

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>JOHN McNAMARA</b>	:	DECISION
	:	DTA NO. 813361
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1989 through February 28,	:	
1991.	:	

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Petitioner John McNamara, Federal Prison Camp Seymour Johnson, Register #3951-053-Piedmont A, Caller Box 8004, Goldsboro, North Carolina 27533-8004, filed an exception to the determination on remand of the Administrative Law Judge issued on December 24, 1998.

Petitioner appeared by Eugene B. Fischer, Esq. and J. Timothy Shea, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on September 14, 1999 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. 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 the Notice of Determination was addressed to petitioner pursuant to the provisions of Tax Law § 1147(a)(1).

III. Whether petitioner was denied due process of law by the Administrative Law Judge's denial of his request for a continuance of the proceedings.

IV. Whether petitioner was denied due process by the Administrative Law Judge's denial of petitioner's request for subpoenas at the hearing.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. We have also deleted findings of fact "5" and "8" because they are not in the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Findings of Fact "2" through "18" were found by the Tax Appeals Tribunal in its decision issued January 30, 1997.

2. The Division of Taxation ("Division") allegedly mailed to petitioner, John McNamara, a Notice of Determination (Notice No. L-008523436-4) dated March 11, 1994 for sales and use taxes in the amount of \$523,832.00, plus penalties of \$171,624.40 and interest of \$261,934.35, for a total amount due of \$957,390.75 for the period December 1, 1989 through February 28, 1991.<sup>1</sup>

The explanation and instruction section contained the following:

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<sup>1</sup>The Notice of Determination was addressed to "McNamara - John, 108 Van Brunt Manor Rd, East Setauket, New York 11733-3901."

This notice is issued because you are liable as an Officer/ Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.

Our records indicate that you are/were an Officer/Responsible Person of McNamara Buick-Pontiac, Inc.

We modify finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

3. Petitioner sent a Request for Conciliation Conference (“request”), dated July 14, 1994, which referenced Assessment ID L-008523436-4 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 July 16, 1994. BCMS received the request on July 20, 1994. Attached to the Request for Conciliation Conference was a power of attorney appointing J. Timothy Shea as petitioner’s representative. Said power set forth petitioner’s address as 108 Van Brunt Manor Road, East Setauket, NY 11733. The power was signed by petitioner and acknowledged before a notary public on July 14, 1994.<sup>2</sup>

4. By Conciliation Order (CMS No. 140745) dated September 23, 1994, the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on March 11, 1994 and the request was not mailed until July 16, 1994, or more than 90 days from the date of the notice, the request was untimely filed.

6. Petitioner filed a petition with the Division of Tax Appeals dated November 22, 1994 by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated November 23, 1994. The petition was received by the Division of Tax Appeals on November 28, 1994.

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<sup>2</sup>We modified finding of fact “3” to more fully reflect the record.

7. Petitioner is seeking a reversal of the order dismissing the conciliation conference request pertaining to the Notice of Determination which assessed sales and use taxes for the period December 1, 1989 through February 28, 1991. The petition challenges the assessment of \$523,832.00 in tax, plus penalty and interest. The petition states:

1. On or about May 20, 1994 Petitioner received three (3) notices of determination and four (4) notices of estimated determinations for sales tax arising from the operations of Angst Inc.
2. Included in the aforementioned notices was a page entitled 'consolidated statement of tax liabilities' which listed an eighth (8<sup>th</sup>) assessment (the subject assessment #L 008523436-4) in the amount of \$532,832 plus interest and penalties.
3. This was the very first notice petitioner had of such assessment.
4. On June 8, 1994, Petitioner's attorney, J. Timothy Shea, filed requests for conciliation conferences on the notices of assessment referred to in paragraph 1.
5. On July 6, 1994, my attorney, J. Timothy Shea, was informed by the New York State Department of Taxation and Finance, Hauppauge, New York, that the eighth (8<sup>th</sup>) assessment was a sales assessment arising from another corporation, McNamara Buick Pontiac, Inc., notice of which was mailed on June 20, 1994 to the Petitioner.
6. On July 6 and July 22, 1994 respectively, the Department canceled four (4) of the assessments referred to in paragraph 1.
7. On July 15, 1994 my attorney filed a request for a conciliation conference with the New York State Department of Taxation and Finance for the subject assessment, #L008-523436-4.
8. My attorney was notified by order dated September 23, 1994 that notice of the subject assessment #L008523436-4 was issued to the Petitioner on March 11, 1994 and the request for a conciliation conference was denied as untimely.

9. On November 7, 1994, the Department canceled the remaining three (3) assessments referred to in paragraph 1.

10. Petitioner [sic] never received any notice of determination or estimated determination of the subject assessment #L008523436-4 from the New York State Department of Taxation and Finance on or after March 11, 1994.

9. An answer, dated January 24, 1995, was served on petitioner by a transmittal letter also dated January 24, 1995. The Division, in its answer, stated that it lacked “knowledge of information sufficient to form a belief as to the allegations contained in item (6) of the petition.” It further stated that: (1) a Notice of Determination (Notice No. L008523436, dated March 11, 1994) was issued to petitioner, pursuant to Articles 28 and 29 of the Tax Law, asserting tax due in the amount of \$523,832.00, plus penalty and interest; (2) that Notice of Determination “bearing certified control number P 911 174 283 addressed to John McNamara, 108 Van Brunt Manor Rd., East Setauket, NY 11733-3901 was stamped ‘REFUSED’ and returned” to the Division; (3) petitioner failed to request a conciliation conference within 90 days from the issuance of the notice; (4) on September 23, 1994, BCMS issued a Conciliation Order (CMS No. 140745) to petitioner which denied petitioner's request as untimely made; (5) 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 (6) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of timeliness of petitioner's protest. The answer also states that petitioner has the burden to prove that “the assessment at issue is erroneous or otherwise improper,” and to show that petitioner's protest was timely.

10. On February 27, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1).<sup>3</sup>

11. In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Geraldine Mahon and Daniel B. LaFar, employees of the Division; a copy of the New York State Department of Taxation and Finance Assessments Receivable certified mail record (“CMR”) dated March 11, 1994; a copy of the Notice of Determination dated March 11, 1994; a copy of the envelope used to mail the Notice of Determination; a copy of the envelope which contained petitioner's Request for Conciliation Conference; and a copy of the Request for Conciliation Conference.

12. Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, which relates to the Division's computer system for generating notices of deficiency and notices of determination to taxpayers under Articles 28 and 29 of the Tax Law.

13. In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency or determination prior to their shipment to the Division's mechanical section for

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<sup>3</sup>The Division's representative, in paragraph 2 of her affidavit, incorrectly stated her second ground as “a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Conciliation Order.” However, paragraph 7 of her affidavit correctly stated that:

[s]ince the petitioner did not file a Request for Conciliation Conference or a Petition with the Division of Tax Appeals within the time period prescribed by Tax Law sections 170(3-a)(a) and 1138(a)(1), the late Request for Conciliation Conference was properly denied and the Petition before the Division of Tax Appeals should be dismissed, with prejudice for lack of jurisdiction.

mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record", and the corresponding notices of determination generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the CMR. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her initials or signature and/or a U.S. Postal Service postmark to a page or pages of the CMR. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the CMR containing a list of the notices allegedly issued by the Division on March 11, 1994, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.<sup>4</sup>

Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Determination, addressed to petitioner, which bears assessment identification number L-008523436 and certified control number P 911 174 283.<sup>5</sup> Page 20 of the CMR contains certified control number P 911 174 283, Notice of Determination number L008523436, addressed to petitioner,

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<sup>4</sup>Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding. The Notice of Determination was sent to "McNamara - John."

<sup>5</sup>The Division's address listed on this Notice of Determination was:

"New York State Department of  
Taxation and Finance  
Audit Division - Suffolk D.O. - Sales Tax  
Veterans Memorial Highway  
Hauppauge, NY 11788-5599."

McNamara - John, 108 Van Brunt Manor Road, East Setauket, New York 11733-3901. The certification and notice numbers listed match those on the notice issued to petitioner.

On this copy of the CMR, the certified control numbers run consecutively from P 911 174 073 on page 1 to P 911 174 327 on page 24, with 11 entries per page, except page 24 which contains 2 entries, as well as the total figures for the CMR. All 24 pages of the CMR bear the print date of March 2, 1994, changed manually on the first page and last page only to March 11, 1994 and the record print time of 42:29:28. Each of the 24 pages submitted is date stamped March 11, 1994 by the Albany, New York Roessleville Branch of the United States Postal Service. Ms. Mahon explained in her affidavit that the print date for the CMR is approximately 10 days prior to the mail date in order to give sufficient time to review the notices by hand and to process the postage. She notes that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service. She also identified that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the United States Postal Service after mailing.<sup>6</sup>

It is noted that while the CMR submitted contains, on page 24, the total number of pieces listed, 255, it does not contain a total for the number of pieces received at the post office. On page 24, the number 255 is circled on the line entitled "TOTAL PIECES AND AMOUNTS

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<sup>6</sup>In paragraph 3 of her affidavit, Ms. Mahon described the CMR as follows: "The certified mail record for the block of Notices issued on *March 11, 1991* including the Notice of Determination issued to John McNamara consists of 24 fan folded (connected) pages" (emphasis added). There is a typographical error. The correct date is March 11, 1994. All remaining paragraphs of her affidavit recite the March 11, 1994 date.



LISTED,” and directly beneath the circled number 255 is the illegible initials or signature of the postal representative.

14. Daniel B. LaFar is employed as a principal mail and supply clerk in the Division’s mail and supply room. Mr. LaFar’s duties include the supervision of mail and supply room staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar’s affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on March 11, 1994.

Mr. LaFar stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail and supply room, a member of the staff weighs and seals each envelope, postage and fees are affixed with a postage meter stamp and the postage and fee amounts are recorded on the CMR. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the CMR indicating receipt by the Postal Service. The postal employee also circles the total number of pieces listed to indicate that this was the total number of pieces received at the post office. After the CMR has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here, CARTS Control Unit).

15. Attached to Ms. Seifert’s affidavit as Exhibit “3” is a photocopy of the face side of what appears to be a window envelope, containing what appear to be three window boxes. The window box in the upper left-hand side of the envelope contained the following return address:

New York State Department of  
Taxation and Finance  
Audit Division - Suffolk D.O. - Sales T  
Veterans Memorial Highway  
Hauppauge, NY 11788-5599.<sup>7</sup>

Directly beneath the return address window box is a window box which contained petitioner's address as follows:

L-008523436-C001-2  
MCNAMARA - JOHN  
108 VAN BRUNT MANOR RD  
EAST SETAUKET NY 11733\_\_901.<sup>8</sup>

To the right of the return address window box is what appears to be a window box which has the word "CERTIFIED" directly above the alleged window box and the word "MAIL" directly beneath the window box. The following numbers appeared in the window box: "P 911 174 28."<sup>9</sup>

The post-paid meter stamp bears "Albany, NY," the date "Mar 11 '94" and U.S. postage of \$1.29. There is a stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contained "RETURNED TO SENDER" and the sleeve contained "REFUSED." There is some extraneous handwriting on the envelope. The envelope also contained a "received" date stamp of March 16, 1994 by the Division's Suffolk District Office Sales Tax Section.

16. Attached to Ms. Seifert's affidavit as Exhibit "4" is a copy of petitioner's Request for Conciliation Conference and a copy of the envelope which contained petitioner's Request for Conciliation Conference. His request was received by the Division on July 20, 1994. It had been

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<sup>7</sup>A portion of the return address is not visible in the alleged window box.

<sup>8</sup>There is a thick black scribble line through a portion of the address. It has obscured part of the zip code.

<sup>9</sup>A portion of the certified control number is not visible in the alleged window box.

mailed by certified mail and the envelope containing the request bore a postal meter date of July 15, 1994 and was postmarked July 16, 1994.

17. In opposition to the Division's motion for summary determination, petitioner submitted the affidavit of his representative, Eugene B. Fischer, Esq. Mr. Fischer, in his affidavit, stated that the Division had failed: (1) to prove that it mailed the Notice of Determination on or about March 11, 1994 to petitioner, and (2) to provide any evidence of the Notice of Determination's receipt by petitioner. In his affidavit, he alleged that there were numerous deficiencies in the Division's proffered proof of mailing.

First, he pointed out the inconsistency between the date on the Notice of Determination allegedly issued to petitioner and the postmark date on the copy of the envelope which allegedly was used to mail the Notice of Determination. Mr. Fischer averred that the former had a date of March 11, 1994, while the latter had a metered mail postmark date of March 11, 1991 which was consistent with the date referenced in paragraph 3 of Ms. Mahon's affidavit. He further stated that:

There are no documents or affirmations included in the Division of Taxation's motion in support of a mailing of a Notice of Deficiency [sic] to the Petitioner on March 11, 1991, nor was there a copy of any mailing envelope or Post Office documents submitted in support of a mailing of a Notice of Deficiency [sic] on March 11, 1994. Therefore, the Division has failed to prove that there was any mailing of the Notice of Deficiency [sic] dated March 11, 1994 to John McNamara (emphasis in original).

Second, he stated that the certified control number on the envelope in which the Notice of Determination was allegedly mailed differed from the certified control number included in the affidavits of Christina L. Seifert and Geraldine Mahon and page 20 of the CMR.<sup>10</sup>

Third, he averred that the CMR contained material flaws, as follows:

(A) there were two summaries listed on page 24 of the CMR: (1) "Total Pieces and Amounts Listed" and (2) "Total Pieces Received at Post Office." The former contained a number while the latter was blank. Mr. Fischer averred that "the failure to include any amounts on that line leads to the logical conclusion that *no* pieces were received at the Post Office and there was no mailing of any of the pieces listed" in the CMR (emphasis in original).

Mr. Fischer further stated that:

The affidavit of Daniel Lafar [sic] (Division's Exh. 2) in paragraph 6 states unequivocally, apparently but not specifically referring to page 24 of the certified mail record, that the postal employee signed (not initialed) the certified mail record and circled the number of pieces listed to indicate that this was the number of pieces received at the Post Office. There is no indication in either the affidavits of Ms. Mahon or Mr. Lafar [sic] that it is standard Post Office procedure to 'circle' the number of pieces of mail received, and no explanation at all of why the line 'Total pieces received at Post Office' is left blank. Further, Mr. Lafar [sic] does not indicate how he has come to his conclusion that it was a Post Office employee who affixed his signature to the certified mail record. He does not identify the employee, nor indicate that he recognized the signature. Far better evidence in this regard would have been an affidavit from the employee delivering the certified mail record to the Post Office. In the absence of a foundation having been laid for Mr. Lafar's [sic] conclusions concerning the signing and circling on page 24 of the certified mail record, his affidavit must be disregarded in those respects.

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<sup>10</sup>Mr. Fischer referenced paragraphs 3 and 5 of Ms. Seifert's affidavit and paragraphs 8 and 11 of Ms. Mahon's affidavit.

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Ms. Mahon indicates in paragraph 7 of her affidavit that 'the Postal Service representative placed his/her initials on page 24 of the certified mail record'. However, while there are certain markings on page 24 of the certified mail record, it is impossible to determine if they are initials of any person, and there is no substantiation of the identity of any Postal Service employee who initialed page 24. This is further indication that either this mailing was not handled 'in the regular course of business' and as a common office practice, or that the mailing procedures used in the regular course of business by the Department are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are insufficient to support the proof of mailing of the subject Notice.

(B) Only the first and last page of the CMR have a manual date change from the record print date of 03/02/94 to the date on which the notices were allegedly delivered to the post office, 03/11/94. Mr. Fischer noted that there was no change of date on page 20 of the CMR, which contained the information related to the alleged mailing of the notice to petitioner:

and no reason is given for the failure to change the dates manually on all of the intervening pages and whether only the first and last pages were stamped in the ordinary course of business. In addition, there are no initials or other identification of the person making such changes.

Fourth, Mr. Fischer notes that the return address on the envelope in which the Notice of Determination was allegedly mailed was the Division's office in Hauppauge, New York. He further notes that there was a stamp on the envelope which indicated that the envelope was received by the Division's Hauppauge, New York office on March 16, 1994. He averred that:

There is no explanation of how or why a Division envelope with an address of a Division office in Hauppauge, New York, was processed in the Division's Albany, New York office and mailed in a U.S Post Office in Albany, New York, in the affidavits of Geraldine Mahon or Daniel Lafar [sic]. Further, if the 'Refused'

stamp was affixed by the U.S. Post Office . . . the Post Office returned the envelope to the 'sender', the Division's Hauppauge office, and not to the Division's Albany office. The words 'returned to sender' are apparently part of the subject stamp. Therefore, clearly, there is an inconsistency between the affidavits of Geraldine Mahon and Daniel Lafar [sic], and the return address on the mailing envelope concerning the place of mailing that has not been explained by the Division, and such inconsistency reflects upon the veracity of the affiants and/or the record-keeping procedures of the Division in this instance, and as to whether this purported assessment was handled in the regular course of business and pursuant to the practices and procedures of the Mail and Supply Room (Aff., Daniel F. Lafar [sic], ¶¶ 8; 10), or there were unique circumstances in this matter which caused the alleged assessment *not* to be handled in the regular course of business.

There also has been no evidence introduced of any mailing of the assessment from the Division's Hauppauge, New York office (emphasis supplied in original).

Fifth, Mr. Fischer asserted that the Division did not lay a foundation for the conclusion that the stamped words "returned to sender" and "refused" inside of a hand and sleeve was a "U S Postal stamp." He further asserts that "any conclusions concerning those stamped words must await the introduction of evidence concerning their origin."

Sixth, Mr. Fischer asserted that:

Petitioner should have the opportunity to cross-examine Ms. Mahon concerning the ability of the Division to produce return receipts in certain instances, the regularity with which such receipts are maintained or produced for evidence in cases, whether a log book is maintained for the receipt of such documents, and her own involvement in the production of receipts in those cases in which the Division introduces same into evidence

Seventh, he contended that the best evidence of mailing and the receipt or reason for nonreceipt of a document was the maintenance of a log, or other documentary evidence of the return of certified mail documents. He argued that the Division failed to produce the best

evidence of the mailing, the refusal and its return, the delivery receipt “which presumably contained a signature or notation as to who refused same.” Lastly, he asserted that petitioner denied “ever receiving, refusing to receive, or having any knowledge of any envelope containing the subject assessment.”

18. Attached to Mr. Fischer's Affidavit in Opposition as Exhibit “B” was petitioner's affidavit in which he stated, in pertinent part, that:

2. Prior to the filing of a Request for Conciliation Conference by my attorney, J. Timothy Shea, on July 15, 1994, in connection with the above-indicated matter, I did not receive, nor did I refuse to receive, nor did I have any knowledge of, any Notice of Determination, or Notice of Deficiency, concerning Sales and Use Tax assessments issued to me personally as a responsible Officer of McNamara Buick-Pontiac, Inc. for the periods 12/01/89-2/28/91, and in particular, I did not receive, or refuse to take delivery of, or have any knowledge of, Assessment Number L-008523436 prior to July 15, 1994.

19. On February 27, 1995, the Division filed a motion for summary determination on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1). After due consideration of the motion papers, affidavits and all pleadings and documents submitted, the Administrative Law Judge determined, on September 7, 1995, that the Division established that, on March 11, 1994, the Notice of Determination was properly mailed to petitioner at his last known address, and because petitioner's request for a conciliation conference was mailed on July 16, 1994, the request was not timely and the Division of Tax Appeals did not have jurisdiction to entertain the merits of

petitioner's case. The Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition filed by petitioner in this case.

20. On exception, petitioner argued that the postage-paid meter stamp on the envelope which contained the Notice of Determination issued to him had a date of March 11, 1991 and not a date of March 11, 1994, as determined by the Administrative Law Judge. Petitioner also questioned certain aspects of the envelope used to mail the Notice of Determination to him such as the return address on the envelope indicating that it originated from the Hauppauge District Office and not the Albany office and the fact that, since the last number of the certified mail number was obscured on the face of the envelope, the certified mail number did not match the certified mail number listed in the CMR. With respect to the CMR, petitioner asserted that, on page 24, the marking near the number 255 was illegible which would lead to the conclusion that such marking had no significance and, since, the summary line for number of pieces of mail received by the United States Postal Service was blank, there existed a material flaw in the CMR. Lastly, petitioner argued that the affidavits submitted by the Division were inadequate to establish that standard procedures for mailing the Notice of Determination were followed in this case. Therefore, petitioner asserted that the Division failed to sustain its burden of proof in this case.

21. The Tax Appeals Tribunal reversed the determination of the Administrative Law Judge granting summary determination. The Tribunal found that given the difference in certified control numbers, the various extraneous comments written on the envelope of unknown origin, the extraneous markings, the confusion raised by the postage meter stamp affixed by the Division and the overall poor quality of the photocopy, several issues were raised concerning the fact and



date of mailing which were not resolved on the motion. The Tribunal directed that the matter be placed on the hearing calendar of the Division of Tax Appeals as soon as possible.

22. On April 30, 1997, a hearing was held on the issue of jurisdiction only. At that hearing, both parties' presentations consisted of the submission of documentary evidence only.

23. In support of its proof of mailing of the Notice of Determination dated March 11, 1994, the Division submitted the affidavit dated April 22, 1997 of Geraldine Mahon, with an attached photocopy of a 24-page CMR, the affidavit dated April 23, 1997 of James Baisley and the affidavit dated April 25, 1997 of Gary Glubiak, with an attached window envelope. Ms. Mahon and Messrs. Baisley and Glubiak are all Division employees.

24. Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, and has been since 1989.

25. In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency and notices of determination ("notices") "prior to shipment to the Department's Mechanical Section for mailing." As part of her duties, she receives a computer printout, entitled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record," and the corresponding notices. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number," which is recorded on the CMR. The name and address of the person to whom the notice is to be mailed on a particular day is also recorded on the CMR.

26. Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the CMR containing a list of the notices allegedly issued by the Division on March 11, 1994 which she

asserts bears the information relating to petitioner's notice and is a true and accurate copy of the original CMR.<sup>11</sup> Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of the first side of the Notice of Determination addressed to petitioner, McNamara-John, 108 Van Brunt Manor Rd, East Setauket, NY 11733-3901, bearing assessment identification number L-008523436-4 and certified control number P 911 174 283. Page 20 of the CMR shows an article of certified mail, certified control number P 911 174 283, notice number L 008523436, addressed to petitioner, MCNAMARA-JOHN, 108 VAN BRUNT MANOR RD, EAST SETAUKET, NY 11733-3901. The certification and notice numbers on the CMR correspond with those found on the copy of first side of the notice.

On this copy of the CMR, the certified control numbers run consecutively from P 911 174 073 on page 1 to P 911 174 327 on page 24, with 11 entries per page except page 24, which contains 2 entries, as well as the total figures for the CMR. All 24 pages of the CMR bear the print date of March 2, 1994, changed manually on the first and last pages only to March 11, 1994. Each of the 24 pages is date stamped March 11, 1994 by the Roessleville Branch of the U.S. Postal Service ("USPS") in Albany, New York. Ms. Mahon states in her affidavit that

[i]n the upper left hand corner of the CMR, page 1, the date 03/02/94 was manually changed to 3/11/91. The original date, 03/02/94, 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 03/02/94 to 3/11/94 was made by personnel, in the Department's mail room, who changed the date so that it

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<sup>11</sup>Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not parties to this proceeding.

conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

She also states that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the USPS; and that the pages remain connected when the postmarked document is returned to Ms. Mahon's office after mailing. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a USPS representative, who then affixes his or her initials or signature and/or a USPS postmark to a page or pages of the CMR. Ms. Mahon states that the USPS postmark appearing on each page of the CMR on which the notice at issue appears, confirms that such notice was sent on March 11, 1994. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

It is noted that while the CMR contains on page 24, the total number of pieces listed, 255, it does not contain a total number of pieces received at the post office. On page 24, the number 255 is semicircled on the line entitled "TOTAL PIECES AND AMOUNTS LISTED" and directly beneath the semicircled number 255 are presumably the initials or signature of the postal representative.

27. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom") and has held that "position since 1994."

28. In his affidavit, Mr. Baisley attests to the regular procedures followed by the mailroom staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. After a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a

member of Mr. Baisley's staff counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one. A member of the mailroom staff delivers the CMR and envelopes to the Roessleville Branch of the USPS. Mr. Baisley states that the CMR is the Department of Taxation and Finance's record of receipt by the Roessleville Branch of the USPS for pieces of certified mail. The postal employee who received the CMR affixed a USPS postmark to every page of the CMR, circled the total number of pieces and initialed the CMR to indicate the number of pieces received from the Division. After the CMR has been signed and/or stamped by the USPS, it is returned the following day to the originating office within the Division (here CARTS Control Unit). Mr. Baisley avers that his

knowledge that the postal employee circled the "total number of pieces" for the purposes of indicating that 255 pieces were received at the Post Office is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on March 11, 1994, an employee of the mailroom delivered a sealed, post-paid envelope for delivery addressed to John McNamara, 108 Van Brunt Manor RD, East Setauket, NY 11733-3901 to the Roessleville Branch of the U.S. Postal Service in Albany, New York. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the CMR, with the postmarks, delivered to and accepted by the Postal Service on March 11, 1994, for the records maintained by the CARTS

Control Unit of the Division. He affirms that the staff's regular procedures were followed in mailing the pieces of certified mail in question to petitioner.

29. Gary Glubiak is a Tax Auditor II in the Division's Audit Division, Suffolk District Office, Sales Tax Unit and has been employed by the Division for 28 years. Mr. Glubiak's duties include supervising sales tax auditors in the Suffolk District Office, including Gregg Owsenek.

In his affidavit, Mr. Glubiak states, in pertinent part:

3. Attached hereto as Exhibit A is the envelope that contains Notice of Determination L008523436 which was sent by certified mail to John McNamara, 108 Van Brunt Manor RD, East Setauket, NY 11733-3901 and which was refused. The Notice of Determination, L008523436, was generated by the Department in Albany and was mailed from Albany. It is the policy of the Department to use the address of the District Office where the auditor is located as the return address for the Notice.

4. It is the policy of this office that when mail comes into this office, it is in dated by the clerical staff with the date the piece of mail is received. The envelope containing Notice of Determination L008523436 was in dated by this office on March 16, 1994. The in date stamp is located under the metered postmark of March 11, 1994. The clerical staff then looked up which auditor was assigned to this matter and wrote the auditor's name, "Owsenek", in the upper left corner of the envelope. The envelope was then placed in the auditor's message folder for the auditor to retrieve when he returned from the field.

5. On November 21, 1994, I had a meeting with Mr. McNamara's attorney at the attorney's office. It is the usual policy of this office not to open refused Notices of Determination. However, at the attorney's office I opened the envelope containing Notice of Determination L008523436 and the attorney made a copy of the Notice. I then noted on the back of the envelope that I resealed the envelope at the attorney's office, as noted by my initials G.G., and I dated it. I then placed tape over the side of the envelope to reseat it, the tape covered my writing.

6. The only notations made on the envelope by employees of this office, including myself, were the March 16, 1994 in date state [sic] on the front of the envelope, the name Owsenek written on the front of the envelope and my notations written on the back of the envelope concerning the envelope's opening.

30. Attached to Mr. Glubiak's affidavit as Exhibit "A" is an original window envelope along with its contents. This envelope measures 4½" by 10 6/16" and contains three window boxes. Located in the envelope's upper left-hand corner, printed in green ink, is "DTF-998.1 (6/87)." Directly beneath the Division's envelope style number is "owsenek' handwritten in blue ink. The window box in the upper left-hand side of the envelope contains the following return address:

"New York State Department of  
Taxation and Finance  
Audit Division - Suffolk D.O. - Sales Tax  
Veterans Memorial Highway  
Hauppauge, NY 11788-5599."

Directly beneath the return address window box is a window box which contains petitioner's address as follows:

"L-008523436-C001-2  
MCNAMARA-JOHN  
108 VAN BRUNT MANOR RD  
EAST SETAUKET, NY 11733-3901."<sup>12</sup>

To the right of the return address window box is a green edged window box which has the word "CERTIFIED" printed in white directly above the window box and the word "MAIL" printed in white directly beneath the window box. The following numbers appear in the window box:

"P 911 174 283."

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<sup>12</sup>There is a thick black marker scribble line over a portion of the address window box. However, the black line does not obscure any portion of the zip code.

The red ink post-paid meter stamp bears “ALBANY NY”, the date “MAR 11’94” and U.S. postage of \$1.29. There is a red stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contains “RETURNED TO SENDER” and the sleeve contains “REFUSED.” Just above the word “REFUSED” are handwritten words “PO Box 824”, as well as the letter “L”, an illegible letter and the number 3/14. A thin black line runs through the two letters and the number. The envelope also contains a “received” date stamp of March 16, 1994 by the Division’s Suffolk District Office Sales Tax Section. The left side of the envelope has two punch holes, while the right edge has been slit and taped closed with transparent tape. The following notation appears on the back left-side of the envelope: “Resealed, @ Atty, office, GG, 11/21/94.”<sup>13</sup>

31. At the conclusion of the hearing, the Administrative Law Judge opened the envelope and gave a photocopy of the Notice of Determination to petitioner’s representative.

32. The window envelope contains four folded sheets of paper and a folded window envelope (style “DTG-999.9 [7/91]”). The first sheet is a two-sided Notice of Determination addressed to petitioner as follows: “L-008523436-C001-2, MCNAMARA-JOHN, 108 VAN BRUNT MANOR RD, EAST SETAUKET, NY 11733-3901”, bearing the number “P 911 174 283” printed on the top right side of page 1, dated “3/11/94” and having the Assessment ID number “L-008523436-4.” The second sheet is a single-sided document entitled “PAYMENT DOCUMENT,” while the third sheet is a single-sided document entitled “REQUEST FOR CONCILIATION CONFERENCE.” Both documents are addressed to petitioner at the Van

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<sup>13</sup>These words, handwritten in blue ink, are in column form with the tape covering them.

Brunt Manor Road address. The last sheet is a single-sided document entitled “NOTICE OF TAXPAYER RIGHTS.”

33. The Division submitted two affidavits of James Miller in support of its position that the Notice of Determination was issued to petitioner’s last known address. Mr. Miller is an assistant director in the Personal Income Tax Returns Processing Bureau. Part of Mr. Miller’s regular duties include overseeing the analysis and testing of computer systems which process tax return information. In his first affidavit, dated April 29, 1997, Mr. Miller attests to how these computer systems store information derived from various sources and generate printed documents, as well as printouts of purged information, which are sent to taxpayers. According to Mr. Miller, information is “captured” from the taxpayer’s return or an application for an extension to file a return onto the Personal Income Tax Return Processing System (“Returns Processing Database”). If the header label information on the current return is different from the corresponding prior year information, the header data is passed to the Taxpayer Indicative Data (“TID”) System. The TID database search is based on an exact match of the taxpayer’s social security number. A further check is performed comparing the last name and the first three characters of the first name. If there is an exact match, the remaining header data is then compared on a character-to-character match. The system also compares the date the taxpayer’s header information is reported to the Division against the notification date associated with the taxpayer’s existing TID information. The system will not replace a taxpayer’s header information with less current return data information. TID receives update files from two sources: 1) the return data capture records and 2) the master file header change program.



Updates are performed daily and weekly, respectively. According to Mr. Miller, assessments are issued to the most current TID address at the time of issuance.

Information from the taxpayer's return or application for an extension to file a return is keyed onto the Returns Processing Database, where it is stored in a record format. The records on the Return Processing Database are extracted and stored on Computer Optical Laser Disk. According to Mr. Miller, the documents attached to his affidavit are true and accurate printouts of the information contained on the hard copies of petitioner's applications for extensions of time to file a Personal Income Tax Return for the tax year 1992. In this case, the taxpayer's address represented on the printout was information used to process the taxpayer's return or the application for an extension to file. Refunds or assessments resulting from initial processing of the return are sent to this address.

Attached to Mr. Miller's affidavit as Exhibit "A" are copies of two printouts entitled NYS DEPT OF TAXATION AND FINANCE - PERSONAL INCOME TAX INQUIRY which contain information concerning the type of return filed by petitioner for tax year 1992. According to the printouts, petitioner filed an application for an extension of time to file (Form IT-370) on April 15, 1993, as well as an application for additional extension of time to file (Form IT-372). Petitioner's address is listed as "108 - VANBRUNT MANOR RD, EAST SETAUKET NY 11733-3901" on each of these printouts.

34. Mr. Miller's second affidavit, dated April 29, 1997, again detailed how the Division's computer systems process and store tax return information on the Returns Processing Database. Mr. Miller also identified the exhibit attached to his affidavit as a transcript of the stored record of the information from petitioner's Personal Income Tax Return for the tax year 1992. The

exhibit consists of a computer printout entitled NYS DEPT OF TAXATION AND FINANCE - PERSONAL INCOME TAX INQUIRY bearing a print date of 4/28/97. According to the printout, petitioner filed his 1992 Form IT-201 Resident Income Tax Return on November 15, 1994 and listed his address as "PO BOX 824, East Setauket, NY 11733-0634".

35. On October 20, 1994, the Division granted petitioner's application for an additional extension of time to file his 1993 personal income tax return until January 16, 1995. This application was filed on petitioner's behalf by his accountant. The address listed on the application was "108 Van Brunt Manor Road, East Setauket, New York 11733."

36. In October 1995, petitioner filed his 1993 New York State personal income tax return (Form IT-201). Petitioner's address, as listed on the return, was "P.O. Box 824, East Setauket, NY 11733."

37. At the hearing, petitioner's representative requested that the hearing be continued because he intended to file an Offer in Compromise and because he wished to review the Division's exhibits and return for oral argument at another time. In addition, petitioner's representative requested that the affiants whose affidavits had been submitted into evidence by the Division be subpoenaed to testify in person or, in the alternative, that the affidavits be precluded from evidence. These requests were denied by the administrative law judge.

38. During the hearing, petitioner's representative's request to amend the petition to include the issue of whether the Notice of Determination was sent to petitioner's last known address was granted. Petitioner's representative requested additional time post-hearing to submit documentary evidence on the issues of mailing and last known address. His request was granted.

39. On June 6, 1997, petitioner submitted a copy of the front side of petitioner's 1992 New York State personal income tax return (Form IT-201) on which petitioner's address was listed as "P.O. Box 824, East Setauket, NY 11733." In his cover letter, Mr. Fischer stated that the return "was filed in October or November of 1993." The record in this matter was closed at that time.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that when timeliness is an issue, the Division must establish a standard procedure for the issuance of notices by one with knowledge of the procedure and the fact that the procedure was followed in the particular case in issue (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

The Administrative Law Judge found that the Division's evidence of the two requirements listed above was "defective in many respects," noting that the Division could not establish a "chain of custody" for the CMR. Additionally, the Administrative Law Judge concluded that the Division could not explain a changed date on the CMR or that the number of pieces of mail listed in the CMR were, in fact, delivered to the postal service.

The Administrative Law Judge then turned to whether the Division proved actual mailing of the notice, given its inability to establish official regularity of the mailing procedure, and weighed the circumstantial evidence present herein (*Coleman v. Commissioner*, 94 TC 82; *Matter of Snyder*, Tax Appeals Tribunal, December 11, 1997). The Administrative Law Judge found that the original, returned window envelope and the affidavit of a Division employee who described the procedures followed with returned mail and specifically this envelope, were satisfactory to prove the fact and date of mailing of the notice. Additionally, the Administrative

Law Judge accepted the Division's "faulty" records as additional circumstantial evidence of mailing.

With regard to the address used by the Division, the Administrative Law Judge accepted the affidavits of James Miller, who stated that the Personal Income Tax Returns Processing Bureau stored information from taxpayer's returns, which could be accessed at any time by reference to a social security number. Mr. Miller's affidavit stated that assessments are issued to the most current address on the system at the time of the assessment. In this case, the system noted petitioner's address, 108 Van Brunt Manor Road, East Setauket, New York 11733-3901, taken from applications for extension of time to file on April 15, 1993. An additional document submitted was the transcript of a stored record of petitioner's 1992 Personal Income Tax Return, indicating that the return was filed on November 15, 1994, and listed his address of P.O. Box 824, East Setauket, New York 11733-0634. However, the same records showed that another extension filed on petitioner's behalf for 1993 was granted by the Division on October 20, 1994 and the address listed on the application was the 108 Van Brunt Manor Road, East Setauket address. The Administrative Law Judge found that the evidence demonstrated that the 108 Van Brunt Manor Road, East Setauket address was petitioner's last known address.

Having established the mailing of the notice to petitioner's last known address in accordance with Tax Law § 1147(a)(1), there arises a presumption of receipt which is rebuttable by the taxpayer, but said rebuttal must be more than a mere denial. The Administrative Law Judge found that petitioner's mere denial did not rebut the presumption of receipt. Consequently, the Administrative Law Judge found that petitioner did not file a petition for a conciliation

conference in a timely manner and that the Division of Tax Appeals lacks jurisdiction to hear the case.

Also, the Administrative Law Judge concluded that petitioner's due process rights were not abridged by her failure to grant a continuance to review documentary evidence and be afforded an opportunity to rebut same through documentary evidence and oral argument. Since the Administrative Law Judge afforded petitioner the opportunity to submit additional documentary evidence on the issues of last known address and general mailing, of which petitioner availed himself, the Administrative Law Judge found no harm to petitioner. In addition, although not afforded an additional opportunity for oral argument, petitioner did submit two detailed post-hearing briefs.

Finally, the Administrative Law Judge concluded that petitioner's due process rights had not been abridged by her refusal to issue subpoenas at the hearing. Since the regulations require that such requests be made 20 days prior to the hearing (20 NYCRR 3000.7[b]), petitioner's request was not timely. In addition, petitioner's representative, an attorney, was also able to issue subpoenas. However, since the request was made to the Administrative Law Judge at the hearing it was not timely and properly denied.

### ***ARGUMENTS ON EXCEPTION***

Petitioner has raised several arguments on exception. Foremost, petitioner contends that the Division has not proffered any evidence by an employee with knowledge of the relevant procedures of a standard procedure for issuing notices.

Petitioner argues that the Administrative Law Judge's failure to discuss *Matter of Cal-Al Burrito Co.* (Tax Appeals Tribunal, July 30, 1998) was an "egregious judicial error" given

petitioner's characterization of the case as "controlling precedent." In *Cal-Al*, the Tribunal found that the affidavits of Division employees and a CMR did not establish issuance of the notice.

Petitioner maintains that the cases cited by the Administrative Law Judge: *Coleman v. Commissioner* (*supra*), *Massie v. Commissioner* (T.C. Memo 1995-173, 69 TCM 2417, *affd* 82 F3d 423, 96-1 USTC ¶ 50,237) and *Matter of Snyder* (*supra*) are distinguishable and do not support the conclusion that the Division established proper mailing of the notice in this case.

Petitioner argues that the Administrative Law Judge erred in concluding that the window envelope and the notice contained therein were "original" documents given what petitioner believes are defects in the Glubiak affidavit. Also, petitioner contends that there is no evidence of what the words on the window envelope signify or who placed them on the envelope.

Petitioner submits that he would like to incorporate by reference the arguments he made in his brief to the Administrative Law Judge below. We note these arguments and the Administrative Law Judge's disposition of same.

### ***OPINION***

We affirm the determination of the Administrative Law Judge.

Tax Law § 1138 former (a)(1) authorizes the Division to issue a Notice of Determination to the person liable for the collection or payment of the tax which will finally and irrevocably fix the amount of tax due unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a Notice of Determination is to be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to

[Article 28] 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 timely filing of a request for a conference or a petition is a jurisdictional prerequisite for review of the notice (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where the timeliness of a request for a conciliation conference or 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). The Division must prove both the fact and date of mailing of the notice at issue (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the postal service for mailing (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*Matter of Katz, supra*). 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).

To demonstrate proper mailing, the Division must produce evidence of its standard procedures for the issuance of such notices by one with knowledge of such procedures, corroborated by direct testimony or documentary evidence that this procedure was followed in the particular case at hand (*see, Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The United States Tax Court, interpreting provisions of the Internal Revenue Code analogous to those at issue herein, has decided that a properly completed Postal Service Form

3877 or its counterpart “represents direct documentary evidence of the date and fact of mailing” of the assessment (*Wheat v. Commissioner*, T.C. Memo 1992-268, 63 TCM 2955, 2957, *citing Magazine v. Commissioner*, 89 T.C. 321). “Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of [the division]” (*Wheat v. Commissioner, supra*, 63 TCM, at 2958, *citing United States v. Zolla*, 724 F2d 808, 84-1 USTC ¶ 9175, *cert denied* 469 US 830, 83 L Ed 2d 59). When the Internal Revenue Service (hereinafter “IRS”) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. 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.

We have found that a properly completed CMR is substantively the same as the Postal Service Form 3877 (*see, Matter of Montesanto, supra*). This Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division’s compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division’s case “if the evidence adduced is otherwise sufficient to prove mailing” (*Coleman v. Commissioner, supra; see also, Wheat v. Commissioner, supra*).

In the instant matter, the Division may not rely on the CMR because of the insufficiency of the Baisley affidavit. As pointed out by the Administrative Law Judge, there is no way of



determining if Baisley even worked for the Mail Processing Center on March 11, 1994, thereby calling into question his knowledge of why the number of articles was circled on that date. In *Matter of Service Merchandise Co.* (Tax Appeals Tribunal, January 14, 1999), we found that Baisley's statement, identical to the one made here in his affidavit, was the distinguishing factor from the flaw found in *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), where failing to state a basis of his knowledge for the circling of the number of pieces received at the post office and a postal service employee's initials, vitiates the efficacy of the entire CMR. If this were the extent of the Division's proof, a defected CMR and affidavits of office practice, it would not prevail.

However, the Division also produced an envelope with the original Notice of Determination, which indicates that the notice was actually mailed in accordance with the mailing procedures outlined in the Mahon affidavits and the LaFar and Baisley affidavits. The envelope indicates that the notice was delivered and "refused" and then returned to the Suffolk District Office, where it was in-dated five days after being sent from Albany and routed to the auditor in charge of the file, "Owsenek." The envelope remained unopened in Owsenek's file until it was taken by Mr. Glubiak to petitioner's attorney's office on November 21, 1994, where it was opened and photocopied.

This additional evidence, uncontroverted by petitioner, is crucial. We have noted that such evidence would be sufficient to prove actual mailing (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). In *Brager*, we analyzed a United States Tax Court case, *Massie v. Commissioner* (*supra*), which found that the IRS "presented competent evidence in the form of testimony by a manager as to the mailing procedures of [the IRS district office]; an incomplete

certified mail list, which at least suggests mailing; the original notice of deficiency dated [the date of mailing on the mail list]; and . . . an original envelope bearing the proper article number and the stamp-marks indicating the mail was not claimed by the addressee.” In *Massie*, the Tax Court determined that his evidence overcame a flawed certified mail list and was sufficient to prove mailing.

The Court in *Massie* dismissed that petitioner’s suggestions that there was no direct testimony concerning the mailing of the notice and that there were gaps in the documentary evidence, saying that there was no requirement to produce employees who personally recall each notice that is mailed. In addition, Massie’s claim of non-receipt was not sufficient to prevail without further evidence or an explanation of why the notice went “unclaimed” as stamped on the returned envelope.

The instant case is very similar to *Massie* and we conclude that the Division’s production of the returned envelope is proof of actual mailing which overcomes the flaw in the Baisley affidavit. Certainly, petitioner’s failure to offer an explanation of why the notice was refused for delivery at his last known address is harmful to his case, yet he made no attempt to address the issue in this proceeding.

In light of our analysis, we conclude that the notice was properly mailed and issued by the Division on March 11, 1994 and the request for a conciliation conference was properly denied.

With respect to the last three issues, we find that the Administrative Law Judge completely and adequately addressed the remaining issues, to wit:

— whether the notice was mailed to petitioner’s last known address;

— whether petitioner was denied due process by the Administrative Law Judge’s denial of petitioner’s request for a continuance; and

— whether petitioner was denied due process by the Administrative Law Judge’s refusal to issue subpoenas.

Therefore, we conclude that there is no reason to modify the determination’s discussion or disposition of these issues in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John McNamara is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of John McNamara is dismissed.

DATED: Troy, New York  
March 9, 2000

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner