

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JENNY OIL CORPORATION	:	DECISION
	:	DTA No. 812723
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods September 1, 1983 through September 30,	:	
1983 and June 1, 1984 through June 30, 1984.	:	

Petitioner Jenny Oil Corporation, c/o Richard V. Kennon, 66 Drum Hill Road, Wilton, Connecticut 06897, filed an exception to the determination of the Administrative Law Judge issued on September 28, 1995. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation, appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioner filed a letter stating it would not be filing a reply brief. This letter was received on January 16, 1996 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

- I. Whether petitioner's request for a conciliation conference was timely filed.
- II. Whether petitioner's representative had filed a power of attorney which entitled him to a copy of the notice sent to petitioner.
- III. Whether the Notice of Determination was jurisdictionally defective and therefore is invalid.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, Jenny Oil Corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S901114819M) dated November 14, 1990 in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90 for the period March 1, 1984 through August 31, 1984.¹ Under "Explanation" the box was checked next to the statement:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(A)(1) OF THE TAX LAW."

The "Explanation" section also contained the following:

"50E Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law and are based upon available records and information:

<u>PERIOD ENDING</u> <u>INTEREST DUE</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	
05/31/84	0484	\$124,720.59	\$ 62,360.30	\$143,540.54
08/31/84	0185	485,909.28	242,954.64	528,098.55"

In the lower left hand corner of this Notice of Determination, the following initials appear: "MD:AF".

In addition, on November 14, 1990, the Division issued two other notices of determination pertaining to Richard V. Kennon and Robert H. Kennon, as officers of Jenny Oil Corporation. The first Notice of Determination (Notice No. S901114820M) was issued to Richard V. Kennon for sales and use taxes in the amount of \$610,629.87, plus penalties of

¹The Notice of Determination was addressed to "Jenny Oil Corporation, P.O. Box A, Katona, New York 10536."

\$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90 for the period March 1, 1984 through August 31, 1984.² Under "Explanation" the box was checked next to the statement:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(A)(1) OF THE TAX LAW."

The "Explanation" section also contained the following:

"60E You are liable individually and as President of Jenny Oil Corporation under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>PERIOD ENDING</u> <u>INTEREST DUE</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	
05/31/84	0484	\$124,720.59	\$ 62,360.30	\$143,540.54
08/31/84	0185	485,909.28	242,954.64	528,098.55"

The following initials appeared in the lower left hand corner of this notice: "MD:AF".

A Notice of Determination (Notice No. S901114821M) dated November 14, 1990 was issued to Robert H. Kennon for sales and use taxes due in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09 for a total amount due of \$1,587,583.90.³ As in the case of the Notice of Determination issued to Richard V. Kennon, the box was checked next to the statement concerning the estimation of the tax. The "Explanation" section also contained the following:

"60E You are liable individually and as Vice-President of Jenny Oil Corporation under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>PERIOD ENDING</u> <u>INTEREST DUE</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	
05/31/84	0484	\$124,720.59	\$ 62,360.30	\$143,540.54
08/31/84	0185	485,909.28	242,954.64	528,098.55"

The following initials appeared in the lower left hand corner of the notice: "MD:AF".

²The Notice of Determination was addressed to "Richard V. Kennon, As President of, Jenny Oil Corporation, Three Westview Lane, Katonah, New York 10536."

³The Notice of Determination was addressed to "Robert H. Kennon, As Vice-President of, Jenny Oil Corporation, 22 Topland Road, Hartsdale, New York 10530."

On July 15, 1993, the Division's Tax Compliance Central Office issued a Consolidated Statement of Tax Liabilities to "Jenny Oil Corp., c/o Epstein Feintisch & Co., 2381 Hylan Blvd, Staten Island, NY 10306-3199." Included under Section A of the Consolidated Statement of Tax Liabilities was the following, inter alia:

<u>Tax Type</u>	<u>Assessment ID</u>	<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Interest Amount Assessed</u>	<u>Penalty Amount Assessed</u>	<u>Assessment Payments/ Credits</u>	<u>Current Balance Due</u>
Sales	L-004673963-2	06/30/84	\$610,629.87	\$1,154,931.95	\$305,314.94	0.00	2,070,876.76

The Division submitted as its Exhibit "C" a Request for Conciliation Conference ("request") dated September 2, 1993, which referenced Notice/Assessment ID L-004673963-2 and was sent by petitioner to the Bureau of Conciliation and Mediation Services ("BCMS") by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated September 2, 1993. BCMS received the request on September 7, 1993. As the basis for the request, petitioner's representative wrote:

"1. Petitioner denies any knowledge of ever receiving prior Tax Assessments or Notices of Determination/Deficiency for the taxes now allegedly subject to collection.

"2. Petitioner denies owing the taxes, penalties and interest listed as outstanding and subject to collection according to the Taxpayer's Collection Notice, dated July 15, 1993, attached as Exhibit No. '1'.

"3. The Taxpayer Collection Notice does not provide sufficient information to explain the basis for the alleged tax deficiency.

"4. Petitioner's due process rights have been substantially contravened by the Department's failure to provide adequate information to enable Petitioner to fully respond to the Taxpayer Collection Notice.

"5. Petitioner reserves the right to file additional objections upon receiving appropriate information from the Tax Department."

By Conciliation Order (CMS No. 136141) dated February 25, 1994, the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on November 14, 1990 and the request was not received until September 7, 1993, or more than 90 days from the date of the notice, the request was untimely filed.

Petitioner filed a petition with the Division of Tax Appeals dated March 8, 1994 by U.S.

Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated March 8, 1994. The petition was received by the Division of Tax Appeals on March 11, 1994.

Petitioner is seeking a review of the Conciliation Order which denied the request for a conciliation conference pertaining to the Notice of Determination which assessed sales and use taxes for the periods September 1, 1983 through September 30, 1983 and June 1, 1984 through June 30, 1984. The petition challenges the assessment of \$2,070,876.76 in tax, penalties and interest. The petition states, in pertinent part:

- "1. The Conciliation Order lists the Notice Number as L004673963, whereas the Assessment ID No. on the Taxpayer Collection Notice is L-004673963-2. Petitioner knows nothing about a Notice Number L004673963. It was only upon reading the Conciliation Order that Petitioner first learned about a Notice Number L004673963
- "2. The Conciliation Order states the Year/Period as 9/1/83 - 9/30/83 & 6/1/84 - 6/30/84. However, this is the first time Petitioner has ever been notified of this tax period in connection with L-004673963-2. On the Taxpayer Collection Notice, Assessment No. L-004673963-2 is listed with a tax period ended 6/30/84.
- "3. The Tax Department failed to properly serve Petitioner with Assessment Nos. L-004673963-2 and L004673963.
- "4. Assessment Nos. L-004673963-2 and L004673963 were issued outside the period of limitations.
- "5. Petitioner timely filed its request for a conciliation conference. There is no proof that Assessment Nos. L-004673963-2 and L004673963 were issued or served on or about November 14, 1990. Petitioner received the Taxpayer Collection Notice, Assessment No. L-004673963-2, in July 1993 and submitted its request for a conciliation conference within 90 days of such request, to wit, on or about September 2, 1993.
- "6. Petitioner denies owing the taxes, penalties and interest listed as outstanding and subject to collection according to the Taxpayer Collection Notice, Assessment No. L-004673963-2.
- "7. Petitioner denies owing any taxes, penalties and interest relating to Assessment No. L004673963.
- "8. Petitioner's due process rights have been substantially contravened by the Tax Department's failure to provide adequate information to enable Petitioner to properly respond to Assessment Nos. L-004673963-2 and L004673963.
- "9. Petitioner reserves the right to file additional objections upon receiving appropriate information from the Tax Department."

An answer, dated May 4, 1994, was served to petitioner by a transmittal letter also dated

May 4, 1994. The Division, in its answer, denied the allegations contained in numbered paragraphs 1 through 9 in item (6) of the petition. It further stated that: (1) a Notice of Determination (Notice No. L004673963-2, dated November 14, 1990) was issued to petitioner, pursuant to Articles 28 and 29 of the Tax Law, asserting additional tax due in the amount of \$610,629.87, plus penalty and interest; (2) petitioner failed to request a conciliation conference within 90 days from the issuance of the notice; (3) on February 25, 1994, BCMS issued a Conciliation Order (CMS No. 136141) to petitioner which denied petitioner's request as untimely made; (4) pursuant to Tax Law §§ 170(3-a)(a) and 1138(a)(1), a request for a conciliation conference must be filed within 90 days from the date of the statutory notice; and (5) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of the timeliness of petitioner's protest. The answer also states that petitioner has the burden to prove that "the assessments at issue are erroneous or otherwise improper", and to show that petitioner's protest was timely.

On May 16, 1994, the Division of Tax Appeals received petitioner's reply to the Division's answer to the petition. Petitioner's representative, in the reply, stated the following as affirmative defenses:

1. "The underlying, purported Notice of Determination, No. L004673963, is barred by the applicable statute of limitations."
2. "The underlying, purported Assessment, No. L-004673963-2, is barred by the applicable statute of limitations."
3. "The underlying claims of the Division are barred by the Division having entered into accord and satisfaction of the underlying claims, for good and valuable consideration."
4. "Petitioner was not afforded the notice of the underlying Notice of Determination and Assessment, required by the applicable statutes and regulations."

The Division submitted as its Exhibit "A" a letter dated October 24, 1994 in which the Division of Tax Appeals notified petitioner of the following:

"The timeliness of the request for conference and/or petition filed in the above matter has been raised as an issue. Since this is a threshold jurisdictional issue

which must be resolved before a hearing on the merits of your case can be allowed, the hearing which has been scheduled will confine itself strictly to this timeliness issue."

Copies of this letter were sent to petitioner, its representative and the Division's representative.

At the hearing, the Division submitted the affidavit of James Hika, with attachments, as its Exhibit "G". James Hika is an Excise Tax Auditor II in the Transaction and Transfer Tax Bureau ("Bureau") of the Metropolitan District Office ("D.O.") and has held this position since 1973. His affidavit sets forth the custom and practice in the preparation and mailing of notices of determination.

In his affidavit, Mr. Hika stated that he was familiar with the Bureau's procedures, as they existed in November 1990, for mailing sales tax notices of determination ("notices"). He indicated that the Notice of Determination issued to petitioner (Notice No. S901114819M [converted to Notice No. L004673963-2]), dated November 14, 1990, was prepared by the Bureau, proofread and then deposited in an envelope addressed to petitioner. He also indicated that the Bureau prepared and attached a return receipt request, or Postal Form 3811 ("green card"), to the envelope. According to Mr. Hika, "the address on each envelope and green card is taken from the enclosed Notice." The envelope containing the notice, with the attached green card, was then brought to the mailroom.

Mr. Hika explained that it was and is the procedure of the mailroom to prepare a certified mail record for each day's set of notices sent by certified mail. He stated that:

"The taxpayer's name and zip code are written on the certified mail record. The certified mail number from each envelope's green card is entered on the certified mail record. The envelopes are compared with the certified mail record to verify that all Notices are accounted for.

"Mailroom personnel then deliver the envelopes containing the Notices to the United [sic] States Postal Service, which then stamps the certified mail record. A copy of the stamped certified mail record is returned to the Bureau.

"When 'green cards' are returned to the D.O. they are forwarded by the mailroom to the Bureau."

Attached to Mr. Hika's affidavit as Exhibit "A" is a copy of the Notice of Determination

(S901114819M), which he asserts was mailed on November 20, 1990 and was delivered on November 21, 1990 to Jenny Oil Corporation. Attached to Mr. Hika's affidavit as Exhibit "B" is the certified mail record ("CMR"), consisting of PS Form 3877, which contains the list of the notices allegedly mailed on November 20, 1990.⁴ Attached to the affidavit as Exhibit "C" is a copy of the front and back of PS Form 3811, Domestic Return Receipt Card ("green card"), Article Number 752 363. The Hika affidavit affirms that the certified mailing of the Notice of Determination to petitioner was in compliance with Bureau mailing procedures. He further indicated that he was "unaware of any problems that arose with respect to executing the required Bureau procedures for mailing the Notice" to petitioner.

The mailing record submitted consists of a copy of Postal Service Form 3877 which contains the following: the name and address of the sender is listed as "DEPARTMENT OF TAXATION & FINANCE"; the box is checked next to "Certified" in the column marked "Indicate type of mailing". PS Form 3877 lists in table form for each item sent the article number, the name and address of the addressee, the postage, fees, charges and remarks. There are entries on all 15 lines of the form. Lines 4, 5 and 6 contain the entries which appear to pertain to petitioner. The information listed on lines 4, 5 and 6 of the CMR is as follows:

Line 4 - " 361 Jenny Oil Co_p " 10536⁵
Line 5 - " 362 " " " " 10530
Line 6 - " 363 " " " " 10536.

Across the bottom of the page are spaces for total number of pieces listed by sender, the number of pieces received by the post office and the name of the post office's receiving employee.

Review of the bottom of the PS Form 3877 indicates that there is a circled "15" in the space for

⁴Portions of Exhibit "B" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

The ditto marks in the article number column refer to the first three numbers listed on line 1 - "752." In the name and address column, the third letter of the word "Co_p" is impossible to decipher; there is also no explanation of the ditto marks before "10536."

total number of pieces listed by sender and a circled "15" in the space for total number of pieces received by the post office. There is an illegible signature in the space for the name of the post office's receiving employee. This CMR is date stamped November 20, 1990 by the United States Postal Service, although the postmark is extremely faint and illegible.⁶

Included as part of the Hika affidavit is a copy of the front and back of PS Form 3811 ("green card"). On the back of the green card, item 3, "Article Addressed to:", contains the typed entry "Jenny Oil Corporation, P.O. Box A, Katonah, New York 10536." Item 4, "Article Number", has handwritten "752 363". "Type of Service" checked is "certified". Item 5, "Signature - Address", contains an illegible signature.⁷ Item 6, "Signature - Agent", and item 7, "Date of Delivery", are both blank. This green card is date stamped November 21, 1990 by the Katonah, New York branch of the United States Postal Service, although the postmark is somewhat faint and slightly illegible.⁸

The upper middle of the front of the green card has been stamped "RECEIVED, NOV 29, 1990, TTTB UNIT, DEPARTMENT OF TAXATION AND FINANCE, METROPOLITAN DIST. OFFICE." The following was printed in the sender's name, address and zip code space: "NEW YORK STATE, DEPARTMENT OF TAXATION AND FINANCE, METROPOLITAN DISTRICT OFFICE, 55 HANSON PLACE, BROOKLYN, NEW YORK 11217-1579." The lower left hand corner of the green card contains the following: "ATTENTION:, MICHAEL D'ESPOSITO, TTTB UNIT, ROOM 1114, (ELEVENTH FLOOR)."

The Division submitted as its Exhibit "H" a copy of the front and back of PS Form 3811,

⁶The date of November 20, 1990 is clear; the remainder is illegible.

⁷The signature appears to be that of Richard Kennon. The first name is readable; however, the last name is somewhat illegible and difficult to read.

⁸The November 21 portion of the date is clear; however, the last two numbers in the year are not too clear, although it appears to be 1990. "Katonah, NY" and a portion of the zip code, "1053 _ _ 998," are clear; the remainder of the postmark is illegible.

Return Receipt ("green card") for article number 752 361.⁹ As its Exhibit "I", the Division submitted the face side of an envelope. In the upper left hand corner of the envelope is the return address of the Division's Metropolitan District Office.¹⁰ Typed in the upper middle of the envelope is "CERTIFIED MAIL, RETURN RECEIPT REQUESTED." It is addressed to "Robert H. Kennon, Jenny Oil Corporation, 22 Topland Road, Hartsdale, New York 10530."¹¹ Stamped on the envelope is a box which contains "CERTIFIED MAIL, NO. 752362, RETURN RECEIPT REQUESTED, FEE PAID."¹² The U.S. Postal Service postage paid stamp is in the upper right hand corner of the envelope and bears the date November 20, 1990. Directly beneath the postmark is stamped "1st Notice 11/21; 2nd Notice 12-4-90; Return 12-9-90." In the lower left hand corner was a stamped hand with "RETURNED TO SENDER" in it and directly beneath it were various reasons why the envelope was being returned to the sender. However, none of the reasons was checked.

During the hearing, the Division's representative, Ms. Seifert, offered the following explanation as to why she placed Exhibits "H" and "I" into evidence:

"I placed them into evidence to clarify postal form 3877 which is Exhibit B of the

⁹On the back of PS Form 3811, the box for item 3, "Article Addressed to;" contains the typewritten entry "Richard V. Kennon, Jenny Oil Corporation, Three Westview Lane, Katonah, New York 10536." Item 4, "Article Number," has handwritten "752 361." "Type of Service" checked is "certified." Item 5, "Signature - Address," contains the signature "Richard J. Kennon." Item 6, "Signature -Agent," and item 7, "Date of Delivery," are both blank. There is a date stamped by the United States Postal Service on the back of the green card. The November 21 portion of the date is clear, but only the "1" in the year is legible. "Katonah, NY" is somewhat clear; a portion of the zip code, "10536-399_," is less clear; and the remainder of the postmark is illegible.

The front of the green card has the following listed in the space provided for the sender's name, address and zip code "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, METROPOLITAN DISTRICT OFFICE, 55 HANSON PLACE, BROOKLYN, NEW YORK 11217-1579."

¹⁰The return address listed is: "New York State, Department of Taxation and Finance, Metropolitan District Office, 55 Hanson Place, Brooklyn, NY 11217-1579." Typed next to the return address is "TTTB UNIT, ROOM 1114, (ELEVENTH FLOOR)."

¹¹This address was crossed out and the following address was handwritten "FWD, 1737 Palmland Drive, Boynton, Beach, Fla. 33436."

¹²The number 752362 is handwritten.

Hika affidavit. On the postal form 3787 [sic], Jenny Oil is listed -- Jenny Oil Corporation is listed on Line 4 and notations are made on Lines 5 and 6 indicating that things were also sent to -- or appears to be Jenny Oil Corp.

"Exhibits H and I show that article number 752361 was sent to Richard V. Kennon, Jenny Oil Corporation. That -- Exhibit I shows that certified mail number 752362 was sent to Robert H. Kennon,

Jenny Oil Corporation. And Exhibit C attached to the Hika affidavit shows that article number 752363 was sent to Jenny Oil Corporation. I wanted to clarify how the specific documents were sent out" (tr., pp. 53-54).

Petitioner's representative objected to the introduction of Division's Exhibit "G", the Hika affidavit, into evidence because Mr. Hika was not available for cross-examination. Mr. Levine stated that petitioner was being "deprived of a fundamental right to explore the knowledge of a person who submits an affidavit and inquire what the basis of his knowledge is, if any" (tr., p. 16). In response to Mr. Levine's objection, the Division's representative, Ms. Seifert, stated that:

"It is the procedure of the Department that we do not present witnesses in mailing cases" (tr., pp. 18-19).

The affidavit was allowed into evidence as the Division's Exhibit "G" (tr., pp. 20-21).

At the hearing, petitioner submitted as its Exhibit "1" a letter dated December 3, 1984 sent by Kenneth L. Robinson, Esq., to William J. Greeney of the Division regarding Jenny Oil Corp. - Motor Fuel Taxes.¹³ Mr. Robinson wrote, in pertinent part:

"As we discussed by telephone last week, enclosed please find a Power of Attorney executed by an officer of Jenny Oil Corp. Hereafter, please submit all letters and direct all telephone calls concerning the Motor Fuels Tax Audit of Jenny Oil Corp. to our attention."

A copy of the Power of Attorney referenced in the letter was not submitted into evidence. Petitioner's representative explained that his office could not find the actual copy of the Power of Attorney (tr., p. 32).

As its Exhibit "2", petitioner submitted a copy of a letter dated January 28, 1985 sent by

¹³At that time, Mr. Robinson was an associate in the law firm of Carl Levine, P.C. The letter was addressed to: "William J. Greeney, Tax Auditor II, New York State Department of Taxation and Finance, White Plains District Office, 99 Church Street, White Plains, New York 10033."

Barry Holmes to Carl Levine, P.C.¹⁴ in response to Mr. Robinson's December 3, 1984 letter to Mr. Greeney. In this letter, Mr. Holmes acknowledged the filing of a power of attorney and sent a photostat of Motor Fuel Tax Assessment No. 2442 issued to Jenny Oil Corporation on December 10, 1984.

Included as part of petitioner's Exhibit "2" was a copy of the Notice of Determination of Tax Due under Motor Fuel Tax Law, Notice No. 2442, dated December 10, 1984 which asserted additional motor fuel tax due pursuant to Article 12-A of the Tax Law for the audit period May 1981 through April 1984 in the total amount of \$1,325,108.64.¹⁵

As noted in Findings of Fact "1" and "2", the Division issued notices of determination dated November 14, 1990 to Jenny Oil Corporation, Richard V. Kennon, as president of Jenny Oil Corporation, and Robert H. Kennon, as vice-president of Jenny Oil Corporation. Each Notice of Determination asserted additional sales and use taxes due in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90.

Petitioner submitted as its Exhibit "3" a December 14, 1990 letter from Richard H. Champion, Esq., to Supervising Administrative Law Judge Andrew Marchese concerning Richard V. Kennon and Robert H. Kennon's application "for a prompt hearing in respect of a pre-decision warrant, issued November 14, 1990 and in the amount of \$1,587,583.90." This letter contained the following information:

"The names, addresses and telephone numbers of the applicants are:

Richard V. Kennon
180 Succabone Road
Bedford Hills, New York

Robert H. Kennon
28 Swamp Fox Circle
Little River, South Carolina

¹⁴Mr. Holmes was an Excise Tax Auditor II with the Division's District Office Audit Bureau in Albany, New York.

¹⁵The total amount due was broken down as follows:

13,145,919 gals. @ \$.08	\$1,051,673.52
Penalty	<u>273,435.12</u>
TOTAL	\$1,325,108.64

914-666-7689

803-249-8826

"The name, address and business identification number of the business involved is:

Jenny Oil
Identification No.: 13-2833403
PO Box A
Katonah, New York 10536

"The name, address and telephone number of the taxpayer's representative is:

Richard H. Champion
1233 20th Street, N.W.
Suite 800
Washington, DC 20036
202-457-0919."

This letter also asked that the Division be required to furnish to the applicant's representative a written statement which contained information used as the basis for the determination of the amount of the warrant in accordance with 20 NYCRR 604.8(b) (renum 20 NYCRR 2394.8 eff July 10, 1991). The letter also stated that Mr. Champion was contacted by Ms. Patricia Brumbaugh of the Division's Law Bureau on December 14, 1990 about the Messrs. Kennon's request to BCMS for a prompt hearing with respect to the pre-decision warrant and their request for information about the propriety of the amounts reflected in the pre-decision warrant.

At the hearing, petitioner submitted a letter from Patricia L. Brumbaugh to Mr. Champion dated December 18, 1990 as its Exhibit "4". Ms. Brumbaugh wrote, in pertinent part:

"Following up on our telephone conversation of December 14, 1990 enclosed is a workpaper showing the breakdown of the sales taxes asserted in this matter. The quantity of motor fuel is based on eleven invoices for barge loads of gasoline as set forth at page 12 of the indictment against Richard V. Kennon and Robert H. Kennon which was the subject of a recent conviction. A copy of that page of the indictment is also enclosed.

"Tomorrow, December 19, 1990, I will be meeting with the Transactions and Transfer Tax Bureau (TTTB) auditor whose audit work resulted in issuance of the Notice of Determination. By the end of this week I will forward to you his affidavit setting forth the facts underlying these Notices.

"It should be noted that the enclosed workpaper also show [sic] computation of motor fuel taxes on the same gallonage. The computation itself is a mechanical matter of applying a known tax rate to the identified gallonage. These amounts relate to a portion of the periods covered by a notice of determination, which was issued to the corporation and is presently pending hearing in the Division of Tax Appeals. The attorneys of record for that matter are Levine, Robinson & Algios. Unless I have a power of attorney from you from the corporation, or a delegation of authority from the attorneys of record, I will not be permitted to discuss any aspect of that matter with you."

Attached to this letter was a computation sheet entitled "JENNY OIL COMPUTATION OF TAX DUE SALES AND MOTOR FUEL" which contained computations of motor fuel tax, penalties and interest due for the period ending May 31, 1984 and August 31, 1984, as well as sales tax, plus penalties and interest, for the same period. The sales tax computation was as follows:

<u>Period Ending</u>	<u>Gallons</u>	<u>Rate</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
5/31/84	1,259,804	.099	\$124,720.59	\$ 62,360.30	\$143,540.54	\$ 330,621.43
8/31/84	<u>5,061,555</u>	.076	<u>485,909.28</u>	<u>242,754.64</u>	<u>528,098.55</u>	<u>1,256,962.47</u>
	6,321,359		\$610,629.87	\$305,314.94	\$671,639.09	\$1,587,583.90

Also attached to Exhibit "4" was page 12 of an indictment which referenced 11 invoices for bargeloads of gasoline.

Richard V. Kennon and Robert H. Kennon each filed a Request for Conciliation Conference dated February 5, 1991 by their authorized representative, Carl Levine.¹⁶ As part of its Exhibit "6", petitioner included both Richard and Robert Kennon's requests for conciliation conference; the individual powers of attorney each had executed appointing Carl S. Levine, Esq., and Kenneth L. Robinson, Esq., as their respective representatives; as well as Notice of Determination (Notice No. S901114820M) issued to Richard V. Kennon, as president of Jenny Oil Corporation.

Richard V. Kennon's conciliation conference request references notice/ assessment identification number S901114820M, and Robert H. Kennon's conciliation conference request references notice/assessment identification number S901114821M. Review of both requests

¹⁶Each request contained a box labeled "Name on notice/assessment" and a blank space. That blank space on Richard Kennon's request contained "Richard V. Kennon"; while on Robert Kennon's request, the space contained "Robert H. Kennon."

reveals that the same bases were used in both requests. The bases stated are as follows:

- "1. Notice of Determination was issued outside period of limitations.
- "2. Sales taxes were or may have been paid to New York State by others in chain of title or were required to have been paid by others in chain of title.
- "3. Taxpayer is not obligated to pay the relevant taxes to the Department due to application of applicable law and regulations.
- "4. Such other and further arguments as shall be raised at the Conference or upon filing of the Petition."

A petition dated August 9, 1993 was filed on behalf of Richard V. Kennon and Robert H. Kennon, officers of Jenny Oil Corporation, by their representative, Carl S. Levine (Petitioner's Exhibit "7"). This petition referenced a prior petition submitted on July 14, 1993, which had been assigned DTA No. 812100 by the Division of Tax Appeals, and two conciliation orders (CMS Nos. 111138 and 113653). The petitioners were contesting tax in the amount of \$1,587,583.90. The petition stated, in pertinent part, in item 6 that:

- "1. On July 14, 1993 a Petition was submitted under the same CMS Nos. 111138 and 113653, solely on procedural grounds to protest the failure to grant Petitioners a Conciliation Conference.
- "2. It is possible that the procedural matter will not be resolved within the 90 day period provided for Petitioners to protest the Conciliation Orders. Therefore, in the interest of protecting Petitioners' rights to protest the assessments on the merits, this Petition is filed within such 90 day period and without waiver of the prior Petition for procedural relief.
- "3. Petitioners deny owing the taxes, penalties and interest assessed in the Notice of Determination, dated November 14, 1990
- "4. The Notice of Determination does not provide sufficient information to explain the basis for the alleged tax deficiency.
- "5. The Petitioners' due process rights have been substantially contravened by failing to provide sufficient information to enable Petitioners to fully repond [sic] to the Notices of Determination. Thus, the Notices of Determination should be dismissed.
- "6. Petitioners reserve the right to file additional objections upon receiving appropriate information from the Tax Department."

The Division of Tax Appeals assigned DTA No. 812161 to this petition.

As its Exhibit "11", petitioner submitted a single-page handwritten memorandum from the audit workpapers. The memorandum was addressed "To Mike" and bore the date 11/20. It

stated, in pertinent part, the following:

"Call from Bill Frank: Richard Kennon has moved to the two addresses below. Please send additional certified notices there. -- Also, see if there is any lawyer who has their Power of Attorney and send copies to him."

Petitioner's representative offered the following information about this memorandum:

"This is a one-page handwritten memo from the work papers. References a call from Bill Frank. He was a supervisor in the TTB Unit with responsibility over petroleum companies, among other things.

"It's dated November 20th which, I would note, I believe is the same date as the assessments or very close in date to the notices.

"The point that I am making with this exhibit is that it says, 'Also see if there is any lawyer who has their Power of Attorney and send copies to him.' My point is, that clearly wasn't done" (tr., pp. 49-50).

In addition to the Administrative Law Judge's findings, we find the following:

As its Exhibit "10," petitioner submitted a Stipulation of Discontinuance of Proceeding in the Matter of the Petition of Richard Kennon and Robert Kennon, as officers of Jenny Oil Corporation for the tax period March 1, 1984 through August 31, 1984. As relevant here, the stipulation states that:

"[t]he above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, with prejudice, and that the deficiency/determination or refund is recomputed as follows:

Deficiency/determination or refund	\$3,189.61
Interest	\$4,310.39 (as of <u>6/12/94</u>)
Penalty	none "

OPINION

Tax Law § 1138(a)(1) provides, in pertinent part, that:

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

Tax Law § 1147(a)(1) provides that:

"[a]ny 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."

A taxpayer has the option of requesting a conciliation conference with BCMS upon receipt of the Notice of Determination, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (20 NYCRR 4000.3[c]).

Tax Law § 170(3-a)(a) provides, in part, that BCMS shall provide a conference at the request of a taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed."

Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish both the fact and date of mailing of the notice of determination (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The proof required consists of evidence of a standard procedure for the issuance of such notices offered by one with personal knowledge of such procedures and evidence that establishes that the procedure was followed in the particular case under consideration (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, *affd* 499 F2d 550, 74-2 USTC ¶ 9533).

We deal first with the issue of whether the Division proved mailing of the notices in issue to petitioner.

The Administrative Law Judge found that the certified mail record (CMR) submitted by the Division was not properly completed:

"[w]hile this one-page CMR does contain the certified number, name of petitioner, the date, postmark and signature of a postal employee acknowledging receipt, it does not contain petitioner's address. Also, based on a review of the CMR, it appears that petitioner was the intended recipient of three notices sent by certified mail (see, Finding of Fact "13"). As the Tribunal noted in Matter of Montesanto (supra):

"As we discussed in Katz and Clark [Tax Appeals Tribunal, June 18, 1992], a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the taxpayer's representative, the date, postmark and the signature of a Postal Service employee acknowledging receipt.'

"I find that the evidence submitted fails to satisfy the Division's burden that the notice was properly mailed to petitioner on November 20, 1990. As the Tribunal noted in Matter of Katz (supra)" (Determination, conclusion of law "E").

The Administrative Law Judge found, however, that the Division did prove the date of receipt of the notice by petitioner through:

"returned postal receipts PS forms 3811 (green cards) addressed to 'Jenny Oil Corporation' (Article No. 752363) and 'Richard V. Kennon, Jenny Oil Corporation' (Article No. 752361), respectively, as well as the returned envelope addressed to 'Robert H. Kennon, Jenny Oil Corporation' (Article No. 752362) (see, Findings of Fact '13,' '14,' '15'). Based on this evidence, the statutory 90-day period may be measured from the date of the United States Postal Service postmark on the PS Form 3811, to wit, November 21, 1990. The Division has established that petitioner received the Notice of Determination on November 21, 1990" (Determination, conclusion of law "F").

On exception, petitioner asserts that the Division did not satisfy its burden of proving it properly mailed the Jenny sales tax assessment to petitioner and that the Administrative Law Judge erred in relying on the green cards (the Forms 3811) as the date from which to measure the 90 days (Petitioner's brief, pp. 14-16). The Administrative Law Judge, having concluded that the CMR was flawed, then "leaps to the remarkable conclusion that, although the Division did not demonstrate that it mailed the notice, it nevertheless demonstrated receipt of the notice by Jenny" (Petitioner's brief, p. 16).

We affirm the determination of the Administrative Law Judge. "Return receipt

notification cards (i.e., Form 3811) constitute proof of proper mailing as of the date of receipt" (Matter of Wisdom, Tax Appeals Tribunal, March 21, 1996).

The Administrative Law Judge next rejected petitioner's argument that the 90-day period for filing a petition should be tolled because the Division did not serve a copy of the Notice on its authorized representative.

"Petitioner has not submitted any evidence to show that, prior to issuance of the Notice of Determination, Mr. Levine and/or members of his law firm were petitioner's representatives for sales taxes during the relevant period. In fact, although it appears that Mr. Levine and/or a member of his law firm were petitioner's representatives with regard to the motor fuel tax audit, a copy of that power of attorney was not submitted into evidence either (see, Findings of Fact '17,' '18,' '19'). Petitioner's argument that since the motor fuel tax and sales tax are integrated in this case, the power of attorney appointing Mr. Levine and/or members of his law firm should encompass the sales tax as well as the motor fuel tax during the relevant period is without merit. 20 NYCRR 2390.5 states, in pertinent part, that a power of attorney:

"should clearly describe the proceeding in which the attorney or agent is authorized to represent the taxpayer and the taxable year or period involved therein."

"Motor fuel taxes and sales taxes are separate and distinct taxes. It was petitioner's burden to introduce evidence that Mr. Levine or a member of his law firm had filed a power of attorney, and the party upon whom the burden or proof rests loses if no evidence is offered on the fact at issue (see, Matter of Grace & Co., Tax Appeals Tribunal, September 13, 1990). No such evidence was produced here (see, Matter of Sliford Restaurant, Tax Appeals Tribunal, October 10, 1991)" (Determination, conclusion of law "G").

The Administrative Law Judge found that since there was no tolling of the 90-day period, petitioner's request for conference dated September 2, 1993 was not timely filed.

On exception, petitioner asserts that the Administrative Law Judge was wrong because the sales tax assessment issued in 1990 was based on the same audit that produced the motor fuel tax assessment in 1985; Mr. Levine furnished the Division with a power of attorney for the motor fuel tax proceeding, thus, the Division was on notice that he was representing the corporation in the proceeding concerning the motor fuel tax assessment; and the Division was also on notice that Mr. Levine was representing the responsible officers, the Kennons, before the Division in the sales tax matter.

"It should not have taken a rocket scientist to realize that the same attorney, to wit, Mr. Levine, who was representing Jenny on the corollary 12-A matter and its principals in their companion sales tax matters, would also be representing Jenny in the current matter. Rather, it should have seemed only logical and within the confines of normal practice that the same attorney would represent Jenny in all these related matters. Practically speaking, why would a corporation retain a different attorney to handle three matters all revolving around the identical set of facts and law?" (Petitioner's brief, p. 13).

We affirm the determination of the Administrative Law Judge. The purpose of the power of attorney is to provide the Division with clear knowledge that the taxpayer has chosen to be represented by a specific representative in a particular proceeding. That representative is deemed to act as the agent of the taxpayer "in all respects relevant to the proceeding" (Matter of Bianca v. Frank, 43 NY2d 168, 401 NYS2d 29). Here, the proceeding was to contest the sales tax asserted by the Division. There was no power of attorney filed in connection with that proceeding. Thus, the Division was not aware that Mr. Levine was petitioner's representative. The core of petitioner's argument is that it was reasonable for the Division to infer that Mr. Levine was petitioner's representative and that based upon such inference, it was required to mail Mr. Levine a copy of the sales tax assessment. We cannot agree. No matter how reasonable such an inference may appear, it does not provide a legal basis for the Division to treat Mr. Levine as petitioner's agent.

The Administrative Law Judge also rejected as "meritless" petitioner's alternative argument that the Division was placed on notice of the corporation's protest by the Kennons' timely protests of their individual assessments which were identical to the sale tax assessment issued to Jenny. The gist of petitioner's assertion is that the notice to them referred to Jenny as did petitioner's request for a conciliation conference.

"The information contained in the Kennons' requests, inasmuch as it relates to petitioner, does not satisfy any of the requirements specified in the Division's regulations, nor can it be said that it fairly advised the Commissioner of petitioner's claim so as to constitute an informal request. The only references to Jenny Oil Corporation in either of the Kennons' requests is on their respective notices of determination which were referenced by notice/assessment number and annexed to their respective requests. I do not find the words 'Jenny Oil Corporation' to be sufficient to put the Division on notice that a request for a conciliation conference was being made by petitioner, Richard Kennon or Robert Kennon with regard to

the Notice of Determination (Notice No. S901114819M) issued to petitioner.

"Petitioner did not make a timely request for a conciliation conference.

". . . that the Division of Tax Appeals should first determine the validity of the Notice of Determination issued to petitioner and thus whether it has jurisdiction before considering whether the protest was timely" (Determination, conclusions of law "H" and "I").

We affirm the determination of the Administrative Law Judge. The liability of the Kennons is separate and distinct from that of the corporation. The representations of the Kennons do not bind the corporation nor do the representations of the corporation bind the Kennons. Each must proceed to contest that liability in the manner prescribed by law (see, Matter of On-Site Petroleum Unlimited (Tax Appeals Tribunal, February 8, 1996).

The Administrative Law Judge next rejected petitioner's assertion that the Division of Tax Appeals should first determine the validity of the Notice of Determination issued to petitioner and, thus, whether it has jurisdiction before considering whether the protest was timely.

"Petitioner maintains that the Notice of Determination was issued more than six years after the audit period. It contends that there is no indication on the face of the Notice of Determination that the Division alleged fraud. In its brief, petitioner asserts that:

"no specific allegations of fraud against Jenny have ever been made in this matter. The first time the Law Bureau advised Petitioner it was purportedly alleging fraud was in its Answer filed May 4, 1994' (Petitioner's brief, p. 15)" (Determination, conclusion of law "I").

Petitioner also argues that there can be no finding of fraud against it (the corporation) when the Division entered into a stipulation to settle the identical sales tax assessments issued to Richard and Robert Kennon, the president and vice president and sole shareholders of Jenny, which stipulation reduced from \$1,587,583.90 to \$7,500.00 (\$3,189.61 tax, \$4,310.39 interest and \$0.00 penalty), the liability of the Kennons. The simple logic of petitioner's position is "that it does not make sense that the principals are innocent of fraud but their corporation is guilty of fraud" (Determination, conclusion of law "I").

The Administrative Law Judge found that "[t]he sole issue at the hearing was the timeliness of petitioner's request for a conciliation conference. The issue of fraud goes to the merits of the case" (Determination, conclusion of law "I"). The Administrative Law Judge found that since the request for conference was not timely filed, the Division of Tax Appeals "was without jurisdiction" to address the matter.

We affirm the determination of the Administrative Law Judge.

We appreciate the logic of petitioner's argument on the merits of the fraud issue. However, the issue of whether the notices were mailed within the period of limitation for assessment of sales and use taxes is an affirmative defense (Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887) and without a timely request for a hearing having been filed, this Tribunal has no jurisdiction to address this issue (Tax Law § 170[3-a][e]; Matter of Batavia Coal & Oil, Tax Appeals Tribunal, February 2, 1995).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jenny Oil Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Jenny Oil Corporation is denied.

DATED: Troy, New York
June 20, 1996

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

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