

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ORRIN SEGUIN** : DECISION  
**D/B/A CLUB 37** : DTA No. 808312  
: :  
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 September 1, 1982 through May 31, 1985 :

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Petitioner Orrin Seguin d/b/a Club 37, R.D. 3, Box A221, Plattsburgh, New York 12901 filed an exception to the determination of the Administrative Law Judge issued on February 13, 1992 with respect to his 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 September 1, 1982 through May 31, 1985. Petitioner appeared by David J. Marshall, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a reply brief. Petitioner's request for oral argument was denied.

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

***ISSUES***

- I. Whether petitioner timely protested a Notice of Determination and Demand for Payment of Sales and Use Taxes Due.
- II. Whether an affidavit of an employee of the Division of Taxation was properly admitted into evidence and, if so, whether it may serve to contravene testimony offered by petitioner and his accountant in support of the petition.
- III. Whether petitioner's due process rights were violated by the Division of Taxation's failure to hold the conciliation hearing after notifying petitioner in 1986 that a hearing would be held.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1985 against petitioner, Orrin Seguin d/b/a Club 37, assessing sales and use taxes due of \$16,489.41, plus interest, for the period September 1, 1982 through May 31, 1985. Petitioner conceded that this statutory notice was received by him on August 22, 1985.<sup>1</sup> In June 1985, petitioner sold his bar and grill known as Club 37 (which he had operated in Massena (St. Lawrence County) for approximately 15 years) to the Lambert Corporation. It appears that, as a result of the bulk sale of the business, an audit was performed. The audit report noted that:

"[s]ince the time to assess the purchase was about to expire, assessments were issued against both the purchaser [the Lambert Corp.] and seller [petitioner] on August 21, 1985."

Petitioner asserts that within a few days after he received the notice of determination he went to his accountant, David Leary, and gave him a copy of it. Petitioner testified that his

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<sup>1</sup>The Division of Taxation introduced an affidavit of Michael Bellair, a Sales Tax Auditor III, whose duties included the preparation and mailing of notices of determination generated by the Utica District Office. Mr. Bellair described the general mailing procedures followed in the Utica office and attached a copy of a so-called certified mailing record which shows a listing for the statutory notice at issue herein. It is observed that this certified mailing record does not bear a stamp of the United States Postal Service to show when it was received by the Postal Service from the Utica District Office. However, the photocopy of the Postal Service Form 3811 (return receipt) attached to Mr. Bellair's affidavit shows that the statutory notice at issue herein was delivered on August 22, 1985 and signed for by Lisa Laprade, petitioner's secretary.

accountant protested the assessment by sending the following letter dated October 25, 1985 to the Utica District Office<sup>2</sup> of the Division of Taxation:

"[t]his letter of protest is being filed on behalf of the above named taxpayer [petitioner] for your Notice of Determination and Demand for Payment of Sales and use tax [sic] U-BS-121-01, Notice number S850821000U dated 08/21/85. At this time we would request a conference to discuss the findings of the recent audit of said taxpayer. If there are any additional forms or petitions to be filed by the taxpayer please advise both the taxpayer and this office as to what must be done.

"Thank you for your assistance in this matter."

The notice of determination at issue did not provide, on its face, an address to which a protest of the assessment should be submitted.<sup>3</sup> In fact, Utica is designated in the space on the notice for "Office" and the following words appear in bold type, "Make payment promptly at the office shown above."

David Leary, who has been petitioner's accountant since the early 1970's, testified that petitioner, in late August of 1985, brought the notice of determination for his review. In response, he prepared the protest letter dated October 25, 1985 described above which he said he "dictated." It is not known why he waited two months from his meeting with petitioner to take steps to submit a protest. Mr. Leary recalled that his father, Jay W. Leary, took the protest letter to the Post Office for mailing. David Leary also testified that he saw a receipt stamped by the Post Office showing the mailing of the protest letter as well as "the return receipt, the green card" which came back after delivery of the protest letter to the Utica District Office. David Leary

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<sup>2</sup>The protest letter shows the following address:

"N.Y.S. Dept. of Taxation & Finance  
State Office Building  
207 Genesee Street  
Utica, New York 13501."

<sup>3</sup>Petitioner testified that he did not know whether a "Notification of Your Rights to Protest," a Tax Appeals Bureau Form TA-9.1 (4/82), which then provided advice and guidance on contesting an action taken by the Department of Taxation and Finance, was included with the statutory notice. Such notification would have advised petitioner to protest an action taken by the Department by filing a petition with the former Tax Appeals Bureau at its Albany office. It is observed that such form was attached to petitioner's petition dated June 8, 1990.

testified that in late 1989 he was asked, for the first time, to look for the postal receipts, but was unable to find them.

David Leary testified that he, not his father, was primarily responsible for petitioner's account. However, David Leary is not a certified public accountant or a public accountant, and he was, as a tax practitioner, an employee of his father's small accounting firm. Because his father was the firm's sole certified public accountant, it appears that after the death of Jay W. Leary on September 12, 1987, the accounting firm's operations were substantially modified. David Leary testified that after his father's death, most of the firm's records were placed in storage, and Mr. Leary suspects that the postal receipts were misplaced or lost in the process.

In response to the question of the Division of Taxation's representative whether this was the "first tax matter that you were involved with where a protest was made?," David Leary replied, "I'm not sure." Furthermore, it was Mr. Leary's understanding at the time that the Utica District Office was "where you send everything," including a protest.

Sometime in February 1986, petitioner received a subpoena dated February 13, 1986 requiring him to appear on February 25, 1986 with regard to the assessment at issue herein. The subpoena noted that petitioner's "failure to respond to previous notices from the Department of Taxation and Finance has resulted in the issuance of this subpoena to appear at the office named above [Utica District Office]." The subpoena was issued by Donna Bahry, as Deputy Tax Commissioner. It is noted that near the top of the subpoena, in a prominent position, the following telephone number was provided: (315)793-2504.

Petitioner testified that as soon as he received the subpoena he went to see David Leary:

"I said, Dave, what's going on? I said, 'I got a subpoena to show up here [Utica] on the 25th' and, I said, 'I haven't even had a hearing yet'.

"He said, 'just a minute'. And he got on the telephone. And he called somebody. And all I heard him say was that you do not have to appear on the 25th of February. The matter is being discussed and they'll let us know what they're going to do. And

that satisfied me for the time because I was very concerned about going down there on the 25th of February."

David Leary testified that he phoned Donna Bahry who said there was no need to appear for the subpoena. The following testimony of Mr. Leary with regard to the timely filing of the protest letter was brought out by leading questions on direct examination:

"Attorney Marshall: In 1986 when you had this conversation with this person, what did they tell you?"

"David Leary: They said there was no need to appear at the subpoena, that they had -- I'm trying to remember now. There was no need for Orrin to appear for the subpoena. That they had on their files some of the information and that some of the files were in another office, which I took at that time to mean Albany.

"Attorney Marshall: And did they indicate that they had an appeal letter that they had received?"

"David Leary: Yes.

"Attorney Marshall: In 1985?"

"David Leary: Yes.

"Attorney Marshall: Did they also indicate at that time that Orrin would be receiving a hearing?"

"David Leary: Yes.

"Administrative Law Judge: You're saying 'they'. Who is 'they'?"

"Attorney Marshall: He's indicated that Donna Bahry was the person he thought he speak [sic] to.

"Administrative Law Judge: A she, right? She indicated that there was this letter [protest letter dated October 25, 1985] in her file?"

"David Leary: I believe so, your Honor. Yes."

Petitioner introduced into evidence a photocopy of a page from David Leary's New York Telephone bill of itemized calls from February 20, 1986 to March 17, 1986. The fourth itemized call shows a three-minute phone call on February 21, 1986 at 4:01 P.M. to Utica, New York to

the phone number shown on the face of the subpoena, (315)793-2504. However, David Leary testified that he made no contemporaneous notes of his phone conversation.

After the phone conversation of February 21, 1986, petitioner testified:

"I didn't do anything for quite some time except write a letter much later in the year, when I hadn't heard anything. And I don't have a copy of that letter, but I did get an answer back."

The "answer back" was a letter dated December 22, 1986 from Dawn Roemmele of the Central Sales Tax Section in Albany which provided as follows:

"[w]e acknowledge receipt of your letter of October 25, 1986<sup>4</sup> requesting a meeting in connection with the above mentioned Notice [notice of determination dated August 21, 1985].

"We have forwarded your letter to our Utica District Office with a request for them to contact you and arrange for a mutually satisfactory informal meeting appointment date.

"You should, at that time, be prepared to submit evidence to substantiate any adjustment to the above mentioned Notice. In addition, should you designate an individual to represent you at this meeting, a properly completed Power of Attorney must be presented.

"In all future correspondence regarding this matter, please refer to protest number PR-BS-366, line I."

This letter dated December 22, 1986 from Dawn Roemmele to petitioner was prepared at the request of John Bartell, who at the time was a Tax Technician I in the Bulk Sales Unit in Albany. According to Mr. Bartell's testimony, when he picked up the bulk sales file concerning this matter, he saw a copy of petitioner's protest letter of October 25, 1985. Assuming it was "a timely-filed protest," Mr. Bartell gave the case to Dawn Roemmele to process which resulted in the letter dated December 22, 1986 to petitioner, supra. Mr. Bartell testified that, in early 1987, the Utica District Office sent the matter back noting that a timely protest had not been filed.

Petitioner testified that he sent photocopies of the protest letter dated October 25, 1985 to various Division of Taxation employees involved in this matter in November of 1989. He

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<sup>4</sup>Dawn Dromirecki, formerly known as Dawn Roemmele, candidly admitted during her testimony that the 1986 is in error and should read 1985. The reference was to petitioner's protest letter of October 25, 1985.

testified that he did not send any other photocopies of the protest letter to Division of Taxation employees at an earlier time. What appeared to prompt petitioner to send photocopies of the protest letter was the issuance of a warrant dated October 25, 1989 against him which noted that tax in the amount of \$16,489.41, plus penalty and interest, had been found due to the State. The warrant, which was issued by the Tax Compliance Division located at the Utica District Office, provided the name and telephone number for Chester F. Baryla, a Tax Department employee. Petitioner testified that he phoned Mr. Baryla who advised him that he had the original of the protest letter dated October 25, 1985 in his file.

It is petitioner's testimony that it was not until November 1989 that he was advised by a Division of Taxation employee that the original protest letter dated October 25, 1985 had not been timely received. According to petitioner, "[t]he only time that it was ever said that they had not received it was from [John Bartell]" in November 1989.

Petitioner then consulted an attorney and on April 17, 1990 filed a Request for Conciliation Conference which was denied by a conciliation order dated May 25, 1990 for the following reason:

"[t]he 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 21, 1985, but the request was not mailed until April 17, 1990, or in excess of 90 days, the request is late filed."

The testimony of petitioner and his accountant, David Leary, was contradicted by evidence introduced by the Division of Taxation. The Division of Taxation introduced into evidence an affidavit<sup>5</sup> dated April 22, 1991 of Donna Bahry who stated in her affidavit:

"[t]hat it is my recollection that I never received, acknowledged receipt of or indicated in any manner that the Department had received a timely protest letter in connection with the notice S850821000U [the notice of determination dated August 21, 1985]."

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<sup>5</sup>Petitioner's representative was provided with a copy of this affidavit approximately two weeks before the hearing.

Ms. Bahry also indicated in her affidavit that she reviewed the "Utica District Office Tax Compliance Unit file involving this matter" before concluding that a timely protest letter was not "received by the Utica District Office Tax Compliance Division" (emphasis added). In her affidavit, Ms. Bahry also stated that she had a conversation with "Robert Mason, Sales Tax Auditor . . . with the Utica District Office Sale [sic] Tax Unit who reviewed the Utica District Office Sales Tax Unit file." Ms. Bahry seems to imply by this statement (although it was not explicitly noted in her affidavit) that the Utica District Office Sales Tax Unit also did not receive a timely filed protest letter.

Attached to Ms. Bahry's affidavit is a photocopy of the "activity sheet" of the Utica District Office Tax Compliance Unit included in its file on petitioner. The activity sheet, in fact, consists of five pages of notes under a column labeled "Action" which reference specific entry dates, commencing September 29, 1982 and ending March 29, 1991. (There appears to be a final, nearly illegible entry next to the date 4/1, although 4/1 appears to be crossed out.) It is observed that there is no entry referencing the phone conversation of February 21, 1986 noted above. The entry<sup>6</sup> closest in time to this date is the following:

"5/14/86: Called TP re 285, 385 demands, 283 - 485 B/S seller, and 485 & 186 del. TP said his acct had supposedly called someone re subpoenas -- audit protested per TP (no info on AR or in file). TP will call acct then call back. (Note: reached TP at POB phone #). (K. Skelly)

"TP called back. Said acct talked to someone re subpoenas on 2/21/86 (subp show<sup>7</sup> no notes). Protest on audit was mailed 2/27/85 (?) -- TP doesn't think any ack rec'd -- will have acct send copy of protest.<sup>8</sup> TP will send copy 485 filed A no remit, final ret.

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<sup>6</sup>The abbreviations and coded language are those of an individual named K. Skelly, who signed his or her name in parenthesis after the action noted. There appear to be two entries made on this date because the name K. Skelly was signed twice.

<sup>7</sup>This word is a best guess since it is nearly illegible.

<sup>8</sup>Petitioner testified, as noted above, that he did not send to any Division of Taxation employee a photocopy of the protest letter dated October 25, 1985 until November 1989. However, it is observed that petitioner's accountant, David Leary, did not testify whether or not he sent a photocopy of the protest letter to any Division of Taxation



TP sold bus 5/28/85, now wkg as mgr. (K. Skelly) [emphasis added]."

Petitioner testified that he "had no contact with anybody from the Department until November 1989, with any phone calls." When the Division of Taxation's representative explicitly questioned petitioner concerning the May 14, 1986 phone conversation described by K. Skelly, supra, petitioner responded: "I can't recall."

We find an additional finding of fact as follows:

It is noted that the record contains a copy of the protest letter stamped with a receipt date of May 21, 1986 by the Division of Taxation.

### ***OPINION***

The Administrative Law Judge determined that the Division of Taxation's (hereinafter the "Division") mailing record was inadequate to prove the date of mailing of the notice since the record lacked a postmark indicating such date. However, the Administrative Law Judge determined that petitioner had until November 19, 1985, or 90 days from August 21, 1985, to request a hearing from the Tax Commission<sup>9</sup> regarding his notice of determination. The Administrative Law Judge reached this conclusion because the photocopy of the return receipt from the notice evidences that it was delivered to petitioner and signed for by petitioner's secretary on August 22, 1985.

The Administrative Law Judge did not reach the issue of whether or not the protest letter dated October 25, 1985 qualified as an application for a hearing from the Tax Commission since he held that petitioner failed to carry his burden of proving actual delivery of the letter within 90

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employee. In contrast, in petitioner's reply brief, his representative argued as follows:

"[n]o other letter or copy of the letter of October 25, 1985 was sent by petitioner or any agent of the petitioner until three years later in 1989 when petitioner sent another copy of the 1985 letter."

<sup>9</sup>As the Administrative Law Judge noted in his determination, the "division of tax appeals," as of September 1, 1987, replaced the "tax commission" as the body responsible for managing the administrative hearing process, and the current applicable statutory provision (Tax Law § 1138[a][1]) reflects this change.

days of the issuance of the notice. Specifically, the Administrative Law Judge cited the Division's records, the testimony of the Division's witnesses and the affidavit of a Ms. Donna Bahry, a Tax Compliance Representative with the Department of Taxation and Finance in the Utica District Office, as evidence that the protest letter was not timely delivered.

Finally, the Administrative Law Judge held that since petitioner was unable to locate a copy of the postmarked United States certified mail sender's receipt from the protest letter, petitioner could not rely on 20 NYCRR former 535.1(b) to elevate his (and his accountant's) testimony regarding the certified mailing of the letter to the level of prima facie evidence of the delivery of same.

Accordingly, the Administrative Law Judge sustained the notice of determination.

On exception, petitioner does not contest the Administrative Law Judge's determination establishing the date of the mailing of the notice as August 21, 1985. Instead, petitioner argues that he did timely mail, and that the Tax Department did timely receive, the October 25, 1985 protest letter.<sup>10</sup> Petitioner maintains that neither the relevant statute nor regulation require that a protest letter be mailed to Albany rather than to a district office, as was done in petitioner's case. Petitioner asserts that he has met the burden of proving actual delivery of the 1985 protest letter to the Tax Department through the testimony elicited at hearing and the evidence submitted on his behalf (Exception, p. 2). Petitioner emphasizes that the Tax Department had the letter in its files in Albany in 1986 -- a fact petitioner claims was conceded by the Division's own witnesses - - and that, contrary to the Administrative Law Judge's conclusion, petitioner had not mailed a copy of the protest letter to the Division prior to 1989.

Petitioner specifically objects to the Administrative Law Judge's decision to admit, and then to give credence and weight to, the affidavit of Ms. Bahry and the accompanying "activity sheet" which contained notations made by various persons in the Tax Compliance Bureau.

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<sup>10</sup>While in petitioner's exception he inadvertently wrote that the Tax Department "timely received the August 25, 1985 protest letter" (Exception, p. 2, emphasis added), petitioner corrected the date to October 25, 1985 in his brief on exception.

Petitioner argues that not only does Ms. Bahry's affidavit contain errors and is otherwise discreditable because it omits certain significant information, but that he had no chance to cross-examine Ms. Bahry or the persons who made the notations. At the same time, contends petitioner, the Administrative Law Judge failed to give proper weight and credence to the testimony of the Division's witnesses, Mr. John Bartell and Ms. Dawn Dromirecki, whose testimony, petitioner claims, contradicted the Division's position.

In addition, petitioner challenges the Administrative Law Judge's application of the law regarding the proof required of petitioner to establish the timely mailing and delivery of the October 25, 1985 letter to the Division. Specifically, petitioner asserts that 20 NYCRR 535.1(b), as in effect in 1985, does not require petitioner to produce a green card/ mailing receipt to prove delivery since the letter was mailed by certified, rather than ordinary, mail. Petitioner claims that:

"[a]ny document sent by registered or certified mail [sic] such registration or certification is prima facia [sic] evidence that it was delivered to the tax commission" (Petitioner's brief on exception, p. 17, citing Tax Law § 1147[a][2]).

Finally, petitioner contends that his due process rights were violated by the Division's failure to hold the conciliation hearing after notifying petitioner in 1986 that a hearing would be held. Petitioner notes that instead of complying with its own requirements and affording petitioner the hearing the Division told him he would receive, the Division waited over four years before notifying petitioner that it was contesting the timely filing of his protest (Petitioner's brief on exception, pp. 22-23).

In response, the Division maintains that the Administrative Law Judge applied the proper principles of law to the issues and properly held that petitioner failed to establish prima facie evidence that the Division either received the protest letter within 90 days of the issuance of the notice or that the letter was mailed within this time period. Additionally, the Division stresses that the Administrative Law Judge's determination is not founded upon "speculation,

inadmissible evidence or evidence to which excessive weight was given" (Division's brief on exception, p. 3). In this regard, the Division notes that petitioner had every opportunity to subpoena those witnesses whom he wished to cross-examine and that, therefore, petitioner's argument that he was impermissibly deprived of the right to cross-examine certain witnesses is unfounded. The Division asserts that in light of all of the circumstances, petitioner has not been deprived of his due process right to a hearing.

We affirm the determination of the Administrative Law Judge. Further, because we find that the Administrative Law Judge completely and adequately addressed the first issue, that of the timeliness of petitioner's protest letter, we see no reason to analyze this issue any further. We do, however, feel compelled to explain to petitioner his misunderstanding of the applicable law regarding the burden of proof.

Petitioner claims, on exception, that it was an improper application of Tax Law § 1147(a)(2) for the Administrative Law Judge to require petitioner to produce a copy of the postmarked United States certified mail sender's receipt to prove that the protest letter was actually delivered to the Division of Taxation before the 90-day statutory period had expired.

Tax Law § 1147(a)(2) provides, in pertinent part, that if any document is sent by United States registered (or certified) mail, "such registration [or certification] shall be prima facie evidence that such document was delivered to the tax commission . . . ." Petitioner argues that since it sent the protest letter by certified mail, it has established a prima facie case of delivery. Petitioner fails to comprehend that it is the taxpayer's burden to prove that the document was, in fact, sent by certified mail (see, Storelli v. Commissioner, 86 TC 443; see also, Matter of WSD United Transp., Tax Appeals Tribunal, July 27, 1989; Matter of Sipam Corp., Tax Appeals Tribunal, March 10, 1988 [decisions in which it is established that section 1147(a)(2) of the Tax Law is modeled after Internal Revenue Code § 7502, and that, therefore, the Federal tax cases

construing section 7502 are relevant when analyzing section 1147(a)(2) cases)].<sup>11</sup> As the court explained in Storelli:

"it is clear that delivery to the Tax Court is not a requirement when certified mail is used, unlike the case when a document is sent by ordinary mail (citation omitted). However, the requirements of the regulations must be fulfilled before a presumption arises that the petition was timely delivered. As such, petitioners must prove that a timely postmarked certified mail sender's receipt was properly issued and that the envelope or wrapper in which the original petition was mailed was properly addressed" (Storelli v. Commissioner, supra, at 448).

Thus, despite petitioner's contentions to the contrary, the Administrative Law Judge properly concluded that for petitioner to be able to rely on 20 NYCRR former 535.1(b) -- the regulation in effect in 1985 construing Tax Law § 1147(a) on prima facie evidence of delivery -- petitioner must produce a copy of the postmarked United States certified mail sender's receipt.

Where the exception of section 1147(a)(2) is not applicable, "courts have consistently rejected testimony or other evidence as proof of the actual date of mailing" (see, Matter of Sipam Corp., supra, citing Deutsch v. Commissioner, 599 F2d 44, 46, 79-1 USTC ¶ 9407, cert denied 444 US 1015). Therefore, the testimony of petitioner (and petitioner's accountant) regarding the certified mailing of the letter of protest is simply insufficient to establish delivery when delivery is contested by the Division.

We decline to address the issue of whether or not petitioner sent the original protest letter to the proper address since petitioner's failure to prove timely mailing or delivery of the letter renders such an analysis unnecessary.

We turn next to the second issue, that of whether the Administrative Law Judge improperly admitted the affidavit of Donna Bahry and the notations of the persons in the Tax Compliance Bureau on the attached audit "activity sheet," and whether this evidence was improperly credited in the face of contradictory testimony.

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<sup>11</sup>In Sipam, noting that: "[t]he Tax Commission has followed federal precedent in interpreting section 1147(a)(2) and the regulations adopted thereunder," this Tribunal affirmed that interpretation (citing Matter of Micro-Carburetor Corp., State Tax Commn., June 30, 1986; Matter of Lynch, State Tax Commn., June 21, 1985).

Petitioner claims that the affidavit of Ms. Bahry:

"is false and incorrect and contains errors and omissions and has not been corroborated by any factual evidence and should not have been used to rebut the testimony of petitioner and Mr. Leary [petitioner's accountant] and that said evidence was not credible and also should not have even been allowed into evidence and even if properly allowed into evidence was given too much weight by the Judge" (Petitioner's brief on exception, pp. 11-12).

Petitioner also asserts that this affidavit and the notations made on the activity sheet run contrary to the testimony of petitioner and even the Division's own witnesses, and that the latter testimony should have been accorded more weight since petitioner never had the opportunity to cross-examine the affiant or the persons who made the notations on the activity sheet.

First, we note that relevant hearsay is admissible in an administrative hearing (see, Matter of Gray v. Adduci, 73 NY2d 741, 536 NYS2d 40; Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027; Matter of Kucherov v. Chu, 147 AD2d 877, 538 NYS2d 339) and that, therefore, the affidavit of Ms. Bahry and the notations made on the activity sheet accompanying the affidavit were properly admitted into evidence by the Administrative Law Judge. Second, petitioner was not unduly deprived of his right to cross-examine the affiant or those who made the notations on the activity sheet. If petitioner felt the testimony of a particular person or persons was critical to satisfying his burden of proof, he could have subpoenaed any and/or all of these persons prior to the hearing (see, 20 NYCRR 3000.6[c]; Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Anray Serv., Tax Appeals Tribunal, December 1, 1988; Matter of 3 Guys Elec., Tax Appeals Tribunal, September 9, 1988). Third, we reject as unfounded petitioner's contention that the Administrative Law Judge accorded too much weight to the affidavit and activity sheet notations in the face of contradictory evidence. The so-called contradictory evidence, the testimony of Dawn Dromirecki and John Bartell, workers in the Albany branch of the Department of Taxation and Finance, does not contradict the affidavit of Ms. Bahry and, furthermore, does not support petitioner's claims.

In her affidavit, Ms. Bahry attests to the fact that the original of the October 25, 1985 protest letter was never received by the Utica District Office of the Tax Compliance Division. Rather, she states that the Utica District Office only received copies of said letter which were mailed after the issuance of the subpoena sent to petitioner from the Department of Taxation and Finance on February 13, 1986.

Petitioner states that Dawn Dromirecki and John Bartell testified that "they had in their possession a copy of the 1985 protest letter in their files in May 1986 in Albany" (Petitioner's brief on exception, p. 14, emphasis added).<sup>12</sup> Petitioner's insinuation is that because neither he, his accountant, nor his representative sent copies to the Division prior to 1989, this copy of the 1985 letter had to have been made from the original letter which must necessarily have been received by the Division. Petitioner also maintains that in a telephone conversation between Ms. Bahry and petitioner's accountant on February 21, 1986, Ms. Bahry told petitioner's accountant not to worry about the February 25, 1986 subpoena date and that a hearing would be scheduled for petitioner (Petitioner's brief on exception, p. 7; Exhibit "5"). Petitioner urges that the omission from Ms. Bahry's affidavit of any mention of this conversation makes the affidavit unreliable. We are not persuaded by petitioner's arguments.

Contrary to petitioner's assertions, the testimony of Ms. Dromirecki and Mr. Bartell simply does not support the claim that petitioner filed his original protest letter by November 19, 1985. Rather, the testimony simply shows that they had a copy of the letter sometime in 1986. Further, petitioner's claim that no copies of the letter were sent to the Division prior to 1989 is contradicted by the notations on the activity sheet made by a "K. Skelly" to the effect that on May 14, 1986, in a telephone conversation with the taxpayer, the taxpayer agreed to have his accountant send a copy of the protest letter, and that a copy of the protest letter was stamped with a receipt date of May 21, 1986 by the Division. Finally, the fact that a phone call, as evidenced by the phone bill offered as Exhibit "5," was made to the Utica

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<sup>12</sup>A search of the transcript does not support this claim.

office on the date petitioner claims his accountant called Ms. Bahry there does not prove that petitioner's accountant spoke to Ms. Bahry herself, nor does it prove that she said the things petitioner alleges she said. In fact, Mr. Bartell testified that he telephoned Ms. Bahry in 1987 to ask her if she knew anything about the original protest letter, and she said no (Tr., pp. 100-104). Petitioner's accountant made no contemporaneous notes of the conversation, and no follow-up letter was requested by or sent to petitioner to document the conversation. Moreover, even if the conversation did take place, the failure to mention it in her affidavit would not render the remainder of Ms. Bahry's affidavit incredible or unreliable.

Thus, as far as petitioner's proof is concerned, all that we are left with is the fact that the Division acknowledges that the protest letter was received sometime in 1986 (see, Tr., pp. 102, 104), that a copy of the protest letter was stamped with a receipt date of May 21, 1986 by the Division (see, Exhibit "I"), and that a phone call was made to the Utica office for three minutes on February 21, 1986. In the face of this information, we are hard pressed to understand how the Division's witnesses could possibly corroborate petitioner's claim that he filed the protest letter by November 19, 1985. Since petitioner has not established this claim through any other evidence, we reject petitioner's arguments on this issue.

Finally, we turn to the due process issue. Petitioner claims that the Division's failure to grant him a hearing after notifying him in 1986 that it intended to do so was a violation of his due process rights to a hearing. Petitioner cites only Stuart v. Palmer (74 NY 183) in support of his position. We find his reliance upon this case to be misplaced. In Stuart, the petitioner was assessed expenses for a local improvement (1) without being notified of the assessment, (2) without being provided any opportunity to object to or to examine the assessment, and (3) without any opportunity to apply for a review of the assessment. To the contrary, petitioner here not only received a proper notice of determination for sales and use taxes due, but he also had an opportunity to examine the notice and to object to it by timely applying for review of it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:



1. The exception of petitioner Orrin Seguin d/b/a Club 37 is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Orrin Seguin d/b/a Club 37 is dismissed; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1985 is sustained.

DATED: Troy, New York  
October 22, 1992

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

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

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