisdiction before proceeding further, the question of jurisdiction being always open for determination [citation omitted]. . . . The validity of a notice of deficiency upon which a petition is based is a jurisdictional question that, when brought to the Court's attention, should be answered before the Court considers whether the petition was timely filed" (Shelton v. Commissioner, supra, at 198).

The Division argues, on exception, that Shelton is distinguishable because its facts concern a failure to mail the notice to the taxpayer's last known address which reduced the time frame within which the taxpayer has to respond, whereas the facts here concern an error on the face of a notice which was sent to the proper address, a defect which, according to the Division, did not reduce petitioners' response time. Although the defects are of a different nature, both have the potential to deprive the taxpayer of information necessary to file a petition. Therefore, review of the validity of the notices of determination by the Tribunal is proper.

We will now address petitioners' assertion that the notices of determination were jurisdictionally defective for failure to adhere to the relevant statutory requirements, i.e., the Division's failure to "check the box" on the notices of determination, thereby failing to inform the taxpayer that the amount assessed was estimated.

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) (L 1979, ch 714). Section 1138(a)(2) provides that:

> "[w]henever 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).

The notices at issue here apprised petitioners of the amount of tax assessed; that the tax could be challenged through a hearing process; and that a petition for such challenge had to be filed within 90 days. However, the notices did not indicate that the tax was estimated, as the preprinted box on the notices, which was to be checked in the event that the assessment was estimated, was not checked.

The crux of the matter is whether the language of section 1138(2), i.e., the 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 . . ." (emphasis added), is mandatory, as urged by petitioners, meaning that compliance with it is a condition precedent to the validity of the Division's action pursuant to the section (see, People v. Alejandro, 70 NY2d 133, 517 NYS2d 927, 931); or is the language directory, as urged by the Division, meaning that it is intended by the Legislature not to be disobeyed, but a disregard of it, or an inexact compliance, will constitute only an irregularity, not a fatal defect (McKinney's Con Laws of NY, Book 1, Statutes § 171).

The task is one of statutory construction and interpretation. The difficulty always is in reconciling a different result from that which would ordinarily flow from the clear mandatory language of a statute. There is no absolute test (82 CJS § 376). As stated in Matter of King v. Carey (57 NY2d 505, 457 NYS2d 216):

> "the line between mandatory and directory statutes cannot be drawn with precision [citations omitted]. The inquiry involves a consideration of the statutory scheme and objectives to determine whether the requirement for which dispensation is sought by the government may be said to be an 'unessential particular' [citations omitted] or, on the other hand, relates to the essence and substance of the act to be performed and thus cannot be viewed as merely directory [citations omitted]."

While the Legislature's use of terms such as "must" or "shall" is not conclusive, such words of command are ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent (see, Escoe v. Zerbst, 295 US 490, 493; People v. Schonfeld, 74

NY2d 324, 547 NYS2d 266, 267). "Whether a given provision in a statute is mandatory or directory is to be determined primarily from the legislative intent gathered from the entire act and surrounding circumstances, keeping in mind the public policy to be promoted and the results that would follow one or the other conclusion" (McKinney's Cons Laws of NY, Book 1, Statutes § 171; People v. Alejandro, supra; People v. Schonfeld, supra; People v. Graves, 277 NY 115).

We turn then to the legislative history of the statute. Subparagraph 2 of section 1138(a) was added 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 the 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 procedural reforms concerning the administration of sales tax" (Memorandum of Sen. Fred J. Eckert, 1979 NY Legis Ann, at 432). As stated by the bill's sponsor, Senator Eckert: "[t]his will assure certain taxpayers and vendors rights [and will] provide more information and certainty concerning their respective tax liability and hearing procedures . . . " (emphasis added).

Specifically, 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).

The Commissioner of Taxation and Finance, in his comments to the Governor's Counsel after the bill had been passed by the Legislature and was awaiting Executive action, was generally supportive of the legislation, but expressed the reservation that "[t]he proposed amendment should be clarified to exclude estimated assessments based on audits when the taxpayer would be aware of any estimating techniques used" (Governor's Bill Jacket, L 1979, ch 714).

We find nothing in this legislative history which supports the conclusion offered by petitioners and embraced by the dissent, i.e., that the Legislature intended that a failure of exact compliance with the language of the statute is a fatal defect which renders the notice invalid. Indeed, we find such a result drastic and somewhat unrealistic in that it would have us conclude, in effect, that the Legislature intended that the validity of the entire process depended on the Division's compliance with but one single requirement of section 1138(2). On the contrary, it is clear that the Legislature's expressed intention was to insure that taxpayers were informed of the nature of the assessments against them so that they could properly respond to those assessments through the protest procedures provided to them. It is also abundantly clear that the Division's failure to "check the box" on the notice, thereby indicating that the assessment was estimated, did not frustrate the plan of the Legislature to safeguard petitioners' rights.

The record here shows that petitioners were aware that the Division was engaged in an audit of their business activities; that the Division requested petitioners' books and records for purposes of the audit; and that petitioners' books and records were found to be inadequate, thereby causing the Division to conduct an audit based on external indices (see, Exhibit "J," audit report). Further, petitioners' request for a conciliation conference and petition for review of the denial of the request both indicate that petitioners were aware of the fact that the assessment was estimated (see, Exhibits "G" and "H").

In short, petitioners were not misled or prejudiced and enjoyed every privilege which a formally correct notice would have given them (cf., Matter of Cheakdkaipejchara, supra [where we found the taxpayer was prejudiced by the defective notice because the taxpayer did not otherwise have notice of the estimated audit methodology]). This result is consistent with the rationale of the court in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (Sup Ct, Albany County, March 16, 1988, affd on other grounds 151 AD2d 822, 542 NYS2d 61) where the identical issue was dealt with by the Supreme Court in its decision. The Court in Mon Paris held that the Division's failure to indicate that the tax was estimated did not invalidate the assessment. Rather, it held that a taxpayer must be prejudiced by this omission in

order to invalidate the notice. Finding that the petitioner was aware of the estimated nature of the tax and of his need to pursue a remedy, the Court concluded that no prejudice existed (Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., supra;[3] see also, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892 [notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989 [two sales quarters incorrectly listed on the statutory notice did not render it invalid]). The result here is also consistent with those cases which deal with the mandatory requirement that the notice of deficiency be mailed to the taxpayer's "last known address" (Tax Law § 681[a]; Matter of Agosto v. Tax Commn., 68 NY2d 891, 508 NYS2d 934; Matter of Riehm, ___ AD2d ___ [January 30, 1992]). The persuasive fact in each case was that the taxpayer received the notice even though improperly addressed by the Division. In rejecting a strict construction of the word "shall" contained in section 681(a), these cases were grounded upon the legislative history of section 681(a), which stated that the purpose of its enactment was to bring New York in conformity with the comparable Federal provision, Internal Revenue Code § 6212(a) and (b). In accordance with this legislative directive, both cases followed Federal case law in reaching their decisions. Therefore, we conclude that the Division's failure to "check the box" does not render the notice invalid.

We now turn our attention to the issue of timely mailing. Tax Law § 1138 addresses the authority of the commissioner of taxation and finance to make assessments for sales tax due, and also sets out the taxpayer's right to challenge such assessments:

> "[n]otice of . . . [a] determination [of tax due] shall be given to the person liable for the collection or payment of
>
> the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a

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[3]In Mon Paris, the taxpayer brought an action under Article 78 commenced in Supreme Court, Albany County, seeking a refund of taxes allegedly demanded unlawfully by a notice of determination. The Division moved to dismiss the petition, claiming the taxpayer had failed to utilize its administrative remedies and that this failure resulted in the tax becoming finally and irrevocably fixed. The Appellate Division, in affirming the Supreme Court, did not deem it necessary to address the issue of the validity of the assessment, but affirmed on the grounds that the taxpayer's payment of tax under the Amnesty Program constituted admission of tax due, thus making it "unnecessary to reach the other grounds the Supreme Court relied on for affirmance."

> hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (Tax Law § 1138[a][1]).

As an alternative to a formal hearing, a taxpayer may request an informal conciliation conference between the taxpayer, a representative of the Division, and a conciliation conferee (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 20 NYCRR 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment which, in this case, was ninety days (Tax Law §§ 170[3-a][a], 1138[a][1]; see, 20 NYCRR 4000.3[c]).

Upon proper mailing, notice of the assessment is presumed to be received, and the ninety-day period is deemed to begin on the date the notice is mailed:

> "[a] notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (Tax Law § 1147[a][1]).

Failure to timely file a petition bars the Division of Tax Appeals from entertaining the case (Tax Law § 2006[4]; see, 20 NYCRR 3000.3[c]).

Based upon these principles, we find the Administrative Law Judge's dismissal of petitioner's challenge to the order denying the conciliation conference proper.

Petitioners' request for a conciliation conference was submitted to the Division some ten months after the date the notices of determination were allegedly sent to petitioners, and the request was deemed untimely and denied. Therefore, the issue is whether the Division can demonstrate that these notices were properly mailed (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990 citing Magazine v. Commissioner, 89 TC 321). Demonstration of proper mailing by the Division causes petitioners' request to be untimely and properly denied (Tax Law § 1138[a][1]); failure to make such a showing causes the petition for a conciliation conference to be timely (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

When addressing a proof of mailing issue, the Division must demonstrate the use of a standard mailing procedure, in general, and introduce evidence that this procedure was used when conducting the particular mailings at issue (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Cataldo v. Commissioner, 60 TC 522). This requirement has been satisfied. The auditor testified that it is the practice of his office to mail all assessments against a taxpayer in one envelope, return receipt requested (Tr. 1, p. 29). However, the auditor had not personally prepared petitioners' assessments for mailing; rather, it was the auditor's supervisor who sent the assessments to petitioners and their representative and made contemporaneous notes in the auditor's action papers stating the date of the mailing (June 14, 1988), the numbers of the assessments sent to each taxpayer, and the manner in which they were sent (Tr. 1, pp. 18-19; Exhibit "J," audit workpapers). It is not necessary to decide whether these notes, without more, would constitute sufficient direct evidence of mailing, because the record contains additional evidence with respect to each mailing.

The unclaimed envelope which had been sent to petitioners' then representative, Mr. Alexander Jackson, CPA, (Exhibit "E") is sufficient to demonstrate proper mailing to petitioners' representative. This envelope had been sent certified mail, return receipt requested, and was unclaimed despite two attempts by the Postal Service to deliver it. The date of the Division's metered mail stamp and the Postal Service's cancellation stamp on the unclaimed envelope both read June 14, 1988 (Exhibit "E"). This evidence successfully demonstrates that the Division followed its mailing procedures with respect to the notices sent to petitioners' representative (see, Matter of East End Student Transp. Corp., Tax Appeals Tribunal, March 26, 1992).

Further, the auditor received, directed to his attention, two return receipt notification cards bearing petitioners' names and addresses as "addressees" (Exhibits "B" and "D"). These cards, which indicate June 15, 1988 (Exhibit "D") and June 16, 1988 (Exhibit "B") as the date of receipt by the addressee, bear certified receipt numbers which correspond to the certified mail

receipts held by the Division, and bear petitioners' addresses. Return receipt notification cards constitute proof of proper mailing as of the date of receipt (see, Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992). Therefore, the Division has shown June 15 and 16, 1988 to be the dates the notices were mailed to petitioners.

In sum, the testimony and evidence support the Division's assertion that the notices were properly mailed. Therefore, petitioners' unsupported allegation of no receipt is insufficient to rebut the Division's evidence of mailing (Tax Law § 1147[a][1]; see, Matter of American Cars 'R' Us v. Chu, 147 AD2d 797, 537 NYS2d 672), and is even suspect given the discrepancies shown by the Administrative Law Judge below:

> "[a]t best, it appears that petitioners have abandoned their first taken position of timely response, in favor of the position that the assessments were never received. In fact, petitioner Henry Ricca's conflicting claims (i.e. his allegedly timely response was lost in the mail versus his testimony that he never received the assessments) leave both claims of doubtful validity" (Determination, p. 13).

Thus, the request for a conciliation conference received by the Division on April 10, 1989, nearly ten months after the mailing of the notices, is untimely (Exhibit "G").

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Blau Par Corporation and Henry J. Ricca, as officer is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Blau Par Corporation and Henry J. Ricca, as officer is denied; and

4. The order denying the request for a conciliation conference dated June 9, 1989 is affirmed.

DATED: Troy, New York
May 21, 1992

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

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

Dissenting Opinion in the Matter of the Petition of

BLAU PAR CORPORATION AND HENRY J. RICCA, AS OFFICER

Francis R. Koenig (dissenting):

I dissent from the majority's conclusion that the Division's failure to comply with section 1138(a)(2) of the Tax Law does not render the notice of determination invalid. I would conclude that the notice of determination was a nullity and that the assessment must be cancelled, notwithstanding petitioners' failure to file a timely request for a conciliation conference (see, Matter of Malpica, supra; see also, Shelton v. Commissioner, supra).

The essence of the majority's decision is that in enacting the language "whenever such tax is estimated . . . 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" (Tax Law § 1138[a][2], emphasis added), the Legislature intended this statutory direction to be mandatory only when the taxpayer did not otherwise have notice of the fact that the assessment was based on an estimated audit. In my opinion, this conclusion is inconsistent with the language of the enactment, as well as with the case law applying other statutes that prescribe the contents of other required notices.

First, if the Legislature had only meant to require the Division to notify the taxpayer that the tax was estimated and was not concerned about the precise form of the notification, the Legislature would have enacted a provision that simply required the Division to notify the taxpayer and would not have explicitly prescribed the form that the notification would take. By explicitly describing the form of the notice, section 1138(a)(2) indicates to me that the Legislature did not intend the notification of the estimated assessment to be left to vagaries of the audit or, as here, the post-audit process. Instead, the Legislature intended that the taxpayer be informed in a certain way (on the notice of determination) and in a definite manner (bold type, conspicuously placed).

That this was the intention of the Legislature is underscored by the legislative history material cited by the majority: "[t]his bill will assure certain taxpayers' and vendors' rights, [and

will] provide more information and certainty concerning their respective tax liability and hearing procedures" (Memorandum of Sen. Fred J. Eckert, 1979 NY Legis Ann, at 432, emphasis added); the bill was intended to "give taxpayers a more predictable environment in which to operate . . . the bill calls for clearer notification of taxpayers, alerting them to the nature of the assessment" (Memorandum of Division of the Budget, Governor's Bill Jacket, L 1979, ch 714, emphasis added).

The majority decision undermines this legislative goal of certainty, predictability and clarity because it allows the Division to issue a notice of determination that states that the tax was not estimated, and to overcome this error based on information obtained by the taxpayer during the audit process. A taxpayer who is the recipient of this absolutely contradictory information then has the burden, under the majority's view, to show that he has been harmed by this misinformation. In my view, this is exactly the type of situation the Legislature sought to avoid when it directed the Division, through the enactment of section 1138(a)(2), to give notice of an estimated assessment in a certain, clear manner.

Although, as noted by the majority, there is nothing in the legislative history that explicitly states that the failure to comply with section 1138(a)(2) of the Tax Law renders the notice of determination a nullity, case law indicates that such an explicit statement is not necessary to give "shall" its normal mandatory meaning.

In Parker v. Mack (61 NY2d 114, 472 NYS2d 882), the plaintiffs sought to commence a civil action by serving upon the defendant two summonses unaccompanied by complaints. Despite the requirement under CPLR 305(b)[4] that a default notice shall be attached to a summons, the papers served gave no notice of the relief sought. The New York Court of Appeals, focusing on the imperative language of CPLR 305(b), held that the failure to comply

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[4]CPLR 305(b) provides as follows:

> "[s]ummons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default" (emphasis added).

with the statutory notice requirements meant that no action was commenced. Responding to the dissent's contention that the treatment of this defect as jurisdictional should be limited to the effect of default judgments, the Court stated:

> "[w]ere such discrete - and unusual - consequences intended, the Legislature could have readily so provided. No such differentiation is evidenced in the statute however. In that circumstance, respect for legislative authority requires that we give equal effect for all purposes to the explicit addition of the imperative 'shall' in CPLR 305 [subd. (b)]" (Parker v. Mack, supra, 472 NYS2d 882, 883-884).

In Nassau Ins. Co. v. Hernandez (65 AD2d 551, 408 NYS2d 956), the Appellate Division held that an insurer's failure to comply with the requirements of section 313(1) of the Vehicle and Traffic Law when issuing a notice of termination, rendered the notice invalid. Section 313(1) required a notice of termination to include a certain statement in 12 point type. In concluding that the use of 6 point type, rather than the required 12, rendered the notice invalid, the court stated:

> "[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" (Nassau Ins. Co. v. Hernandez, supra, 408 NYS2d 956, 957; see also, In re Aetna Cas. & Sur. Co. v. Morales, 70 AD2d 833, 418 NYS2d 17 [1st Dept 1979]; Cohn v. Royal Globe Ins. Co., 67 AD2d 993, 414 NYS2d 19 [2d Dept 1979], affd 49 NY2d 942, 428 NYS2d 881; Matter of Furstenberg v. Aetna Cas. & Sur. Co., 67 AD2d 580, 415 NYS2d 849 [1st Dept 1979], revd on other grounds 49 NY2d 757, 426 NYS2d 465).

Like the statutes involved in Parker and in Nassau Ins., section 1138(a)(2) describes the contents of a notice that is required to be given. In both Parker and Nassau Ins., it was held that strict compliance with the statute was required without regard to whether actual notice was otherwise achieved, and that failure to comply rendered the notice invalid. In neither Parker nor Nassau Ins. did the court require explicit legislative history in order to give the term "shall" its total effect, i.e., to find the noncomplying notice a nullity.

I disagree with the comparison drawn by the majority between the instant question and that presented in both Matter of Agosto v. State Tax Commn. (supra) and Matter of Riehm (supra). The issue in the latter cases was the effect of the Division's failure to comply with the

statutory direction on how the method of notification was to take place, i.e., by mailing to the last known address. In my view, cases dealing with the method of notification (see also, Margeson v. Smith, 41 AD2d 896, 342 NYS2d 727) are distinct from the case before us which involves a statute that describes the contents of the notice. Where the statute describes in mandatory terms the contents of a notice, I believe it is inappropriate to inquire whether the recipient has been informed despite the noncomplying notice (see, Parker v. Mack, supra; Nassau Ins. Co. v. Hernandez, supra).

For similar reasons, I do not find the decision in Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin. (supra) persuasive. In holding that the notice of determination was valid, the Supreme Court, Albany County, rejected the taxpayer's argument that the Division's failure to check the estimate box invalidated the assessment. In so doing, the court relied on the holding of Matter of Pepsico, Inc. v. Bouchard, supra, 477 NYS2d 892, 893). In this case, as in Mon Paris, section 1138(a)(2) specifically requires that the notice of determination reveal the estimated nature of the assessment on its face.

For all of the foregoing reasons, I conclude that the failure to comply with section 1138(a)(2) of the Tax Law rendered the notice of determination invalid and that the assessment should be cancelled on this basis.

DATED: Troy, New York
May 21, 1992

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