

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
NELLOQUET RESTAURANT, INC. :
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 March 1, 1986 :
through November 30, 1990. :

In the Matter of the Petition :
of :
JOSE BAQUET, OFFICER OF :
NELLOQUET RESTAURANT, INC. :
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 March 1, 1986 :
through November 30, 1990. :

DECISION
DTA NOS. 811548,
811549 AND 811550

In the Matter of the Petition :
of :
WILLIAM BAQUET, OFFICER OF :
NELLOQUET RESTAURANT, INC. :
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 March 1, 1986 :
through November 30, 1990. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 23, 1994 with respect to the petitions of Nelloquet Restaurant, Inc., c/o Blaustein & Weinick, 1205 Franklin Avenue, Garden City, New York 11530, Jose Baquet, officer of Nelloquet Restaurant, Inc., 33 Libby Avenue, Hicksville, New York 11801, and William Baquet, officer of Nelloquet Restaurant, Inc., 16 Frevert Place, Hicksville, New

York 11801. Petitioners appeared by Blaustein & Weinick, Esqs. (Mark R. Blaustein and Gary S. Weinick, Esqs., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioners filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument was heard on September 14, 1995 and began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUES

I. Whether the Division of Taxation properly mailed notices of determination to petitioners Jose Baquet and William Baquet in compliance with the provisions of Tax Law § 1147(a)(1).

II. If not, whether the assessments issued to petitioners Jose Baquet and William Baquet should be cancelled.

FINDINGS OF FACT

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

On February 8, 1994, petitioners submitted with their brief 121 proposed findings of fact, each of which has been incorporated into the following Findings of Fact, except for the following:

(a) Proposed findings of fact "11", "15", "16", "19" through "24", "31" through "33", "40" through "43", "47" through "49", "51", "54" through "58", "63", "66" through "73", "79" through "102", "109" through "113" and "121" are rejected because they relate solely to Issue IV which, based on Conclusion of Law "F", infra, cannot be addressed in this determination;

(b) Proposed findings of fact "18", "26", "29", "52", "53", "75", "76", "105", "106", "108" and "114" through "118" are rejected as being conclusory in nature;

(c) Proposed finding of fact "36" is rejected as not being supported by the record; and

(d) Proposed findings of fact "5", "28" and "77" are accepted in part and rejected in part as follows:

(1) That portion of proposed finding of fact "5" which states that "there is no correlation between missing guest checks and taxable sales receipts" is rejected as being conclusory;

(2) That portion of proposed finding of fact "28" which states that the signature on Postal Form 3811 is not that of William Baquet, but is the signature of Caesar Maldonado, is rejected as being conclusory; and

(3) The first sentence of proposed finding of fact "77" is accepted. The balance is rejected as being conclusory.

1. Pursuant to an audit of Nelloquet Restaurant, Inc. ("Nelloquet") which began in January 1989, the Division of Taxation ("Division"), on September 6, 1991, issued four notices of determination and demands for payment of sales and use taxes due to Nelloquet as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
3/1/86 - 8/31/89	\$61,881.86	\$18,564.56	\$33,248.54	\$113,694.96
9/1/89 - 11/30/90	17,103.68	4,109.50	2,703.36	23,916.54
3/1/86 - 8/31/89	--	6,188.19	--	6,188.19
9/1/89 - 11/30/90	--	1,710.37	--	1,710.37

Each of these notices of determination was sent, by certified mail, to Nelloquet at its business address of 3491 Merrick Road, Wantagh, New York 11793. Nelloquet acknowledges receipt of these notices of determination; each was the subject of a timely request for conciliation conference (see, Conciliation Order CMS No. 118661 in Exhibit "B").

2. On the same date (September 6, 1991), the Division issued four notices of determination and demands for payment of sales and use taxes due to each of Jose Baquet and William Baquet, as officers of Nelloquet, in the exact amounts and for the same periods as those issued to Nelloquet (see, Finding of Fact "1"). Each of the notices of determination issued to

Jose Baquet and William Baquet was addressed to such petitioners at 3491 Merrick Road, Wantagh, New York 11793 (Nelloquet's address).

Jose Baquet and William Baquet deny receipt of any of these notices of determination. Petitions seeking administrative review of these assessments were received by the Division of Tax Appeals on January 8, 1993 (the petitions filed on behalf of each of these petitioners were signed by their representative, Mark R. Blaustein, Esq., on January 6, 1993).

3. At various time prior to the issuance of the assessments, Nelloquet and the Division executed consents extending the period of limitation for assessment of sales and use taxes as follows:

<u>Date Executed</u>	<u>Period Extended</u>	<u>Date for Assessment</u>
6/16/89	3/1/86 - 8/31/86	12/20/89
11/12/89	3/1/86 - 5/31/87	9/20/90
8/1/90	3/1/86 - 5/31/88	6/20/91
5/9/91	3/1/86 - 11/30/88	12/20/91

4. On March 27, 1989, the Division's auditor sent an appointment letter to Nelloquet which scheduled an audit of its books and records for April 26, 1989 (the audit was subsequently rescheduled for June 19, 1989) and requested that all books and records pertaining to the period under audit (March 1, 1986 through February 28, 1989) be provided to the auditor. At various stages during the audit, additional written requests for books and records were made (see, Exhibit "U") and one of these requests advised Nelloquet that the audit period had been extended through the quarter ended November 30, 1990.

5. Nelloquet's recordkeeping consisted of a "one-write" system, i.e., rather than maintaining separate journals, all records were kept in one ledger. The auditor stated that the one-write system did not have a method of accounting for cash expenditures (only check disbursements were shown).

A purchase analysis was performed which indicated cash payouts. Letters were sent by the auditor to all vendors from whom Nelloquet's books indicated it had made purchases. A letter was sent to one vendor (Two Cousin's Fish Market) which was not reported in Nelloquet's records (the auditor found a notation pertaining to this vendor somewhere in Nelloquet's books).

From the replies, the auditor determined that Nelloquet had purchased considerably more than indicated in its books (considerable cash payments were also found). The auditor, therefore, determined that a markup test on purchases could not be performed because he could not ascertain if there were other suppliers not on the books or if there were additional vendors from whom purchases were made in cash. The auditor testified that if he had performed a markup test utilizing the margin of error found in cash purchases and verifications applied to purchases reported by Nelloquet, the resulting assessment would have been greater than the amount at issue herein.

6. The auditor determined Nelloquet's books and records to be inadequate for the performance of a detailed audit based upon the following:

- (a) Sales could not be reconciled from sales invoices (missing guest checks) to deposits to tax returns;
- (b) Purchase records were found to be incomplete since not all purchases were recorded (see, Finding of Fact "5"; and
- (c) Gross sales and purchases per records were not found to be in substantial agreement with the amounts reported on Nelloquet's Federal income tax returns.

Based upon the auditor's determination that Nelloquet's books and records were inadequate, he decided to perform a guest check analysis. The month of December 1988 was initially selected for a test period analysis.

The auditor analyzed the sequence of guest check numbers used by Nelloquet's waitresses in December 1988. A total of 921 guest checks were accounted for; 899 guest checks from this numbered sequence were missing. Of the 899 missing guest checks, 308 were found to have been used in November 1988 and 185 in January 1989. A review of the guest checks used in these surrounding months revealed that none of the missing 899 guest checks were used in the beginning of November or at the end of January.

The 921 guest checks used in December were determined to be 63.78% of the invoices found. The 921 guest checks totalled \$49,881.33, or an average guest check sale of \$54.16. Applying the 63.78% to the missing invoices (406) resulted in 259 guest checks not accounted for; multiplying the 259 unaccounted for guest checks times \$54.16 (average sale) resulted in additional sales for December 1988 of \$14,027.44. Audited taxable sales were, therefore, determined to be \$63,908.77 (\$49,881.33 + \$14,027.44). The margin of error (\$63,908.77 divided by \$32,271.29 reported taxable sales) was 98%. The auditor gave an adjustment for two guest checks per day which could have been used for other purposes. Also taken into account in the auditor's calculation was the fact that no guest checks existed for two days in December (figures for corresponding days of the week were utilized).

The auditor found that Nelloquet's sales per guest checks for January and February 1989 were fairly consistent with the amounts reported on its sales tax returns for these two months. To adjust for what the audit report stated "seemed to be an aberration in the sales for December 1988," the auditor decided not to use the error previously determined (98%). Instead, an error rate of 45.7% was used. This error rate was determined by dividing audited taxable sales of \$63,908.77 by sales per guest checks of \$49,881.33 (sales per the 921 guest checks used in December rather than by the amount of taxable sales reported of \$32,271.29). The result (28.12%) was applied to sales per guest checks for January and February 1989 and total quarterly sales reported of \$117,303.00 (rather than just the reported sales for December 1988) were used as a denominator; thus, an error rate of 45.7% (instead of 98%) was determined.

Taxable sales of \$2,160,436.00 were reported for the audit period. Additional taxable sales were determined to be \$987,319.25 (\$2,160,436.00 x .457), with additional tax due thereon (at 8%) of \$78,985.54, the total additional tax assessed pursuant to the notices of determination issued to petitioners (see, Findings of Fact "1" and "2").

7. At the hearing, the Division introduced an affidavit of Arline Henson (Exhibit "P"), the section head of the sales tax audit section of the Nassau District Office. This affidavit stated that part of her responsibilities was to ensure that notices of determination were correctly

prepared and mailed and, as such, she gained personal knowledge and familiarity with the Nassau District Office's procedures.

Ms. Henson's affidavit set forth the procedures for preparation of the notices of determination and for the mailing of the notices. She identified the personnel involved with the preparation and mailing of the notices at issue herein. With respect to the notices issued to petitioners Jose Baquet and William Baquet, the affidavit stated, in paragraph 12 thereof, as follows:

"When the Domestic Return Receipt (Postal Form 3811) was received back from the taxpayer, Mr. [Lawrence] Meyer [Senior Mail and Supply Clerk] date-stamped the copies of the Postal Form 3800's on the aforesaid 8 1/2" by 11" sheet in the mail log corresponding to the article number on the Domestic Return Receipt to signify the date of receipt. Attached as Exhibit 'C' is a copy of the 8 1/2" by 11" sheet from the mail room's mail log containing the copies of the Postal Form 3800's pertinent to this matter, which have been date-stamped to show that they were received in the mail room on September 6, 1991, and date-stamped again to show receipt of the corresponding Postal Form 3811 (return receipt) in the Nassau District Office on September 11, 1991."

Ms. Henson stated "with certainty" that the envelopes enclosing the subject notices of determination were picked up by Mr. Meyer, taken to the mailroom of the Nassau District Office, had proper postage affixed and were mailed by certified mail on September 6, 1991. She also stated that the items of certified mail were received by Jose and William Baquet or their agent(s) on or about September 7, 1991.

Attached to Ms. Henson's affidavit were the worksheets prepared by the auditor, certified mail receipts (PS Forms 3800) and domestic return receipts (PS Forms 3811) containing a signature indicating that the certified mailings were received at the address (3491 Merrick Road, Wantagh, New York 11793). The signatures on the PS Forms 3811 do not appear to be the signatures of either Jose or William Baquet.

The Division also introduced the affidavit of the auditor, Dennis Simmons (who was present and who testified at the hearing), which confirmed Ms. Henson's description of the office procedures utilized to issue the notices of determination to petitioners Jose Baquet and William Baquet.

8. Approximately 13 to 15 years ago, Jose Baquet started the business of Nelloquet Restaurant. Previously, he had lost his job and had encountered difficulty in finding work. In an effort to help his father, William Baquet provided capital and financing necessary to open the restaurant. On several occasions, William Baquet advanced monies to his parents to keep the restaurant in operation. Jose's wife, Maria, and older son, Joseph, also worked at the restaurant.

