

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CAL-AL BURRITO COMPANY, INC. : DECISION
for Revision of Determinations or for Refund of Sales and : DTA NO. 814532
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 1992 through January 25, 1995. :

Petitioner Cal-Al Burrito Company, Inc., 152 West 57th Street, New York, New York 10019, filed an exception to the determination of the Administrative Law Judge issued on November 13, 1997. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation has established that it complied with the requirements of Tax Law § 1147(a)(1) for the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "9" and "12" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The Division of Taxation ("Division") issued to petitioner, Cal-Al Burrito Company, Inc., a Notice of Determination (Audit Case identification number X-558357089-5) dated April 7, 1995 for sales and use taxes due, for the period December 1, 1992 through August 31, 1994, in the amount of \$101,893.00, less payment credits in the amount of \$12,852.49, for a total amount due of \$89,040.51. The explanation on the notice stated that it was issued to petitioner because it

was "liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141(c) and 1138(a)(3) of the New York State Tax Law." The explanation section also contained the following statement:

The tax assessed has been estimated in accordance with provisions of section 1138 of the tax law and may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a tax appeals hearing by 07/06/95.

The notice listed California Burrito Company, Inc. ("CBC") as the seller. The following four assessment identification numbers were listed on the notice for the period December 1, 1992 through August 31, 1994: L-010212562-3, L-010212563-2, L-010212564-1 and L-010212565-9.

The Division issued a Notice of Determination (Notice number L-010219491-8) dated April 20, 1995 to petitioner for sales and use taxes due in the amount of \$1,575.50, plus penalties of \$189.05 and interest of \$34.02 for a total amount due of \$1,798.57. This notice was issued to petitioner "as a purchaser, in accordance with section 1133(b) of the New York State Tax Law, for business assets, taxable under Article 28 of the Tax Law, transferred to you as a purchaser."

Each of the statutory notices described above shows the following address for petitioner:

Cal-Al Burrito Company, Inc.
Kriss & Feit, P.C.
392 5th Ave
New York, NY 10018-8105

CBC was engaged in the sale of Mexican and Tex-Mex food in restaurant and take-out facilities located in New York City. On January 10, 1995, petitioner, a Delaware corporation, entered into an Agreement of Purchase and Sale of Assets ("purchase agreement") with CBC and its principals for the purchase of all of CBC's assets. According to the purchase agreement, copies of all notices sent to petitioner were also to be sent to the law firms of Kriss & Feit and Platzer, Fineberg & Swergold.

On the same date, January 10, 1995, petitioner sent a copy of a document entitled "California Burrito Company, Inc. Notice of Bulk Sale"¹ ("bulk sale notice") by certified mail to the "NYS Dept. of Taxation & Finance, W.A. Harriman Campus, Albany, NY 12227."

The bulk sale notice contained six paragraphs which outlined the terms of the transaction.

Paragraph 1 of the bulk sale notice set forth the following:

Pursuant to the provisions of §6-107 [sic] of the New York Uniform Commercial Code, you are hereby notified that on the 25th day of January, 1995, a transfer and bulk sale of assets of California Burrito Company, Inc. (hereinafter "Transferor"), whose principal place of business is at 88 Jane Street, New York, New York and who conducts business at other locations listed on Exhibit "A" annexed hereto, will be made to Cal-Al Burrito Company, Inc., hereinafter Transferee having its principal place of business at 152 West 57th Street, New York, New York 10019. The debts of Transferor are not, as a result of this transaction, to be paid in full as they fall due.

According to Exhibit "A", CBC also had business locations in New York City at 1530 Third Avenue, S-409 Four World Trade Center, 172 Seventh Avenue and 456-458 Hudson Street.

Review of paragraph 6 reveals that petitioner was to deliver to CBC, "as payment in full," the following: (i) the assumption of a promissory note, dated November 17, 1994, made by CBC to The Saik Group, LP; (ii) the assumption of Federal and New York State payroll taxes and New York State sales tax obligations plus any accrued penalty and interest to a "maximum amount of \$177,000.00"; and (iii) the assumption of all obligations of CBC as tenant under certain leases.

According to paragraph 5 of the bulk sale notice, a detailed schedule of the property to be transferred, as well as a list of CBC's creditors, could be inspected at the offices of Platzer, Fineberg & Swergold.

On January 13, 1995, Attorney Henry Swergold sent an amended bulk sale notice by certified mail to the Division at the "W.A. Harriman Campus, Albany, NY 12227." The only

¹This notice was addressed to all creditors and claimants of California Burrito Company, Inc.

change made in the amended bulk sale notice was made in paragraph 2 with reference to the real estate leases being transferred.

We modify finding of fact “9” of the Administrative Law Judge’s determination to read as follows:

The Division's Bulk Sale Unit assigned bulk sale number 1995000316 to the bulk sale in issue. A copy of the log from the Bulk Sales Unit file is part of the record. The log contains the entries for audit actions taken with regard to the bulk sale in issue. According to the entry for March 28, 1995, petitioner's bulk sale notification was not considered timely because the notification did not include a breakdown of the purchase price.²

The record in this matter includes two affidavits of Thomas Driver, a sales tax technician II, desk audit specialist in the Division's Bulk Sales Unit. In the first affidavit, dated December 23, 1996, Mr. Driver attests to the normal operating procedures of that unit for mailing a Notice of Claim to Purchaser - Form AU-196.2 (1/93) ("notice of claim") to a purchaser that has filed a Notification of Sale in Bulk ("bulk sale notification"). According to Mr. Driver, a notice of claim, addressed to the purchaser at the mailing address listed on the purchaser's bulk sales notification, is sent by United States Postal Service First Class Mail. Mr. Driver states that is the normal procedure which was followed in February and March 1995 when the Bulk Sale Unit attempted to send petitioner a notice of claim.

Attached to Mr. Driver's affidavit are documents found within the Bulk Sale Unit file for the bulk sale in issue. Mr. Driver describes the first document, attached as Exhibit "A", as "a typed notice of bulk sale which appeared to have been prepared for all creditors for the purpose of notification under § 6-107 of the New York Uniform Commercial Code. . . ." According to Mr. Driver, this notice of bulk sale was not prepared on the Division's official form entitled

²We modified finding of fact “9” of the Administrative Law Judge’s determination by combining it with finding of fact “12.”

“Notification of Sale, Transfer or Assignment in Bulk - Form AU-196.2 (1/93)”;³ however, it did state that petitioner had a principal place of business at 152 West 57th Street, New York, N.Y. 10019. Mr. Driver further states that petitioner's principal address was used on a notice of claim dated February 17, 1995, sent by United States Postal Service First Class Mail, but which was returned by the United States Postal Service ("USPS") to the Division. Exhibit "B" is the notice of claim, dated February 17, 1995 and the attached window envelope in which the notice was mailed. This notice of claim is addressed to petitioner at 152 West 57th Street, New York, NY 10019 and identifies petitioner as the purchaser and CBC as the seller. Review of the window envelope reveals a "First Class US postage date stamp of Feb 17, 1995" in the upper right hand corner and in the middle of the envelope to the right of the two windows the designations "RETURNED TO SENDER" and "MOVED, LEFT NO FORWARDING ADD." Stamped over the forwarding instruction is the Division's date stamp of March 7, 1995, the date on which the Division received this returned piece of mail from the USPS. Mr. Driver indicated that because the notice of claim as addressed had been returned to the Division, the Division could not send the notices of determination to that same address and "the normal procedure in the ordinary course of business" was to have the notices of determination sent to the address listed in the Division's Taxpayer Identification ("TID") system.

Mr. Driver's second affidavit, dated December 24, 1996, again briefly outlined his employment history with the Division's Bulk Sale Unit and the basis of his knowledge of the standard operating procedures for that unit. Mr. Driver also identified an exhibit attached to his affidavit as documents which he found in the Bulk Sale Unit file while he was reviewing it. The exhibit consists of a cover letter dated March 20, 1995, referencing Bulk Sale Number 1995000316, sent by Patricia Rushton of the Division's Sales Tax Section to petitioner at 87 Jane Street, New York, NY 10014; a window envelope, bearing a U. S. postage-paid stamp of March 20, 1995 attached by staple to the cover letter; and a copy of a Notice of Claim to

³There appears to be a typographical error, the correct form is Form AU-196.10 (4/90).

Purchaser dated February 17, 1995 addressed to petitioner at 152 West 57th Street, New York, NY 10019. Ms. Rushton, in her cover letter, stated that the attached notice of claim was returned by the USPS as undeliverable. The envelope, to the right and above the window, has a stamp showing "RETURN TO SENDER MOVED FWDG ORDER EXPIRED", as well as the Division's "received" date stamp of April 3, 1995. According to Mr. Driver, "said envelope indicates that mail from the Dept. of Taxation and Finance could not reach the petitioner at the 87 Jane Street address."

The Division submitted the affidavit of Kathleen Buckley in support of its position that the notices of determination were issued to petitioner's last known address. Ms. Buckley is the tax processing manager of the Registration and License Services unit of the Division and, as such, is knowledgeable and experienced as to the sources for the last known addresses entered in the Division's TID computerized records.

According to Ms. Buckley, petitioner's last known business address contained in the TID Registration Business Address Summary for the period February 15, 1995 (posting date) to December 22, 1995 (posting date) was Kriss & Feit, P.C., 392 5th Ave., New York, NY 10018-8105 ("Kriss & Feit address"). She further states that the Kriss & Feit address was replaced on December 22, 1995 with the address of 99 Park Ave. FL. 6, New York, NY 10016-1501.

Attached to Ms. Buckley's affidavit as Exhibit "A" is a copy of a printout entitled TID - BUSINESS ADDRESS SUMMARY which contains information concerning petitioner's business addresses and was obtained from TID's computerized records. The printout contains petitioner's taxpayer identification number and its legal name. It also contained a list of petitioner's business addresses. Ms. Buckley explained that the source of the Kriss & Feit address was the New York State Department of State, Division of Corporations ("Department of State") daily filing report provided by the Department of State to the Division. The filing report is periodically generated for corporations that have filed a registration statement with the

Department of State to do business in New York. The filing report contains the addresses for the filer of the registration, service of process and the corporation.

Attached as Exhibit "B" is a copy of page 115 of a document entitled "NEW YORK STATE DEPARTMENT OF STATE DIVISION OF CORPORATIONS DAILY FILING REPORT DOCUMENTS PROCESSED 01/24/1995" which lists the filer and process address for Cal-Al Burrito Company, Inc. as Kriss & Feit, P.C., 392 Fifth Avenue, New York, NY 10018 and the corporation's address as "THE CORPORATION, % KRISS & FEIT, P.C., 392 FIFTH AVENUE, NEW YORK, NY 10018." According to Ms. Buckley, the Division uses the corporate address shown on the filing report as the last known address for issuing assessing documents and continues to use that address until it obtains further updated information through other means such as tax return filings.

Furthermore, Ms. Buckley explains that according to the Exhibit "A" printout, there was no address for petitioner, other than the Kriss & Feit address, within the TID computerized records and the TID Registration Business Address Summary on April 7, 1995 and April 20, 1995, the dates of issuance of the notices of determination.

Petitioner's representative sent a Request for Conciliation Conference ("request") dated September 14, 1995, which referenced Assessment ID Numbers L-010212565-9, L-010212564-1, L-010212563-2, L-010212562-3 and L-010219491-8 to the Bureau of Conciliation and Mediation Services ("BCMS") by USPS First Class Certified Mail. The USPS postage-paid stamp is dated September 22, 1995. BCMS received the request on September 26, 1995. Petitioner's address on the request was listed as 152 West 57th Street, New York, New York 10019. The request lists three items as the basis for petitioner's claim, as follows:

1. The Bulk Sale Unit issued the Notice of Determination, and all notices against the Purchaser, to the wrong address even though it had the correct address of 152 West 57th Street, NY, NY 10019. The Bulk Sale Unit received all the correct documentation and notification as required by law. Since the Bulk Sale Unit issued notices to an incorrect address when it had the correct address, all notices should be canceled (see attached copy of Amended Notice

of Bulk Sale). This information was discovered via a phone conversation with the Bulk Sale Unit on 9/8/95.

2. It is not possible to attach Notices of Determination since they were never received by the taxpayer.
3. All penalties should be canceled against the Purchaser.

By Conciliation Order (CMS No. 150184) dated November 10, 1995, the conciliation conferee denied the request for a conference noting that because the statutory notices were issued on April 7, 1995 and April 20, 1995 and the request was not mailed until September 22, 1995, or more than 90 days from the dates of the notices, the request was not timely filed.

Petitioner in its petition reiterated the same three statements from its request as set forth above and added the following as a fourth assertion: "The Taxpayer's representatives never received copies of the Determination Notices."

In support of its proof of mailing of the Notice of Determination dated April 7, 1995 (Audit Case ID of X-558357089-5), the Division submitted the affidavit dated November 25, 1996 of Geraldine Mahon, with an attached photocopy of a one-page certified mail record and the affidavit dated November 25, 1996 of James Baisley. Both Ms. Mahon and Mr. Baisley are Division employees.

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

In her affidavit, Ms. Mahon stated that she supervises the processing of notices of determination prior to their shipment to the Division's mechanical section for mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Non-Presort 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 certified mail record ("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.

Attached to Ms. Mahon's affidavit as Exhibit "A" is the one-page CMR containing a list of the notices allegedly issued by the Division on April 7, 1995. This CMR contains the information relating to petitioner's notice and is a true and accurate copy of the original CMR.⁴ Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of the notice of determination, addressed to petitioner, Cal-Al Burrito Company, Inc., Kriss & Feit, P.C., 392 5th Avenue, New York, New York 10018-8105, bearing audit case identification number X-558357089-5 and certified control number P 911 203 602. Page 1 of the CMR shows an article of certified mail, certified control number P 911 203 602, addressed to petitioner, Cal-Al Burrito Company, Inc., Kriss & Feit, P.C., 392 5th Ave, New York, NY 10018-8105. The certification and notice numbers on the CMR correspond with those found on the copy of the notice.

On this copy of the one-page CMR, the certified control numbers run consecutively from P 911 203 602 to P 911 203 603, with two entries on the page. The one-page CMR bears the print date of March 28, 1995, changed manually to April 7, 1995 and is date stamped April 7, 1995 by the Colonie Center Branch of the USPS in Albany, New York. Ms. Mahon explained in her affidavit that the print date for certified mail records is approximately ten days prior to the mail date in order to allow the Division's mechanical section sufficient time to manually review the notices and to process the postage. She notes that the print date here was changed by personnel in the Division's mail room to conform to the actual date of delivery of the notices to the USPS. 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 page one of the certified mail record on which the notice at

⁴Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not parties to this proceeding.

issue appears, confirms that such notice was sent on April 7, 1995. 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 certified mail record contains, on page 1, the total number of pieces listed, 2, it does not contain a total for the number of pieces received at the post office. Just above the USPS date stamp, are presumably the initials or signature of the postal representative.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS Control Unit, and that as such the certified mail record corresponding to the Notice of Determination issued to petitioners was properly prepared on April 7, 1995.

The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"), 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 Colonie Center Branch of the USPS. Mr. Baisley states that the CMR is the Department of Taxation and Finance's record of receipt by the Colonie Center Branch of the USPS for pieces of certified mail. The postal employee, who received the CMR, affixed a USPS postmark to the CMR and initialed the CMR to indicate the number of pieces received from the Division. The CMR is retrieved from the USPS by a member of Mr. Baisley's staff the day after it is delivered there and is returned to the originating office in the Division (here CARTS Control Unit).

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on April 7, 1995 an employee of the mailroom delivered a sealed, postpaid envelope for delivery by certified mail addressed to Cal-Al Burrito Company, Inc., Kriss & Feit, P.C., 392 5th Ave., New York, NY 10018-8105 to the Colonie Center Branch of the U.S. Postal Service in Albany, New York. In addition, based on his review of the certified mail record, Mr. Baisley determined that a member of his staff obtained a copy of the certified mail record, with the postmark, delivered to and accepted by the Postal Service on April 7, 1995 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 piece of certified mail in question to petitioner.

To establish proof of mailing of the Notice of Determination, dated April 20, 1995, as detailed above, the Division submitted a second set of affidavits, dated November 25, 1996, from Geraldine Mahon and James Baisley. For a second time, Ms. Mahon and Mr. Baisley detailed the general practice and procedure for processing notices of determination by CARTS and the operations and procedures followed by the mail processing center, respectively.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 31 pages of the CMR containing a list of the notices allegedly issued by the Division on April 20, 1995 which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.⁵ According to Ms. Mahon, the original document consisted of 31 fan-folded (connected) pages; that all pages were connected when the document was delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the USPS after mailing. She also states that the certified control numbers run consecutively on the CMR, from P 911 008 537 to P 911 008 873 inclusive, with 11 entries on a page, with the exception of page 31 which contains 7 entries, and there are no deletions. In addition, Ms. Mahon's affidavit states that she examined the CMR issued by the Department of

⁵Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not parties to this proceeding.

Taxation and Finance on April 20, 1995 and that her review confirms that a notice of determination was sent to petitioner at Kriss & Feit, P.C., 392 5th Avenue, New York, NY 10018-8105 by certified mail using certified control number P 911 008 597.

Mr. Baisley, in his affidavit, states that on page 31 of the CMR 337 pieces of mail were listed as being sent to the USPS and that the number was changed manually to 336 to reflect the fact that a piece of certified mail was pulled from the mailing record. According to Mr. Baisley, a piece of mail can be "pulled" to correct a discrepancy in a name or an address. The pulled piece of mail is segregated from the group of notices, is corrected and issued at another time. Mr. Baisley avers that the piece of mail assigned certified control number P 911 008 743 on page 19 of the CMR was pulled and a line was placed through the name and street address of that taxpayer. Mr. Baisley states that this deletion is reflected in the change of the total number of pieces of mail listed on page 31. Mr. Baisley avers that no such mark is made on or near the listing for petitioner.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on April 20, 1995 an employee of the mailroom delivered a sealed, postpaid envelope for delivery by certified mail addressed to Cal-Al Burrito Company, Inc., Kriss & Feit, P.C., 392 Fifth Ave., New York, NY 10018-81005 to the Colonie Center 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 certified mail record, with the postmark, delivered to and accepted by the Postal Service on April 20, 1995 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 piece of certified mail in question to petitioner.

On this copy of the CMR, the certified control numbers run consecutively from P 911 008 537 on page 1 to P 911 008 742 on page 19, at which point there is a break in sequence, the piece of mail bearing certified number P 911 008 743 was pulled and deleted from page 19. The certified control numbers recommence on page 19 with certified number

P 911 008 744 and run consecutively to P 911 008 873 on page 31. The deletion was also reflected on page 31 in that the "Total Pieces and Amounts Listed" figure of 337 is crossed out and the circled handwritten number 336 is listed as the "Total Pieces Received At Post Office." Beneath the circled handwritten number 336 are presumably the initials or signature of the postal representative. All 31 pages of the CMR bear the print date of April 10, 1995, changed manually on the first page only to April 20, 1995. Each of the 31 pages is date stamped April 20, 1995 by the Colonie Center Branch of the USPS in Albany, New York. It is noted that the illegible initials or signature of the postal representative also appear at the bottom right hand corner on page one of the certified mail record.

The only documentary evidence submitted by petitioner is a copy of the affidavit of Henry G. Swergold, Esq., dated August 26, 1996, with attachments. In this affidavit, Mr. Swergold described the steps he took in mailing the amended bulk sale notice (see above).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division must establish both the fact and date of mailing of the Notice of Determination (***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 mailing 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 citing, *inter alia*, ***Matter of Montesanto*** (Tax Appeals Tribunal, March 31, 1994), ***Matter of Accardo*** (Tax Appeals Tribunal, August 12, 1993) and ***Matter of Katz*** (Tax Appeals Tribunal, November 14, 1991).

The Administrative Law Judge concluded that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, ***Matter of Roland***, Tax Appeals Tribunal,

February 22, 1996). The Administrative Law Judge also noted that the Division established that the general procedure for mailing notices of determination was followed on April 7, 1995 in the generation and mailing of petitioner's Notice of Determination.

However, the Administrative Law Judge concluded that the Division failed to establish that the general issuance procedure was followed on April 20, 1995 in the generation and mailing of petitioner's Notice of Determination. Although all 31 pages of the CMR are date stamped April 20, 1995 by the Colonie Center Branch of the USPS and the first and last pages of the CMR were either signed or initialed by a representative of the USPS, the Administrative Law Judge found that the CMR was flawed in that it does not indicate how many of the 336 pieces listed were actually received at the post office citing, *inter alia*, ***Matter of Roland (supra)*** and ***Matter of Huang*** (Tax Appeals Tribunal, April 27, 1995). Although both the Baisley and Mahon affidavits stated that the USPS representative affixed a postmark to each page of the CMR and initialed page 31 of the CMR to indicate the total number of pieces received, the affidavits do not explain how Mr. Baisley and Ms. Mahon know this to be a fact. Further, the Administrative Law Judge found significant that the Mahon affidavit states that there were no deletions from the CMR, while the Baisley affidavit identifies that one piece was pulled and deleted from the CMR. Accordingly, the Administrative Law Judge concluded the Division has failed to prove that the Notice of Determination was actually mailed to petitioner on April 20, 1995 (***Matter of Roland, supra***).

Next, the Administrative Law Judge addressed the question of whether the notices were mailed to the proper address. She noted that Tax Law § 1147(a)(1) requires that notices of determination be mailed to a taxpayer "at the address given in the last return filed by him pursuant to the provisions of [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 notices of determination issued to petitioner in this matter were addressed as follows: "Cal-Al Burrito Company, Inc., Kriss & Feit, P. C., 392 5th Ave, New York, NY 10018-8105."

The Administrative Law Judge concluded that the Division complied with the statutory requirements of Tax Law § 1147(a)(1). The Division submitted original documents taken from the Bulk Sale Unit file maintained for the bulk sale in issue which show that it attempted to send a notice of claim to petitioner at the West 57th Street address and that the notice of claim was returned to it by the USPS. The Division also attempted to re-mail the notice of claim to petitioner at another address and that the re-mailed notice of claim was also returned to the Division as undeliverable. The Administrative Law Judge concluded that the Division exercised due diligence in reviewing its internal computer records to obtain an address for the notices of determination, in light of the fact that the notice of claim sent to petitioner's principal business address was returned to the Division with "Returned to Sender - Moved, Left No Forwarding Add." stamped on the window envelope (*Crawford v. Commissioner*, T.C. Memo 1996-460, 72 TCM 999).

The Administrative Law Judge concluded that the Division proved that it mailed the notices of determination to petitioner's last known address.

Where it has been found that the notices of determination were properly addressed to petitioner's last known address, the presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notices and that the notices were, in fact, mailed in accordance with that routine office practice (*Matter of T. J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97). The Administrative Law Judge noted that the taxpayer has the right to rebut the presumption, but the rebuttal must consist of more than a mere denial of receipt (*Matter of American Cars 'R' Us v. Chu.*, 147 AD2d 797, 537 NYS2d 672; *Matter of T. J. Gulf, Inc. v. New York State Tax Commn., supra*). The Administrative Law Judge pointed out that petitioner, in both its request for conciliation conference and petition, denied receipt of the notices of determination in issue. However, the Administrative Law Judge stated, petitioner failed to submit any evidence to rebut the presumption of receipt other than the general denials contained in the request and the petition. In

addition, the petition contained the argument that petitioner's representative had not received either of the notices of determination. However, the Administrative Law Judge noted, petitioner failed to submit any evidence that it had a duly authorized representative at the time of the issuance of the notices or even to allege who such representative was.

Accordingly, the Administrative Law Judge concluded that the Division presented sufficient evidence to establish that it mailed a Notice of Determination to petitioner, as a bulk sale purchaser, at its last known address on April 7, 1995. Therefore, pursuant to Tax Law § 1138(a)(former [3][A]),⁶ petitioner was required to apply for a hearing by July 6, 1995. Petitioner's request for a conciliation conference was not mailed until September 22, 1995. This request was filed long after the 90-day period had expired. Accordingly, the Administrative Law Judge concluded that the petition with respect to the Notice of Determination dated April 7, 1995 was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case regarding that notice.

With respect to the Notice of Determination dated April 20, 1995 (Notice number L-010219491-8), the Administrative Law Judge concluded the Division failed to establish the date on which that Notice of Determination was mailed to petitioner (*see, Matter of Roland, supra; Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995). Therefore, the Administrative Law Judge concluded, the 90-day filing period of Tax Law § 1138(a)(former [1]) was not triggered, petitioner's request for a conciliation conference was deemed timely and petitioner was held entitled to a hearing on the merits of that notice.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the Division has failed to prove that the Notice of Determination was mailed to petitioner on April 7, 1995. It also argues, as it did below, that

⁶Tax Law § 1138(a)(3)(A), as amended by Laws of 1996 (ch 267) deleted the language in the former statutory provision which finally and irrevocably fixed the liability for payment of sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect to the periods at issue (*see, McKinney's Cons Laws of NY, Book 1, Statutes § 51[b]*).

mailing of the Notice of Determination on April 7, 1995 was flawed, since it was not sent to petitioner's last known address.

OPINION

We reverse that portion of the determination of the Administrative Law Judge which concludes that the Division has presented adequate proof of its issuance and mailing of the Notice of Determination dated April 7, 1995 to petitioner. Instead, we find that the Division has failed to establish that it followed its general procedure for mailing that Notice of Determination. The same flaw which the Administrative Law Judge found in the CMR prepared for the April 20, 1995 Notice of Determination was also present in the CMR prepared for the April 7, 1995 notice. Neither CMR showed how many pieces of mail listed on the CMR were actually received by the Colonie Center Branch of the USPS.

Relying on our prior decisions in *Matter of Roland (supra)*, *Matter of Huang (supra)*, *Matter of Fuchs* (Tax Appeals Tribunal, April 20, 1995), *Matter of Auto Parts Ctr. (supra)* and *Matter of Turek* (Tax Appeals Tribunal, January 19, 1995), the Administrative Law Judge found that although the affidavits of the Division's employees stated that the postal service representative affixed a postmark to the pages of the April 20, 1995 CMR and initialed those pages in order to indicate the total number of pieces of mail that the USPS had received, the affidavits did not explain how the Division employees knew this to be a fact. This same shortcoming pertains to the affidavits submitted by the Division regarding the April 7, 1995 CMR. Since each of these CMRs bears the same flaw, there has been no reason demonstrated why one should be deemed adequate proof of mailing while the other has been held to be defective. Therefore, we conclude that the Division has failed to present adequate proof of its issuance and mailing of the Notice of Determination dated April 7, 1995 to petitioner. As a result, the 90-day period for filing a petition with the Division of Tax Appeals or a request for conference with the BCMS never began to run and petitioner's request for a conciliation conference, mailed on September 22, 1995, was timely.

Since our decision is dispositive of this matter, we need not consider the remaining issue raised by petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Cal-Al Burrito Company, Inc. is granted;
2. The determination of the Administrative Law Judge is reversed with respect to conclusion of law "K," but in all other respects is sustained;
3. The petition of Cal-Al Burrito Company, Inc. is granted; and
4. The request for a conciliation conference filed by Cal-Al Burrito Company, Inc. with respect to the Notice of Determination issued on April 7, 1995 is granted.

DATED: Troy, New York
July 30, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner