STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JEFFREY BRAGER	:	DECISION DTA NO. 812523
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1987 through 1990.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 3, 1995 with respect to the petition of Jeffrey Brager, 107 Foxwood Drive, Jericho, New York 11753. Petitioner appeared by Cartier, Hogan, Sullivan, Bernstein and Auerbach, P.C. (William J. Bernstein, Esq, of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter on November 20, 1995 stating it would not be filing a reply brief, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs. Commissioner DeWitt dissents in a separate opinion.

ISSUE

Whether petitioner's petition was timely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "29" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> The subject of this matter is a Notice of Deficiency dated March 4, 1993 bearing assessment identification number L-007046270-4. Said notice is addressed to petitioner, Jeffrey Brager, and to Paula Brager, petitioner's former wife, at "110 Great Neck Rd. 5E, Great Neck, NY 11021-3304" and asserts a total of $35,321.14 in additional New York State and New York City personal income tax due, plus penalty and interest, for a "total amount due" of $75,593.56 for the years 1987 through 1990. A copy of this notice was introduced into the record herein. This copy also lists a certified mail control number, "P 911 005 784", in the upper right corner. It is clear from the record that petitioner does not dispute the fact that the Division sent a Notice of Deficiency, only that it was sent to 110 Greatneck Road, Greatneck, New York, which petitioner asserts was not his last known address.[1]

On December 24, 1993, petitioner filed a petition in respect of the above-referenced assessment identification number wherein petitioner stated, in pertinent part:

> "No Notices of Deficiency are attached nor were the original Notice or Nortices [sic] timely protested because the Notice of Deficiency was allegedly mailed to Mr. Brager at a prior address, said address being 6 Rodeo Circle, Syosset, New York, despite the fact that the audit information contained petitioner's correct address which is 107 Foxwood Drive, Jericho, New York 11753. In fact Petitioner has never received copies of any such Notices despite numerous requests by his accountants who represented Petitioner during audit and were likewise never sent copies of the Notice of Deficiency."

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[1] We modified finding of fact "1" of the Administrative Law Judge's determination by adding the last sentence in order to more fully reflect the record.

The Division of Taxation ("Division") subsequently filed an answer to petitioner's petition and asserted that since said petition was filed in excess of 90 days from the (alleged) date of issuance of the above-referenced Notice of Deficiency, such petition was untimely filed.

In order to establish the date and proper mailing of the subject Notice of Deficiency, the Division submitted a 30-page document referred to as a "certified mail record" or "CMR."

The first three pages of the CMR are encaptioned "Certified Record of Non-Presort Mail" and are numbered pages "1," "2" and "3," respectively. These three pages list certified control numbers sequentially numbered from P 911 206 805 through P 911 206 836 for a total of 32 pieces. There appear to have been no deletions from the 32 items listed on these three pages. The bottom of page "3" of this "Certified Record for Non-Presort Mail" lists "32" as the total pieces listed therein. This "32" has not been manually circled (see, below). The space corresponding to the heading "Total Pieces Received at Post Office" is blank. Page "3" of the "Certified Record for Non-Presort Mail" contains no signature (see below).

The fourth through thirtieth pages of the CMR bear page numbers "1" through "27." These 27 pages are encaptioned "Certified Record for Zip + 4 Minimum Discount Mail." These 27 pages list certified control numbers sequentially numbered from P 911 005 666 through P 911 005 957 for a total of 292 items. There appear to be no deletions from the 292 items listed on these 27 pages.

The page numbered "27" indicates that 292 pieces of mail were listed on this "Certified Record for Zip + 4 Minimum Discount Mail." It is noted that this "292" has been manually circled. Just below this entry, the space next to the heading "Total Pieces Received at Post Office" is blank.

Page "27" also contains a signature.

All 30 pages of the CMR submitted by the Division contain a pre-printed date of February 22, 1993. On the first page of the document, i.e., page "1" of the "Certified Record of Non-Presort Mail," this date has been manually changed to March 4, 1993.

All 30 pages of the CMR bear a United States Postal Service postmark dated March 4, 1993. The stamp further identifies itself as that of the Roessleville Branch of the U.S. Postal Service, located in Albany, New York.

Assigned to each certified control number on all 30 pages of the CMR is a notice number, a listing of the name of the addressee and mailing address, and a listing of postage and fees.

The page numbered "11" of the "Certified Record for Zip + 4 Minimum Discount Mail" lists certified control number P 911 005 784. Corresponding to this number is notice number "L-007046270" and petitioner's name and the address listed above.

The Division also submitted the affidavit of Donna Biondo, head clerk for the Division's Case and Resource Tracking System ("CARTS") Control Unit. As part of her regular duties, Ms. Biondo supervises the processing of notices of deficiency/determination prior to shipment to the Division's Mechanical Section for mailing. In her affidavit, Ms. Biondo stated that she had reviewed the certified mail record previously described herein and, in connection with such review, the Biondo affidavit further stated, in pertinent part:

> "3. I have examined the [subject certified mail record]. This document is a true and accurate copy of the certified mail record for Notice(s) of Deficiency and Notice(s) of Determination issued by the Department of Taxation and Finance on March 4, 1993, including the Notice of Deficiency issued to Jeffrey Brager. The original document consists of 30 fan-folded (connected) pages. All pages are connected when the postmarked document is returned to our office after the mailing. Portions of [the CMR] have been redacted to preserve the confidentiality of information relating to other taxpayers.
>
> "4. In the upper left hand corner of the certified mail record, page 1, the date 02/22/93 was changed manually to 3-4-93. The original date, 02/22/93, was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice(s) so that there is sufficient lead time for the Notice(s) to be manually reviewed and then processed for postage, etc. by the Department's Mechanical Section. The handwritten change of the date from 02/22/93 to 3-4-93 was made by personnel, in the Department's mail room, who changed the date so that it conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the United States Postal Service.
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> "5. The United States Postal Service authorizes the use of certified control numbers in numerically consecutive blocks. This certified mail record uses two blocks of certified control numbers; certified control numbers 911 206 805 through 911 206 836 (assigned to the items of mail listed on the

first three pages (numbered 1 through 3)) and certified control numbers P 911 005 666 through 911 005 957 (assigned to items of mail listed on the next 27 pages (numbered 1 through 27)). There are two blocks of certified control numbers in [the CMR] because the certified mail record was not separated into two parts with each part corresponding to blocks of certified control numbers. Therefore, the two parts were treated as a single certified mail record.

"6. Each statutory Notice is placed in an envelope by Department personnel and the envelopes are then delivered into the possession of a U.S. Postal Service representative. The Postal Service representative then affixes his or her initials/signature and/or a U.S. Postmark to a page or pages of the certified mail record. Here, the Postal Service representative affixed a Postmark to each page of the certified mail record and placed his signature on page 27 of part two of the certified mail record."

The Biondo affidavit concluded that the certified mail record indicated that a Notice of Deficiency bearing notice identification number 007046270 was mailed to petitioner by certified mail on March 4, 1993 at the address listed in the CMR and using the certified control number P 911 005 784.

In further support of the mailing of the notice in issue, the Division offered the affidavit of Daniel LaFar, principal mail and supply clerk. Mr. LaFar worked in the Division's mailroom at the time of the mailing of the notice at issue herein. The LaFar affidavit explained the regular procedure in the mailroom which was followed when mailing notices of deficiency. The affidavit stated that, upon receipt of the notices, envelopes and certified mail record by the Division's mailroom, a mailroom clerk verified the names and certified mail numbers against the information in the certified mail record. The clerk then weighed and sealed the envelopes containing the notices, affixed postage and fees to the envelopes, and recorded such amounts on the certified mail record. Thereafter, a mailroom employee delivered the envelopes and associated certified mail record to the Roessleville Branch of the U.S. Postal Service in Albany, New York, where a postal employee affixed a dated postmark and/or his or her signature to the certified mail record.

The LaFar affidavit also stated that it was the ordinary course of business pursuant to the practices and procedures of the mail and supply room to pick up the certified mail record the following day and deliver it to the originating office, which was done herein.

The LaFar affidavit further stated that Mr. LaFar had reviewed the certified mail record and the affidavit of Donna Biondo and could determine that an employee of the mailroom had delivered the certified mail addressed to Jeffrey Brager, 110 Great Neck Road East 5E, Great Neck, New York 11021-3304 to the Roessleville Branch of the United States Postal Service in Albany, New York on March 4, 1993, in a postpaid envelope for delivery by certified mail.

Petitioner filed his 1991 New York State personal income tax return (Form IT-201) on October 15, 1992. Petitioner filed said return jointly with his former wife, Paula Brager. Petitioner's address as listed on said return was "110 Great Neck Rd. Apt. 5E, Great Neck, New York 11021."

The address listed on petitioner's 1991 IT-201 was erroneous. At the time said return was filed, petitioner resided at 100 Great Neck Road, Great Neck, New York. Petitioner had resided at that address since about September 1991. Petitioner continued to reside at that location until December 31, 1992 when he purchased a residence at 107 Foxwood Drive, Jericho, New York and moved to that location.

The closing on petitioner's purchase of the Foxwood Drive residence occurred on December 31, 1992. In connection with this transfer, a Form TP-584 (Combined Real Property Transfer Gains Tax Affidavit/Real Estate Transfer Tax Return/Credit Line Mortgage Certificate) was filed with the Suffolk County Clerk on January 12, 1993. The form indicates the address of the property being conveyed, 107 Foxwood Drive, Jericho, New York, and lists petitioner's address as 100 Great Neck Road, Great Neck, New York.

Prior to his living at the 100 Great Neck Road address, petitioner resided with his former wife at 6 Rodeo Circle, Syosset, New York. A power of attorney form listing this address for petitioner was filed with the Income Tax Section of the Division's Queens District Office on March 29, 1991. This form was apparently filed during the course of the audit which led to the Notice of Deficiency in dispute herein.

The power of attorney referred to above appointed Eugene L. Kass and John R. Bernhardi, Jr., C.P.A.'s, as petitioner's representatives in connection with "New York State Income Tax Returns 1987, 1988, 1989."

By letter dated February 9, 1993, the Division's auditor, Kamal Shah, transmitted copies of statements of proposed audit adjustment to petitioner's former representative, John Bernhardi. Both the transmittal letter and the statements themselves indicated the necessity of a response by February 10, 1993 in order to "discuss the audit findings in detail."

Mr. Bernhardi responded to the statements of audit changes by letter dated April 5, 1993, wherein he expressed his disagreement with the audit findings and requested a "conference meeting."

By letter to Mr. Shah dated June 25, 1993, petitioner's former representative advised that petitioner no longer resided at 100 Great Neck Road, Great Neck, New York and that he currently resided at the Jericho address (see, above).

Petitioner received a "Collection Notice" dated August 13, 1993 in respect of assessment number L-007046270-4. This notice was addressed to petitioner at his Jericho address.

In response to the "Collection Notice" dated August 13, 1993, petitioner's former representative transmitted a letter dated August 25, 1993 to the Division's Tax Compliance unit requesting "a copy of the original assessment notice, which is believed to have occurred on June 14, 1993."

By letter addressed to the Division's Compliance Unit dated October 15, 1992 and received on October 16, 1992, Mr. Bernhardi remitted payment on an income tax assessment against petitioner unrelated to the assessment at issue herein. Said letter referenced petitioner's address as "100 Great Neck Road, Great Neck, New York."

We modify finding of fact "29" of the Administrative Law Judge's determination to read as follows:

In his closing statement, petitioner's representative stated:

"[w]e do not dispute the fact that the Department of Taxation and Finance sent a notice of deficiency to 110 Greatneck Road, Greatneck, New York.

"We contend three things. One, that neither of the petitioners nor their representatives ever received a copy of that notice. Number two, that . . . [the notice] was not mailed to the taxpayer's last known address.

"Lastly . . . that the letter . . . dated April 15, 1993 [sic] . . . could and should be considered a request for a conciliation conference . . ." (Tr., p. 29-30).[2]

We also make the following findings of fact.

At hearing, Mr. Bernhardi stated that he had first become aware of the notice issued to petitioner "sometime in August" of 1993.

At the end of the hearing, the Administrative Law Judge addressed the issue of the filing of post-hearing documents as follows:

"[p]etitioner requested an opportunity to file post hearing . . . the power of attorney appointing Mr. Bernhardi as the representative during the course of the audit . . .

"I will give you an opportunity to file those . . . documents post hearing" (Tr., pp. 30-31).

The power of attorney appointing Mr. Bernhardi and Mr. Kass as petitioner's representatives was submitted to the Administrative Law Judge in the post-hearing period (Ex. "10").

OPINION

We deal first with petitioner's assertion that the Division did not mail a copy of the notice to petitioner's authorized representative. This issue was raised at hearing by petitioner. The Division offered no evidence of mailing of the notice to petitioner's representative. In its response to the post-hearing submission of documents by petitioner, the Division did not

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[2] Finding of fact "29" of the Administrative Law Judge's determination read as follows:

"Petitioner did not dispute that the Division issued the subject Notice of Deficiency, addressed to petitioner as indicated in Finding of Fact '1.' Petitioner did deny receipt of such notice."

We modified this fact to more fully reflect the record.

address the filing of the power of attorney nor the substance of the issue (letter dated February 24, 1995). The Administrative Law Judge did not address the issue in his determination.

The law is clear, the failure to serve the notice on petitioner's authorized representative requires a tolling of the 90-day period for the filing of the petition (Matter of Bianca v. Frank, 43 NY2d 168, 401 NYS2d 20; Matter of Multi Trucking, Tax Appeals Tribunal, October 6, 1988). Under the uncontroverted facts in this case, petitioner's authorized representative was not served with a copy of the notice. Accordingly, the matter is remanded to the Administrative Law Judge for a hearing on the merits.

While the above conclusion renders the other issues in the case moot, we will address them in order to provide the parties with a full decision on all the issues.

We deal next with petitioner's assertion that the notice was not "mailed" to petitioner's "last known address" as required under Tax Law § 681(a) and, thus, was not valid.

Petitioner does not dispute the fact that the notice was "sent," i.e., mailed. Just that it was not sent to the "last known address." Petitioner argued that the Division was properly informed of petitioner's correct address by the October 15, 1992 letter remitting a tax payment, the real property gains tax affidavit filed with the Suffolk County Clerk, and the June 25, 1993 letter to Mr. Shah. The Administrative Law Judge rejected this contention. He concluded that the "notice was issued to petitioner at the address listed on the last income tax return filed by him" (Determination, conclusion of law "E"). We agree with this aspect of the Administrative Law Judge's determination. The Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (see, Powell v. Commissioner, 958 F2d 53, 92-1 USTC ¶ 50,147, cert denied 506 US 965; Abeles v. Commissioner, 91 T.C. 1019). That did not happen here. The letter dated October 15, 1992 merely indicated an address for Jeffrey Brager, it did not indicate that the address was any different from that which the Division had on file by virtue of Mr. Brager's last income tax return, nor did it purport, by its terms, to inform the Division of a

change of address by Mr. Brager (see, Stein v. Commissioner, T.C. Memo 1990-378, 60 TCM 211). We reach the same conclusion with respect to the gains tax document and the June 1993 letter which was filed after the Notice was issued by the Division.

We deal next with the issue which subsumed the major portion of the determination of the Administrative Law Judge, i.e., whether the Division demonstrated proper mailing of the notice. While petitioner did not dispute the fact that the notice was mailed by the Division, the Administrative Law Judge apparently believed it necessary to deal with this issue because the Division, in its answer to petitioner's petition, asserted that the petition was untimely. In view of the finding by the Administrative Law Judge that the Division did not prove proper mailing of the notice and his conclusion that, therefore, the notice should be canceled in its entirety, a result with which we disagree, we deal with the issue.[3]

Tax Law § 681(a) provides that if the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail. If such Notice is properly mailed, it becomes a final assessment unless the taxpayer files a petition protesting the Notice within 90 days of the mailing of the Notice (Tax Law § 681[b]).[4] A taxpayer has the option of protesting the Notice by requesting a Conciliation Conference in lieu of filing a petition for hearing if the 90-day period to petition for hearing has not elapsed (Tax Law §§ 170[3-a][a], 689[b]; 20 NYCRR 4000.3[c]).

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[3]Resolution of this issue also resolves petitioner's assertion that his April 5, 1993 letter to the Division in response to the February 9, 1993 statement of audit adjustments should be considered a request for a conciliation conference. In that letter, petitioner disagreed with the adjustments and requested a "conference meeting." Whether this letter can be viewed as a request for a conciliation conference is a factual determination. If the letter was mailed prior to the date the notice was mailed, it would be a premature request for a conciliation conference (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If the letter was mailed subsequent to the date the notice was mailed, it could be viewed as a timely request for a conference.

[4]Section 681 was adopted to "bring New York in conformity with the comparable Federal provision (26 U.S.C. § 6212[a], [b]; 1962 McKinney's Session Laws of New York, Memorandum of State Dept. of Taxation & Finance, at 3536-3537, Executive Memoranda, at 3681-3682)" (see, Matter of Agosto v. Tax Commn. of State of New York, 68 NY2d 891, 508 NYS2d 934, 935; see also, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The 90-day period runs from the date of mailing. It is not necessary that the taxpayer receive the Notice, only that the Division prove it mailed the Notice (Matter of Katz, supra; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517 [dealing with sales tax deficiency under section 1147(a)(1) of the Tax Law]). Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). Once this burden is met, a presumption of proper mailing arises (Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (Matter of Katz, supra; Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Fuchs, Tax Appeals Tribunal, April 20, 1995).

In this case, the Administrative Law Judge determined that the "Division has established a standard mailing procedure through the Biondo and LaFar affidavits" (Determination, conclusion of law "C"). The Administrative Law Judge found, however, that the certified mail record offered by the Division to show that its procedure was followed "is flawed because it does not contain a total for the number of pieces [of mail] received at the post office (see, Findings of Fact '5' and '7').[5] The certified mail record thus does not establish that all of the

[5]The "certified mail record" used by the Division contains all of the same elements as the Postal Form 3877 and has been approved by the Postal Service for the Division for its certified mailings. The terms "certified mail record" and "Postal Form 3877" are interchangeable for purposes of this decision.

pieces listed thereon by the sender were received by the post office (see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995)" (Determination, conclusion of law "C"). The Administrative Law Judge concluded that "[s]ince the Division has failed to prove the fact and date of mailing herein, it must be concluded that the subject Notice of Deficiency was improperly issued and cannot serve as the basis for a valid assessment (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990)" Determination, conclusion of law "D").

On exception, the Division argues that "a review of the evidence will show that the Division . . . has offered adequate proof of mailing" (Division's brief, p. 3).

We affirm the determination of the Administrative Law Judge to the extent it concluded that the Division did not prove the date of mailing.

First, we agree with the Administrative Law Judge that the Biondo and LaFar affidavits and the certified mailing record establish the standard procedure of the Division for mailing notices.

Next, we agree with the Administrative Law Judge that the certified mail record offered by the Division is flawed. The presence of a postmark on the record does not overcome the absence of an indication by the Postal Service employee of the number of pieces of mail delivered to the post office for mailing.

The core of the Division's argument is that the Domestic Mail Manual (DMM) provides that a postmark is not be be placed on the certified mail log unless the postal employee has complied with all the steps in the DMM.[6] The Division argues that the conceded presence of

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[6]The Division's brief recites the steps as follows:

> "'Quality Mailings. If the certified mail numbers are listed on firm mailing bills in consecutive order and the mail is similarly arranged, verify quantity mailings as follows:
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> 'a. Count the pieces of mail and listings on the bill. They must agree.
>
> 'b. Compare certified mail numbers on first and last articles with the first and last numbers listed on the bill. They must agree.
>
> 'c. Make a spot-check to determine whether mailings are properly prepared and postal

the postmark on the certified mail record means that the postal employee has counted the pieces of mail and listings on the certified mail record and determined that they agree. The Division cites to section 912.72 of the DMM as support for its position and argues that:

> "absent a showing that the [Postal Service] failed to adhere to its DMM procedures in this instance, . . . the appearance of the postmark on the Division's mail log demonstrates that all the pieces of mail as set forth on said log, including the notice at issue, were delivered into the possession of the [Postal Service] on March 4, 1993, in accordance with the DMM certified mail guidelines (see, e.g., Wheat v. Commissioner, 63 TCM 2955). Nothing in the record indicates that the USPS failed to adhere to its procedures regarding the Notice at issue (see, e.g., Epstein v. Commissioner, T.C. Memo 1989-498, 58 TCM 128, 134 [where United States Tax Court 'only requires (the IRS) to introduce evidence showing that the notice of deficiency was properly delivered to the Postal Service for mailing' and 'do(es) not require (the IRS) to establish that the Postal Service personnel performed their official duties'])" (Division's brief, p. 4).

The Division asserts flatly that our decision in Matter of Auto Parts Center (supra) is in error to the extent the decision sets forth the conclusion that: "[t]he certified mailing record is also flawed because it does not contain a total for the number of pieces received by the post office" (Division's brief, p. 4, quoting Matter of Auto Parts Center, supra). The Division goes on to assert that subsequent Tribunal decisions which reiterate this conclusion are also in error.

The Division concludes that:

> "[f]inally, it must be noted that this state of affairs presents a substantial threat to the revenues of the State of New York because liabilities which are fixed and final pursuant to one line of repeatedly asserted Tribunal precedent are now placed in jeopardy. This problem is compounded by the repeated fluctuation in the level of evidence necessary regarding what constitutes an adequate CMR and the departure form [sic] the regulations of USPS and relevant case law (e.g., Wheat v. Comm., T.C. Memo 1992-268, 63 TCM 2955)" (Division's brief, p. 11).

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charges are fully prepaid.

'd. Postmark receipt and give to mailer. Enter time articles are mailed, if requested to do so by the sender, placing your initials by the entry. Use ink to enter time and initials in the space for the name of accepting employee.

'e. Deposit articles in mail. Do not return to mailer.' (39 CFR section 211.1; United States Postal Service Domestic Mail Manual, Issue 45, section 912.72, p. 796)" (Division's brief, pp. 3-4).

We disagree. First, the Division's reliance on section 912.72 of the DMM completely overlooks section 912.45 of the DMM which requires that the "accepting employee must count the items, postmark and receipt the bill for the total number, indicating time of mailing if requested, and return the bill to the sender." The two sections taken together seem to require that the postal employee must do two things: affix the postmark to the certified mail record and indicate the receipt of the total number of pieces received. The latter task has not been done.

Second, the Division's argument is fully contradicted by decisions of the United States Tax Court, several of which are relied upon by the Division in its brief, which interpret provisions of the Internal Revenue Code analogous to those at issue here.

The decisions of the Tax Court have been clear and consistent; a properly completed Postal Service Form 3877 or its counterpart "represents direct documentary evidence of the date and the fact of mailing" of the assessment (Wheat v. Commissioner, supra, citing Magazine v. Commissioner, 89 T.C. 321, 324). "Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of the division" (Wheat v. Commissioner, supra, citing United States v. Zolla, 724 F2d 808, 810, 84-1 USTC ¶ 9175, cert denied 469 US 830, emphasis added). "A failure to comply with the Form 3877 mailing procedures may not be fatal if the evidence adduced is otherwise sufficient to prove mailing" (Matter of Wheat, supra, citing Coleman v. Commissioner, 94 T.C. 82, emphasis added).

The decisions of the Tax Court are also clear and consistent that the failure of the postal employee to indicate the number of pieces of mail received for mailing renders the certified mail record incomplete, even where the record contains a postmark.

In Wheat v. Commissioner (supra, 63 TCM 2955, 2958), the Postal Service stamp, indicating a date of October 27, 1986 was affixed to the certified mail record. The Court found that the "[IRS's] failure to have the postal clerk initial the Form . . . and indicate how many pieces of mail were received is an inexactitude which is significant enough to render the presumption [of mailing] inapplicable."

In Massie v. Commissioner (T.C. Memo 1995-173, 69 TCM 2417, affd ___ F2d ___ [Apr. 1, 1996]), the Postal Service stamp indicating a date of August 30, 1991 was affixed to the mail record. The form showed the total number of pieces requested by sender as 3. There was a blank in the space for number of pieces received by the Postal Service but the number 3 in the sender box was circled. The Court found that:

> "in this case, the certified mail list is incomplete because there is no indication of the number of items received by the Laguna Niguel Post Office. Thus, the certified mail list, in and of itself, is insufficient to provide the [IRS] with the presumption of mailing [cite omitted]. [The IRS's] failure to have the U.S. Postal Service clerk initial the certified mail list and indicate how many pieces of mail were received is an 'inexactitude which is significant enough to render the presumption inapplicable'" (Massie v. Commissioner, supra, 69 TCM 2417, 2419).

The scrutiny of the courts to this aspect of the certified mail record is understandable since the failure of the postal clerk to indicate the number of pieces of mail received for mailing goes to the very heart of the issue: whether the Postal Service actually received for mailing all of the notices indicated on the Form 3877.

We also find that the Division's brief grossly misreads the holding of the Court in Epstein v. Commissioner (supra). In short, the Division cites to Epstein for the proposition that an incomplete certified mail record gives rise to the presumption of proper mailing because the Division is not responsible for ensuring that postal employees "perform their official duties." This is not what the Court held in Epstein. What the Court did say was that the Internal Revenue Service ("IRS") was only required "to introduce evidence showing that the notice of deficiency was properly delivered to the Postal Service for mailing." In Epstein, the IRS, through introduction of the Form 3877 and the testimony of Mr. Hatton, met its burden. The IRS was not responsible for seeing to it that the postal employee completed the Form 3877 in the manner prescribed by the DMM. A review of the relevant facts in Epstein bears this out.

The Form 3877 listed the names and addresses of four taxpayers, including Mr. Epstein, sequential certified mail numbers for each of the entries, and the number 4, indicating that four

statutory notices were listed on the form for mailing. The Form 3877 was stamped with the Holtsville postmark dated October 31, 1986.

Mr. Hatton, a clerk at the Holtsville Post Office, explained the procedure he followed in processing certified mail. He would:

> "count the number of letters [submitted for mailing] and compare that number to the number of pieces listed on the Form 3877. If the numbers matched, Mr. Hatton stamped the Holtsville Post Office postmark on the Form 3877 and placed his initials on the form. Mr. Hatton would also acknowledge that he compared the number of letters [submitted] with the number listed on the Form 3877 by either writing the number on the form or by circling the number previously placed on the form by the statutory notice control clerk. Mr. Hatton testified that he was taught this procedure by another employee at the post office and, that as far as he knew, all the postal clerks employed at the Holtsville Post Office used the same procedure" (Epstein v. Commissioner, supra, 58 TCM 128, 131).[7]

Mr. Hatton testified that he placed the postmark on the Form 3877 and acknowledged that his initials are on the bottom of the form. The number 4 on the form is circled, but Mr. Hatton could not remember if he circled that number.

It is in this factual context that the Court addressed Mr. Epstein's assertion that the notice was "invalid because the Postal Service . . . failed to follow its own regulations concerning the verification of certified mail. Specifically, [Mr. Epstein] argues that Mr. Hatton's failure to compare the names, addresses and certified mail numbers listed on the statutory notices of deficiency with the corresponding line entries on the Form 3877 is fatal to a showing that the notices were actually mailed" (Epstein v. Commissioner, supra, 58 TCM 128, 133-134).

The Court rejected the argument.

> "The method Mr. Hatton employed to verify the statutory notice letters obviously did not comply with the procedures set forth in either the Internal Revenue Manual or the Domestic Mail Manual. This finding,

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[7] Mr. Hatton also testified that if a discrepancy existed between the number of letters listed on the Form 3877 and the number of letters submitted for mailing, he would examine the letters submitted to determine which letter or letters were missing. He would then draw a line through that specific entry on the Form 3877 to indicate that the letter was not verified and would cross out the incorrect number of pieces listed by the sender and write the correct number on the form. "Only after noting the problem on the Form 3877 would Mr. Hatton postmark and initial the form" (Epstein v. Commissioner, supra, 58 TCM 128, 131).

> however, is irrelevant to the outcome of this case. Even if Postal Service regulations are not complied with, an otherwise valid notice of deficiency is not rendered ineffective. This Court only requires [the IRS] to introduce evidence
>
> showing that the notice of deficiency was properly delivered to the Postal Service for mailing. We do not require [the IRS] to establish that the Postal Service personnel performed their official duties [cites omitted]" (Epstein v. Commissioner, supra, 58 TCM 128, 134, emphasis added).

Our disposition of this case is in complete accord with Epstein. Like the Court in Epstein, we have been presented with an incomplete certified mail record. Unlike the Court in Epstein, we have not been offered evidence similar to the testimony of Mr. Hatton to fill in the gaps in the certified mail record. Thus, we are concluding that the Division did not prove that it mailed (i.e., delivered) the instant Notice to the Postal Service.

The next issue is whether the Division has offered sufficient other evidence to prove mailing. We agree with the Administrative Law Judge that the Division has failed to introduce evidence sufficient to prove the date of mailing. Again, the Tax Court decisions indicate clearly that something more than the incomplete certified mail record and the Division's affidavits of office practice are necessary.

In Wheat, the IRS presented evidence of its own mailing procedures, the mailing procedures of the Federal Station Post Office in Los Angeles at which the notices were mailed, a file copy of the notice of deficiency, and the original certified mail list (Form 3624).

In addition, and importantly, the IRS dealt with the failure of the postal employee to indicate the number of pieces of mail received for mailing. Mary Willis, who was employed as a postal clerk in the Federal Station Post Office in Los Angeles during the time in question, testified that during the time at issue the Postal Service accepted forms other than 3877; that the form at issue here, 3624, was one of those forms, and that based on the round postal stamp, the subject list was handled by the Federal Station Post Office. Ms. Willis also testified as to the standard procedure for mailing certified mail at the Federal Station Post Office in October 1986 indicating that under the procedures in place at the Federal Station Post Office, the postal clerk

would not affix the Postal Service stamp if the certified numbers on the list did not match the numbers on the envelopes.

The Court found this evidence sufficient to overcome the flawed certified mail list.

In Massie, the Court found that the IRS "presented competent evidence in the form of testimony by a manager as to the mailing procedures of [IRS's] Laguna Niguel District Office; an incomplete certified mail list, which at least suggests mailing; the original notice of deficiency dated August 31, 1991; and [importantly] an original envelope bearing the proper article number and stamp-marks indicating the mail was not claimed by the addressee" (Massie v. Commissioner, supra, 69 TCM 2417, 2420).

In Coleman v. Commissioner (supra), the Form 3877 on which the taxpayer's notice was listed was page 2 of the three sequential Forms 3877 which were stapled together at the time of delivery to the post office. The first and third Forms 3877 were completely filled out. Page 2 "did not contain either the round Postal Service cancellation stamp or the initials of the Post Service employee, both of which verify receipt of the items listed on the form" (Coleman v. Commissioner, supra, at 85).[8]

The Court concluded that page 2 of Form 3877 was incomplete and did not entitle the IRS to the presumption of mailing which attaches to a properly completed Form 3877. The Court stated that where "the habit evidence and the Form 3877 are insufficient to carry the [IRS's] burden of proof, [the IRS] may offer additional evidence to corroborate and show timely mailing." The Court found that the IRS met its burden: "[t]he fact that contiguous forms 1 and 3 were stamped indicates that, although overlooked by the postal employee, the Form 3877 bearing [Coleman's] notice was in fact delivered for mailing on October 31, 1985. Additionally,

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[8]The Court noted that to a large extent, the described procedure follows the IRS manual except that the clerk did not initial and date the Form 3877 in anticipation of being called as a witness to testify to the date on which the notices were mailed. The Court noted that "[t]his is the only known instance where an employee failed to check the Form 3877 for the postal stamp and to return it to the postal clerk before returning the Form 3877 to the IRS office" (Coleman v. Commissioner, supra, at 89; see, Internal Revenue Service Manual Handbook Part IV, § 423.67[9]).

many of the [other forms] associated with the contiguous Forms 3877 show a November 1 attempted or actual delivery date. Based on this evidence, a November 1 delivery date strongly suggests an October 31, mailing. We find that, through habit evidence, an incomplete Form 3877, and other documentary evidence," i.e., the fact that contiguous forms 1 and 3 were stamped, coupled with evidence that other notices on the contiguous forms were actually delivered, the IRS has proved an October 31, 1985 mailing (Coleman v. Commissioner, supra, at 92).

We contrast the evidence in these cases with the evidence in this case where the Division relies only upon the flawed certified mail record and the affidavits of office practice. There is no "other evidence such as the testimony of the postal employee" (Wheat); there is no original envelope (Massie); there is no evidence that other notices listed on the certified mail record were delivered (Coleman).

If an incomplete certified mail record and affidavits of office practice are all that is needed to prove mailing, then the decisions in Wheat, Massie, and Coleman would have been at least shorter, if necessary at all.

We conclude that the evidence offered by the Division is not adequate to overcome the omissions in the certified mail record and that the Division has failed to prove that it mailed the Notice.

We reject the Division's request that we should reverse our prior decisions. Those cases involved facts analogous to the facts in this case. In order to alter our prior stated decisions, we would have to set forth reasons for doing so. We find no such reasons here (Matter of Charles A. Field Delivery Serv., 66 NY2d 516, 498 NYS2d 111).

Finally, this Tribunal recognizes fully its responsibility to provide a just system of resolving controversies between taxpayers and the Division and to ensure that the elements of due process are present with regard to the resolution of controversies (Tax Law § 2000). "The guarantee of 'justness' and 'due process' in the system is rooted, simply, in the opportunity for each taxpayer to timely and adequately pursue their case and, conversely, the opportunity for the

[Division], on behalf of the people of the State, to timely and adequately pursue the State's interest in the controversy" (Tax Appeals Tribunal Annual Report, 1994-1995, June 16, 1995). It is in this context that we address the implication of the Division's brief that the analysis given mailing evidence by this Tribunal is hypertechnical. The Division is correct -- it is hypertechnical and for good reason. We are dealing here with the right accorded taxpayers under the laws of this State to contest an asserted tax deficiency through the hearing process. We balance this right of the taxpayer against the "difficulty" imposed upon the Division by law, to prove that it informed a taxpayer of this right to contest the deficiency. Our decisions require nothing more of the Division than the Tax Court requires of the IRS and this Tribunal requires of its own employees in connection with the certified mailing of Administrative Law Judge determinations and Tribunal decisions -- that is to see to it that all the requirements of a proper mailing occur. We ask only that the Division insure, as does the IRS and this Tribunal, that the certified mail record its employee receives back from the postal employee is complete. If the Division fails to do that, we require, as do the Federal courts, evidence other than a flawed certified mail record and affidavit of habit to prove that the notice was mailed.

It is clear to the majority of this Tribunal that this standard of proof allows the Division to administer taxes fairly and properly on behalf of all the people of the State and presents no threat to the revenues of this State as asserted by the Division. Stated simply and bluntly, we do not consider it too onerous a task to insure that the certified mail record be completed or that, in the face of an incomplete certified mail record, the Division's attorneys do what the IRS attorneys do, introduce "other evidence" to overcome the flawed certified mail record. To accept less would render the certified mail record and attendant procedural safeguards useless and would require us to base our decisions on what we "assume" happened, not on what independent evidence tells us did happen.

We address next the conclusion of the Administrative Law Judge that "[s]ince the Division has failed to prove the fact and date of mailing . . . it must be concluded that the

subject Notice of Deficiency was improperly issued and cannot serve as the basis for a valid assessment" (Determination, conclusion of law "D," citing Matter of Malpica, supra).

In its brief, the Division does not explicitly address this aspect of the determination. We disagree with the determination of the Administrative Law Judge.

The facts in this case distinguish it from Malpica. Here, petitioner does not dispute the fact that the Division mailed the notice. In Malpica, the fact of mailing was at issue. The Division asserted that the stamped date on the certified mail record constituted proof that the notices were, in fact, mailed and were mailed on that date. We found the claim to be without merit:

> "[o]ther than the Division's bare assertion . . . that the stamped date is also the date that the certified mailing occurred, the Division has failed to offer any evidence, such as an authenticated mailing log, a return receipt, evidence as to its course of business or office practice or any other relevant evidence, that would tend to substantiate the Division's claim that the stamped date of June 30, 1987 is in fact the date that mailing was effectuated" (Matter of Malpica, supra).

We concluded that, under the circumstances, the Division failed to prove the fact of mailing, much less the date of mailing. In view of this failure to prove the fact of mailing, we cancelled the assessment.

In this case, the Division has, through the Biondo and LaFar affidavits, established the procedure for mailing of notices. The position of this Tribunal has been consistent that where the Division has offered proof of its mailing procedure, it is reasonable to infer that a notice has been mailed, albeit not on the date asserted by the Division, and that the proper remedy is not to cancel the assessment, but to view the petition as timely filed and to remand the matter for a hearing on the merits (see, Matter of Roland, Tax Appeals Tribunal, February 22, 1996; Matter of Huang, supra; Matter of Fuchs, supra; and Matter of Katz, supra).[9] This policy differs from that at the Federal level where the failure of the IRS to prove the date of mailing results in a

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[9]Where the Division is able to prove the date of mailing, either through the completed Form 3877 or through other evidence where the Form 3877 is incomplete, the petition will be dismissed as untimely.

cancellation of the notice. However, we believe it is a clear common sense solution to a "hypertechnical" problem, a solution which insures that the Division, on behalf of the people of the State and the individual taxpayer, will have the opportunity to proceed to a hearing on the merits of the case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. This matter is remanded to the Administrative Law Judge for a hearing on the merits;

2. The exception of the Division of Taxation is granted to the extent that the determination of the Administrative Law Judge cancelling the notice is reversed and the matter is remanded for a hearing; and

3. The petition of Jeffrey Brager is granted to the extent that petitioner is entitled to a hearing on the merits.

DATED: Troy, New York
May 23, 1996

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

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

COMMISSIONER DeWITT concurring in part and dissenting in part:

I respectfully disagree with the opinion of the majority in this matter.

In its opinion, the majority concludes (at p. 10) that because the Division failed to produce evidence that it mailed a copy of the Notice of Deficiency at issue to petitioner's representative, the 90-day period within which petitioner must file either a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals is tolled. The majority concludes: "[w]hile [this] conclusion renders the other issues in the case moot, we will address them in order to provide the parties with a full decision on all the issues" (Majority opinion at p. 10). I respectfully disagree that this conclusion moots the other issues raised by the Division on exception.

In his determination, the Administrative Law Judge stated that:

> "C. In this case, although the Division has established a standard mailing procedure through the Biondo and LaFar affidavits, the certified mail record is flawed because it does not contain a total for the number of pieces received at the post office (see, Findings of Fact "5" and "7"). The certified mail record thus does not establish that all of the pieces listed thereon by the sender were received by the post office (see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995).
>
> "On this point, it is noted that the 'total number of pieces listed by sender,' i.e., 292, on page numbered '27' of the certified mail record has been circled (see, Finding of Fact '7'). One could infer that the post office

> employee circled this number to indicate receipt of 292 pieces at the post office (It is noted that the Division has offered no evidence on this point). Such an inference, however, does not tend to establish that all pieces listed on the CMR submitted herein were, in fact, received by the post office, for the CMR submitted by the Division purports to show not that 292 pieces were mailed but that a total of 324 pieces (i.e., 292 + 32 [see, Finding of Fact '5']) were mailed.
>
> "D. Since the Division has failed to prove the fact and date of mailing herein, it must be concluded that the subject Notice of Deficiency was improperly issued and cannot serve as the basis for a valid assessment" (Determination, conclusions of law "C" and "D").

The Administrative Law Judge cancelled the Notice of Deficiency which the Division had issued to petitioner because he found that the Division failed to prove that it had mailed a copy thereof to petitioner at petitioner's last known address by registered or certified mail. Jurisdiction to consider the merits of petitioner's claim concerning this Notice of Deficiency cannot be conferred by the majority simply by concluding that the Notice was likewise not mailed to petitioner's representative. Therefore, the majority's consideration of the issues raised by the Division on exception is not gratuitous or by way of dicta. Rather, a decision on these issues is required to determine if the Division of Tax Appeals has jurisdiction to consider petitioner's claim.

For the reasons that follow, I respectfully dissent in part from and affirm in part the opinion expressed by the majority.

LAST KNOWN ADDRESS

The Administrative Law Judge found that the address used by the Division for issuance of the Notice of Deficiency was petitioner's "last known address" even though it was, in fact, an incorrect address. Since neither party took an exception to that portion of the Administrative Law Judge's determination, we are not called on to review its correctness. However, the majority opinion considered this issue and affirmed the result reached by the Administrative Law Judge. Although it is not necessary to do so, I agree with the majority that the Administrative Law Judge was correct on this issue.

ARGUMENTS ON EXCEPTION

In its exception, the Division argues that it has established its standard mailing procedure through the Biondo and LaFar affidavits and has also established that it followed its standard procedures in the mailing of the Notice of Deficiency at issue herein. It relies on the fact that the postmark of the United States Postal Service (USPS) was placed on every page of the certified mail record and asserts that all the pieces listed on the certified mail record were received by the USPS on March 4, 1993. The Division argues that the regulations of the USPS provide that the postal stamp is not to be affixed to the mailing record unless the number of pieces of mail agree with the number of pieces listed on the mail record; the certified mail numbers agree; the mailings appear to be properly prepared and postal charges are fully prepaid. The Division argues that there is no requirement in the law or in the USPS regulations that the post office note the number of pieces received at the post office on the certified mail record. Therefore, the failure to so note that number is not a fatal defect in the Division's proof of mailing. The Division argues that, to the extent that prior decisions of this Tribunal in Matter of Dattilo (Tax Appeals Tribunal, May 11, 1995), Matter of Huang (Tax Appeals Tribunal, April 27, 1995, Matter of Fuchs (Tax Appeals Tribunal, April 20, 1995), Matter of Sabando Auto Parts (Tax Appeals Tribunal, March 9, 1995) and Matter of Auto Parts Center (supra) disagree with this position, these decisions are in error. The Division discusses prior decisions of this Tribunal on the issue of timeliness of mailing and argues that our standard of review is erroneous.

Petitioner, in opposition, argues that the Administrative Law Judge correctly found that the Division of Tax Appeals lacks jurisdiction because the Division failed to prove the fact and date of mailing. Petitioner also takes issue with that portion of the Administrative Law Judge's determination that found that "[i]n the absence of any other evidence, it must be concluded that the subject notice did bear petitioner's 'last known address'" (Determination, conclusion of law "E"). However, as stated above, since petitioner did not take an exception to this portion of the determination, it is not properly before us for consideration.

PROOF OF MAILING

Pursuant to Tax Law § 681(a), "[i]f upon examination of a taxpayer's return . . . the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

Tax Law § 681(b) provides, in relevant part, that "[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . ."

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

Where the timely mailing of a statutory notice is at issue, the Internal Revenue Service (IRS) bears the burden of proving proper mailing by competent and persuasive evidence (August v. Commissioner, 54 TC 1535). The act of mailing may be proved by evidence of the IRS's mailing practices corroborated by direct testimony or documentary evidence of mailing (Magazine v. Commissioner, 89 TC 321 [1987]). A Postal Service Form 3877 that shows receipt by the Postal Service represents direct documentary evidence of the date and the fact of mailing (see, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, T.C. Memo 1992-268, 63 TCM 2955).

The IRS is entitled to a presumption of official regularity if it provides evidence of the preparation of the notice and its delivery to the post office accompanied by a fully completed Form 3877. This presumption shifts the burden of going forward to taxpayers and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. Therefore, where the existence of a notice of deficiency is not disputed, the IRS may establish that a notice was properly mailed to a taxpayer by introducing a properly completed Form 3877 by itself, absent evidence to the contrary (United States v. Zolla, 724 F2d 808, 84-1 USTC ¶ 9175, cert denied 469 US 830). If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

As with the IRS, where the timeliness of a petition for a hearing is at issue, the Division has the burden to establish that it mailed the notice of deficiency at issue to the taxpayer at his last known address (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commissioner, supra; Trimble v. Commissioner, T.C. Memo 1989-419, 57 TCM 1256; Southern California Loan Assn. v. Commissioner, 4 B.T.A. 223, 224-225). A notice of deficiency is mailed when it is delivered to the custody of the Postal Service for mailing (see, August v. Commissioner, supra at 1538; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

In their opinion, the majority states: "[w]hile petitioner did not dispute the fact that the notice was mailed by the Division, the Administrative Law Judge apparently believed it necessary to deal with this issue because the Division, in its answer to petitioner's petition, asserted that the petition was untimely" (Majority opinion at p. 11). In a prior opinion, this Tribunal has held that "the issue of timeliness is jurisdictional in nature, it may be raised at any time, by a party, or by the adjudicating body and may not be waived (see, United States v. Wright, 658 F Supp 1, 86-1 USTC ¶ 9457, at 84, 120-84, 121)" (Matter of Malpica, supra). Further, as the majority itself notes at page 12 of its opinion, "[w]hen the timeliness of a filed

petition is at issue, the Division must demonstrate proper mailing." Therefore, the Administrative Law Judge necessarily dealt with this issue in his determination.

As this Tribunal held in Malpica, Tax Law § 681(a) "does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (see, Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384)." Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer (Matter of Malpica, supra), i.e., "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Dorff v. Commissioner, supra, citing Zenco Eng'g. Corp. v. Commissioner, 75 TC 318 and Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 USTC ¶ 9533). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (see, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; see also, Caprino v. Nationwide Mut. Ins. Co., 34 AD2d 522, 308 NYS2d 624, 625).

The proof required to demonstrate proper mailing consists of the following: the establishment of a standard procedure for the issuance of such notices by one with knowledge of such procedures and the introduction of evidence to show that this procedure was followed in the particular case at hand (see, Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Cataldo v. Commissioner, supra, at 524). We have found that a properly completed certified mailing record is substantively the same as the Postal Form 3877 (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994, citing Munz v. Commissioner, T.C. Memo 1991-171, 61 TCM 2412, affd 972 F2d 1341 [three-part computer generated form treated in same fashion as Form 3877]). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure may not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (see, Coleman v. Commissioner, supra; Wheat v. Commissioner, supra).

CERTIFIED MAIL RECORD

In its opinion, the majority concludes that "the certified mail record offered by the Division is flawed. The presence of a postmark on the record does not overcome the absence of an indication by the Postal Service employee of the number of pieces of mail delivered to the post office for mailing" (Majority opinion at p. 14). I disagree. An incomplete certified mailing record means that the Division (like the IRS) is not entitled to a presumption of official regularity. The Division continues to bear the burden of proving proper mailing by competent and persuasive evidence. However, the majority incorrectly infers that because the certified mailing record is incomplete, the Division may not rely on it as documentary or direct evidence of the fact and date of mailing.

The majority states that section 912.45 of the Domestic Mail Manual (DMM) (US Postal Service Domestic Mail Manual, incorporated in 39 CFR section 111.1 by reference) "taken together" with DMM section 912.72 "seem to require that the postal employee must do two things: affix the postmark to the certified mail record and indicate the receipt of the total number of pieces received" (Majority opinion, page 16). This is not accurate.

Pursuant to sections 912.45 and 912.72, there are more than two "things" which a postal employee must do when handling certified mail (see, footnote "6" of the majority opinion). However, there is no authority that requires the certified mail record to be totally disregarded as evidence of proper mailing if any of these "things" or steps are not performed. Further, the majority fails to instruct the Division how it can force postal employees to comply with postal regulations as a necessary element in proving delivery of items of certified mail to the USPS. In truth, this Tribunal cannot impose such an impossible burden on the Division nor is there a comparable burden imposed on the IRS.

The burden is on the Division to prove "delivery to" the post office and not receipt by the USPS. Evidence of receipt by the USPS is offered to substantiate the Division's claim of delivery. While it is desirable to have the USPS fully complete each entry on the certified mailing record, including indicating the number of pieces of certified mail it received, there is

no requirement in law or in the USPS regulations that the USPS must actually insert the number of pieces received at the post office on the certified mail record.

The majority confuses the failure of the Division to obtain the presumption of official regularity by presenting a completely and correctly completed Postal Form 3877 or certified mail record with failure to prove delivery of the notice at issue to the USPS. Further, the majority misreads the requirement that, in the absence of the presumption of official regularity, evidence which is "otherwise sufficient" (see, Coleman v. Commissioner, supra; Wheat v. Commissioner, supra) may be used to prove mailing. Instead, the majority imposes the requirement that the Division produce "sufficient other" (i.e., additional) evidence in order to prove mailing (see, Majority opinion, p. 20).

In Massie v. Commissioner (T.C. Memo 1995-173, 69 TCM 2417, affd ___ F2d ___ [Apr. 1, 1996]), relied on by the majority, the IRS submitted in evidence a certified mail record similar to the one in the instant case. The mail record was incomplete because there was no indication of the number of items received by the USPS. In addition to the incomplete certified mail record (which the Tax Court found "at least suggests mailing"), the IRS in Massie presented the testimony of an employee and produced the original notice as well as the original envelope which had contained that notice. (This, of course, demonstrated that the notice had not been delivered to the taxpayer and had been returned to the IRS. There is no indication that the notice at issue in the present case was ever returned to the Division. Absent that, it would be impossible for the Division to have in its possession the original notice or the original envelope in which it was sent.)

The Tax Court in Massie found that the incomplete mail record prevented the respondent IRS from obtaining the presumption of mailing. Nonetheless, the IRS prevailed in Massie because its evidence of mailing was "otherwise sufficient." In an earlier case (Epstein v. Commissioner, T.C. Memo 1989-498, 58 TCM 128), the Tax Court had held that "the showing of whether a notice of deficiency has been returned by the Postal Service to the Internal Revenue Service as undeliverable is not an essential part of the proof required to establish that a

notice has been properly mailed." The Tax Court in Massie held that the IRS is not required to produce employees who can personally recall each of the many notices of deficiency that are mailed. In the case now before this Tribunal, the Division presented an incomplete certified mail log plus evidence in the form of affidavits of its general notice preparation and mailing procedure. The Administrative Law Judge found that the evidence of its general preparation and mailing procedures was adequate. Since the evidence presented in the present case is consistent with that presented by the IRS in Massie, it is unclear what additional evidence the majority requires the Division to produce to satisfy its burden in the instant case.

In Wheat v. Commissioner (supra), also relied on by the majority, the postal clerk did not indicate the number of pieces received at the USPS nor did he sign or date the certified mail record. The IRS, in addition to presenting evidence of its own mailing procedures, presented testimony by a postal clerk as to procedures at the USPS to which the notices were delivered. Based on that testimony, the Tax Court concluded that despite the imperfections in the mailing procedures, "[u]nder standard procedures of the Federal Station Post Office at that time, the [certified mailing list] is not stamped unless the number of envelopes is checked against the number of taxpayer names listed on the [certified mailing list], and the certified mail slip numbers on the envelopes." As a result, even though the IRS did not obtain the presumption of official regularity for exact compliance with the Form 3877 mailing procedures, it did meet its burden of going forward with the evidence and the burden of production shifted to the taxpayer, who failed to meet his burden.

In Epstein v. Commissioner (supra), the Tax Court made detailed findings of fact concerning the procedures taken by the IRS to prepare and mail the notice therein at issue. It found that:

> "the procedure followed [by the IRS] in this case does not completely conform with the mailing procedure set forth in the Internal Revenue Manual. As discussed previously, however, compliance with each aspect of the mailing 'procedure is irrelevant if the evidence adduced is sufficient to prove mailing' Keado v. United States [853 F.2d 1209, 1214]" (Epstein v. Commissioner, supra, 58 TCM 128, 133).

Further, in considering the failure of the USPS employee to strictly comply with the procedures set forth in DMM section 912.72, the Tax Court stated:

> "[t]he method [the postal clerk] employed to verify the statutory notice letters obviously did not comply with the procedures set forth in either the Internal Revenue Manual or the Domestic Mail Manual. This finding, however, is irrelevant to the outcome of this case. Even if Postal Service regulations are not complied with, an otherwise valid notice of deficiency is not rendered ineffective. This Court only requires respondent to introduce evidence showing that the notice of deficiency was properly delivered to the Postal Service for mailing. We do not require respondent to establish that the Postal Service personnel performed their official duties" (Epstein v. Commissioner, supra, 58 TCM 128, 134).

Of special significance to the present case is that in Epstein, the Court did not find a presumption of official regularity in favor of the IRS. Indeed, the Form 3877 was incomplete in that it did not contain a notation by the USPS of the number of pieces received by the post office. The postal employee called to testify by the IRS stated that in processing the certified mail received from the IRS, he "compared the number of letters in the bundle with the number listed on the Form 3877 by either writing the number on the form or by circling the number previously placed on the form by the [IRS] clerk. [He] testified that he was taught this procedure by another employee at the post office and, that as far as he knew, all the postal clerks employed at the Holtsville Post Office used the same procedure" (Epstein v. Commissioner, supra, 58 TCM 128, 131). On the Form 3877 at issue in Epstein, which contained four entries corresponding to four pieces of certified mail, the postal clerk testified that: "he placed that postmark on the form and acknowledged that his initials are on the bottom of the form. The number 4 on the form is circled, but [the postal clerk] could not remember if he circled that number" (Epstein v. Commissioner, supra, 58 TCM 128, 132).

Through the evolution of its decisions concerning the quantum of proof required by the Division to meet its burden of proof to prove the mailing of statutory notices, the Tribunal has been vigilant in safeguarding the rights of taxpayers to a hearing on the merits of their claims. When the timely mailing of a statutory notice is at issue, the focus of our inquiry has been whether or not the Division has shown by competent and persuasive evidence both the fact and

date of mailing. Where the Division did not demonstrate either (e.g., Matter of Malpica, supra, relying on Pietanza v. Commissioner, 92 TC 729 and Magazine v. Commissioner, supra), the assessment has been cancelled. Where receipt of the Notice by the taxpayer was not at issue, our concern was not with the fact of mailing but with the date of mailing. Where the Division's proof of mailing was inadequate to demonstrate the date of mailing, the matter was remanded for a hearing (e.g., Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; Matter of Clark, Tax Appeals Tribunal, June 18, 1992; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

However, in Matter of Auto Parts Center (supra), the Tribunal held that a certified mail record was "flawed because it does not contain a total for the number of pieces received by the post office." The Division now argues that this portion of our decision in that case was erroneous. I agree with the Division. Our holding in Auto Parts Center gives an unwarranted significance to the presence or absence of a notation on the certified mailing record of the number of pieces of mail received by the USPS. Therefore, to the extent that our decision in Auto Parts Center (and our decisions in the cases relying thereon, i.e., Matter of Roland, Tax Appeals Tribunal, February 22, 1996; Matter of Dattilo, supra; Matter of Huang, supra; Matter of Fuchs, supra and Matter of Sabando Auto Parts, supra) holds that the failure to note the number of pieces of certified mail received by the USPS on the certified mail record renders such record flawed for use as proof of mailing by the Division, I believe that it should be overruled.

In the instant case, the Division has presented evidence of its procedures for preparation and mailing of notices which the Administrative Law Judge found adequate. In addition, the Division submitted a 30-page certified mail record or "CMR." The Division stated in its supporting affidavit that the original document consists of 30 fan-folded (connected) pages and all of the 30 pages were connected when the postmarked document was returned to the Division after the mailing. The first three pages listed 32 pieces of mail with certified control numbers sequentially numbered and with no deletions. The fourth through thirtieth pages of the CMR

listed 292 pieces of mail with certified control numbers sequentially numbered and with no deletions. The number "292" on page 27 was manually circled while the heading "Total Pieces Received at Post Office" was blank. Page "27" also contains a signature of a postal employee.

All 30 pages of the CMR submitted by the Division contain a pre-printed date of February 22, 1993 manually changed to March 4, 1993. All 30 pages of the CMR bear a USPS postmark dated March 4, 1993 from the Roessleville Branch of the U.S. Postal Service, located in Albany, New York. Assigned to each certified control number on all 30 pages of the CMR is a notice number, a listing of the name of the addressee and mailing address, and a listing of postage and fees. On page number "11" of the 27 page portion is certified control number P 911 005 784 with a corresponding notice number of "L-007046270" and petitioner's name and the address.

The Administrative Law Judge found that there was no evidence of the number of items received by the USPS since neither the last page of the 27 page portion or the 3rd page of the three page portion contained a notation by the USPS of the number of pieces received by it. I find that, after examining all the evidence presented by the Division in this matter and after clarifying our holding in Matter of Auto Parts Center (supra), the Division has met its burden of proof to establish both the date and the fact of the mailing of the Notice of Deficiency at issue to petitioner on March 4, 1993. The presence or absence of a notation of the number of pieces received by the USPS does not affect the weight of the substantial amount of evidence produced by the Division showing that it delivered the pieces of mail listed on the certified mail record to the Roessleville Branch of the U.S. Postal Service.

MAILING WITHOUT A DATE

In its opinion, the majority stresses that in prior cases it has granted petitioners a right to a hearing by finding that the Division has proved that it "mailed" the statutory notice but has failed to prove the date of mailing. Unless there is evidence in the record of receipt of the notice by the taxpayer, I do not believe that a finding can be made that a statutory notice was

mailed by registered or certified mail without a finding of the date that such notice was mailed. In the instant matter, petitioner has denied receipt of the statutory notice.

The majority states the following:

> "[i]n this case, the Division has, through the Biondo and LaFar affidavits, established the procedure for mailing of notices. The position of this Tribunal has been consistent that where the Division has offered proof of its mailing procedure, it is reasonable to infer that a notice has been mailed, albeit not on the date asserted by the Division, and that the proper remedy is not to cancel the assessment, but to view the petition as timely filed and to remand the matter for a hearing on the merits [citations and footnote omitted]. This policy differs from that at the Federal level where the failure of the IRS to prove the date of mailing results in a cancellation of the notice." (Majority opinion at page 26).

The premise of this analysis is that the Division proved that it mailed the Notice of Deficiency by the evidence demonstrating the preparation of the Notice and of its general mailing procedures. This is incorrect.

A notice of determination is not "mailed" until it is delivered to the USPS for mailing by certified or registered mail to the taxpayer at that taxpayer's last known address. All of the Division's proof focused on establishing that on a certain date it delivered to the USPS a certain piece of mail containing the Notice at issue. The envelope was addressed to petitioner and was to be mailed to petitioner by certified mail. Petitioner has not acknowledged that he received the Notice. How can this Tribunal conclude that the Division has failed to prove that it delivered the Notice to the USPS on a certain date yet conclude, based on the same evidence, that the Division delivered the Notice to the USPS on another, unspecified date? Further, how can this Tribunal require the Division to scrupulously adhere to the standards required of the IRS in order to prove mailing and then ignore the consequences required by Federal policy when the Tribunal finds that these standards are not met?

When the Division does not prove either the fact and date of mailing, I agree with the Administrative Law Judge in the present matter that the appropriate remedy is to cancel the assessment. This is in accord with Federal decisions (see, Magazine v. Commissioner, supra). However, I believe that in the instant case (as I have set forth above), the Division has

introduced adequate proof to demonstrate mailing of the Notice of Deficiency at issue to petitioner at his last known address on March 4, 1993.

CONCLUSION

The Division has demonstrated that it mailed the Notice of Deficiency at issue to petitioner at his last known address on March 4, 1993 and petitioner's petition to the Division of Tax Appeals, filed on December 24, 1993, was filed more than 90 days after that date. However, our analysis cannot end here. As set forth by the majority at page 10 of its opinion, the Division failed to produce evidence that it mailed a copy of the Notice of Deficiency at issue to petitioner's representative. Therefore, the 90-day period in which to file a petition with the Division of Tax Appeals is tolled and the petition must be deemed timely filed. For the reasons set forth hereinabove, I concur in the result reached by the majority for the disposition of this case and conclude that petitioner is entitled to a hearing on the merits.

Dated: Troy, New York
May 23, 1996

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