9. During the audit period and for years both prior and subsequent thereto, Jose (and Maria) Baquet resided at 33 Libby Avenue, Hicksville, New York 11801 and William Baquet resided at 16 Frevert Place, Hicksville, New York 11801. Jose Baquet filed New York State resident income tax returns for the years 1989 (filed in 1990) and 1990 (filed in 1991) with the aforesaid address (see, Exhibit "5").

William Baquet filed New York State resident income tax returns for the years 1989 (filed in 1990) and 1990 (filed in 1991) with the aforesaid address listed thereon (see, Exhibit "6"). A check for the payment of his 1989 tax liability (\$791.00) accompanied the return. The check, payable to New York State Income Tax, was endorsed and cashed.

10. Caesar Maldonado was the bookkeeper at the restaurant. Ann Porpora began working at Nelloquet Restaurant in 1978 or 1979. She worked as a bartender/cashier at the restaurant for a period of 13 years.

In her position as bartender/cashier, she witnessed the signature of Caesar Maldonado on many occasions and stated that she could definitely identify it. At the hearing, she testified that the signature on line 5 of each of the PS Forms 3811 (one addressed to Jose Baquet; the other to William Baquet) was the signature of Caesar Maldonado. William Baquet never authorized Caesar Maldonado to act on his behalf or appointed him his agent for any purpose.

11. At the hearing, Jose Baquet testified that the signature on line 5 of the PS 3811 addressed to him was not his. He does not recall signing the form nor does he recall ever having received any notification from the Division regarding sales tax owed by the restaurant. Jose Baquet testified that he believes that the signature on the PS 3811 form may be that of Caesar Maldonado.

William Baquet testified that the signature on the PS 3811 relating to the notice of determination issued to him was not his and, in addition, that he never received such notice of determination.

12. The notices of determination issued to Nelloquet Restaurant were received by the accountant for the restaurant, Paul Gaynes, who subsequently (and timely) filed a request for a conciliation conference. Mr. Gaynes testified that the notices of determination issued to Nelloquet were delivered to his office by either Jose Baquet, Joseph Baquet or Caesar Maldonado. As to the notices of determination issued to Jose Baquet and William Baquet, Mr. Gaynes testified that he did not receive either of them. There was no indication on the notices issued to Nelloquet that additional notices had been issued to Jose Baquet or William Baquet, individually.

13. The Division's auditor inquired as to the home addresses of Jose Baquet and William Baquet. These addresses appear on the Sales Tax Audit Report Information Sheet (see, Exhibit "R"). The audit report was completed prior to the issuance of the notices of determination. The auditor stated that the address of William Baquet (listed on the audit report) was furnished by Paul Gaynes, possibly from a tax return.

14. Nelloquet did not use books of guest checks (stacks of checks were used instead). Waitresses were given 5 to 10 guest checks per day. The guest checks were not in sequential order (Ann Porpora testified that "it was like somebody dropped a box of checks on the floor and however they were picked up, this is how they were given out").

The audit workpapers (Exhibit "S") reflect the following scenario with respect to the issuance of guest checks:

- a. Check #16073 dated and issued December 7;
- b. Check #16076 dated and issued December 30; and
- c. Check #16080 dated and issued December 10.

In the performance of his audit, the auditor examined guest checks issued by a particular server (Liz) who, on December 2, 1988, issued the following guest check numbers: 20367, 20391, 20392, 18158, 18187, 18191 and 21957.

The auditor admitted, based on the foregoing, that there was a random nature to Nelloquet's issuance of the guest checks. He could not determine whether or not there were unused guest checks which could account for the amount of missing guest checks (see, Finding of Fact "6").

15. Ann Porpora, Nelloquet's bartender/cashier, testified that the restaurant was not open for lunch. She stated that the average seating at a table in the restaurant was two. The price for the salad bar served at the restaurant was \$10.95. She testified that, at the end of a particular evening, either Jose Baquet or Caesar Maldonado would receive the sales receipts.

OPINION

Tax Law § 1138(a)(1) provides that a notice of a determination of sales tax due shall be given to the "person" liable for the collection or payment of the tax and that such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 90 days after giving notice of the determination, applies to the Division of Tax Appeals for a hearing or unless the Commissioner of Taxation and Finance, of his own motion, shall redetermine the same.

Tax Law § 1147(a)(1) provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The 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" (emphasis added).

Petitioners do not dispute that the Division mailed the notices of determination by certified mail. They contend, however, that the Division's mailing of the notices to the business

address where they were received by the business manager was not a proper mailing as required by section 1147, i.e., "to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by [petitioners] pursuant to the provisions of [Article 28] or in any application made by [petitioners] or, if no return has been filed or application made, then to such address as may be obtainable" (Petitioners' brief, p. 14, emphasis added).

The Administrative Law Judge determined that petitioners, as officers of the corporation, were not required to file individual sales tax returns under Article 28. Thus, the Division was required to mail the notices of personal liability to such address as may be obtainable by the Division. Based on the fact that the Division knew petitioners' last known addresses from their personal income tax returns, the Administrative Law Judge concluded that the mailing of the notices to the business address did not conform with the requirements of Tax Law § 1147. The Administrative Law Judge found that both petitioners appeared at the hearing and presented credible testimony that they never received the notices:

"[t]he accountant, Paul Gaynes, testified that he received the notices of determination issued to the restaurant (either from [one of the petitioners] or from Caesar Maldonado . . . and [that he] timely protested the same; however, he testified that he never received the notices of determination issued to the individual petitioners. This evidence . . . serves to rebut any presumption of receipt of these notices by the individual petitioners" (Determination, conclusion of law "D").

Relying on Matter of Karolight, Ltd. (Tax Appeals Tribunal, February 8, 1990), the Administrative Law Judge concluded that the proper remedy was to cancel the assessments.

We deal first with the Division's argument on exception that the mailing of the notices to the business address was correct because that was the address shown on the sales tax return filed by the business and on the consent extending the limitations for the corporation signed by petitioner William Baquet and, also, the address on the power of attorney appointing Mr. Paul Gaynes to represent the corporation during the audit. The Division's argument is that the corporation's return was effectively the return of petitioners because petitioners, as they are allowed to do by the Division's regulations (20 NYCRR 526.11[b][3]), did not file a return in

their name, but rather chose to rely on the return filed on behalf of the corporation. Thus, in the case of responsible officers who choose to rely on the corporation return, the phrase "return filed by him pursuant to this article" in section 1147(a)(1) should be interpreted to refer to the corporation's return (Division's brief, p. 19).

We cannot agree. This argument is essentially the same argument we rejected in Matter of On-Site Petroleum Unlimited (Tax Appeals Tribunal, February 8, 1996 and Matter of Bleistein (Tax Appeals Tribunal, July 27, 1995). In both cases, we concluded that consents to extend the statute of limitation signed on behalf of the corporation were not sufficient to extend the statute for the individual officers. In each case, we found that to bind the officers with a consent signed on behalf of the corporation would be inconsistent with the settled law that the liability of an officer is separate and independent from that of the corporation (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196, 440 NYS2d 382; see, Matter of Halperin v. Chu, 138 AD2d 915, 526 NYS2d 660, appeal dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845 [the issue of the personal liability of the officer could not be reviewed through the application of the corporation for a redetermination of its liability]; Matter of Waite, Tax Appeals Tribunal, January 12, 1995 [given officer's separate liability, the Division's failure to collect sales tax owed from corporation did not preclude it from satisfying outstanding debt from officer]; Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991 [Administrative Law Judge's cancellation of assessment of corporation due to procedural error on part of Division does not result in dismissal of assessment against petitioner]).

In our view, the principle of separate liability of an officer from that of the corporation applies equally to the mailing of the notice, the first step by the Division asserting such liability, as it does to consents to extend the period for asserting liability.

We deal next with the Division's argument that:

"[e]ven assuming that, in the case of a responsible person assessment, 'last filed return pursuant to this Article' does not refer to the return filed by the corporation, it does not follow . . . that a responsible officer assessment must be sent to the address on the officer's personal income tax return . . . the division [argues that it] is free to use any 'address otherwise obtainable'" (Division's brief, pp. 20-21).

The Division argues that this language gives the Division broad discretion to choose any address such as the business address.

We cannot agree. The logical extension of the Division's argument is that in responsible officer cases where the Division, through its own regulation, does not require officers to file individual returns, the proper mailing address would always be the business address. We find no basis for this interpretation of the statute since it renders ineffective the "as may be obtainable" language in section 1147(a)(1); a result clearly not intended by the Legislature (see, McKinney's Statutes § 144). As noted, Tax Law § 1147(a)(1) reflects the theory of separate liability. Where no return is filed or required to be filed, the Division must use its best efforts to obtain the address of the "person" against whom it seeks to assert liability. Where, as here, the Division has in its own records the address of such individuals, it seems clear that such address is "obtainable" in the context of section 1147(a)(1).

We deal next with the Division's argument that we should use our de novo review power to overrule the conclusion by the Administrative Law Judge that petitioners did not receive the notices mailed to the business address. The Division argues that:

"[i]n his [determination] the ALJ concluded that [petitioners'] testimony was credible and served to rebut the Division's proof of receipt. The ALJ offered no reason why he found credible the testimony of petitioners denying that they received the subject Notices. . . .

"Petitioners' bland denial of receipt leaves a slew of questions unanswered" (Division's brief, p. 27).

The crux of the Division's argument is that there is no reason why the business manager, who received the three notices, would deliver the corporate notice to the corporation's representative but not deliver the individual notices to petitioners (Division's brief, p. 29). "To say the least it stretches credulity to believe that a bookkeeper who regularly handled the mail would sign for three certified letters from the Tax Department, and forward only one of them. To render their testimony of nonreceipt credible, it was incumbent on petitioners to produce the testimony of Caesar Maldonado or at least explain why he was not available. Petitioners did neither" (Division's brief, pp. 29-30). The Division also points to the fact that copies of the notices

which petitioners deny they received were attached to their petitions. In light of these inexplicable circumstances, the Administrative Law Judge's passive acceptance of petitioners' testimony of nonreceipt constitutes error.

The Division also asserts that the record reveals that petitioners proved themselves to have little regard for truth telling (Division's brief, p. 30). Pointing to alleged inconsistencies in the petitions and Bill of Particulars, the Division asks "why would [petitioners] be less willing to tell falsehoods about their receipt of Notices? It is this very question which the ALJ should have wrestled with but did not" (Division's brief, p. 32).

We do not agree. The credibility of witnesses is a determination within the domain of the trier of facts, the person who has the opportunity to view the witness first hand and evaluate the relevance and truthfulness of their testimony in light of all the facts and circumstances of the case (see, Matter of Moss, Tax Appeals Tribunal, November 25, 1992; Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992; Matter of Spallina, Tax Appeals Tribunal, February 27, 1992).

Although this Tribunal is not bound by the Administrative Law Judge's evaluation of a witness's credibility (Tax Law § 2006[7]; 20 NYCRR 3000.17[e][1]; Matter of Moss, *supra*; Matter of Jericho Delicatessen, *supra*), we find nothing in the record here which causes us to alter the determination of the Administrative Law Judge (*cf.*, Matter of Wachsman, Tax Appeals Tribunal, November 30, 1995).

Finally, we affirm the determination of the Administrative Law Judge to cancel the assessments issued to Jose Baquet and William Baquet. As we stated in Matter of Karolight, Ltd. (*supra*), relied upon by the Administrative Law Judge,

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

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

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed:
3. The petitions of Jose Baquet, Officer of Nelloquet Restaurant, Inc. and William Baquet, Officer of Nelloquet Restaurant, Inc. are granted; and
4. The notices of determination issued to Jose Baquet, Officer of Nelloquet Restaurant, Inc. and William Baquet, Officer of Nelloquet Restaurant, Inc. on September 6, 1991 are hereby cancelled.

DATED: Troy, New York
March 14, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner