

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SERVICE MERCHANDISE CO., INC.	:	DECISION
	:	DTA NO. 815892
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 June 1, 1990 through August 31, 1995.	:	

Petitioner Service Merchandise Co., Inc., 7100 Service Merchandise Drive, Brentwood, Tennessee 37020, filed an exception to the determination of the Administrative Law Judge issued on January 8, 1998. Petitioner appeared by Brann & Isaacson (Martin I. Eisenstein, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Oral argument, at petitioner's request, was heard on July 16, 1998 in Troy, New York.

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

ISSUE

Whether the Division of Taxation was entitled to summary determination in its favor on the basis that petitioner failed to timely file its request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

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

At issue on this motion is a Notice of Determination dated August 5, 1996 and addressed to petitioner, Service Merchandise Co., Inc., at P.O. Box 24600, Nashville, Tennessee 37202-4600. On its face, this notice bears assessment identification number L-012480106-3 and certified mail control number P 911 005 109. The notice assesses sales tax, penalty and interest in the amount of \$1,792,134.09, and pertains to the sales tax quarterly periods ended August 31, 1990 through August 31, 1995.

Petitioner filed a Request for a Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). This request, as well as the envelope in which it was sent via United Parcel Service "Next Day Service", is dated December 12, 1996. The envelope also bears a BCMS receipt stamp of December 13, 1996. This request was filed by petitioner in response to a Notice and Demand for Payment of Tax Due dated November 29, 1996.

By a Conciliation Order (CMS No. 158692) dated February 28, 1997, petitioner's request for a conciliation conference was denied on the basis that such request had been filed in excess of 90 days after the August 5, 1996 date set forth on the face of the notice.

Notices of determination, such as the notice at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a computer printout entitled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail", referred to as

the Division's certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service ("USPS") through return of the certified mail record to the CARTS Control Unit.

Each computer-generated notice of determination is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its computer printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case pages 1 and 33 of the CMR list an initial date of July 26, 1996, which has been manually changed on each of such pages to August 5, 1996. All of the other pages of the CMR list the initial printed date of July 26, 1996.

After a notice of determination is placed in the Division's Mail Processing Center ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to the Colonie Center Branch of the USPS in Albany, New York, where a postal employee accepts the

envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the CMR.

In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office within the Division.

The CMR in evidence in this case is a 33-page computer-generated document entitled "Certified Record for Zip + 4 Minimum Discount Mail". This CMR, attested to as a true and accurate copy of the Division's CMR for August 5, 1996, lists consecutive certified control numbers P 911 004 765 through P 911 005 122, inclusive. Each such certified control number is assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists 358 items of mail next to the category "Total Pieces and Amounts Listed", corresponding to the 358 certified control numbers listed on the CMR.¹

Information regarding the Notice of Determination pertaining to petitioner is contained on page 32 of the CMR. Specifically, corresponding to certified control number P 911 005 109 is Notice Number L 012480106, along with information listing petitioner's name and address.

Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated August 5, 1996. In addition to bearing a USPS postmark dated August 5, 1996, the last page of the CMR, page 33, includes the category "Total Pieces and Amounts Listed", after which appears the printed figure 358. This figure has been circled and beneath it is the signature "Howley". As noted previously, the certified control numbers on the CMR run consecutively,

¹The notice numbers, names and addresses of taxpayers other than petitioner have been redacted to assure confidentiality with respect to such taxpayers as required under the Tax Law.

and there are no marks, indications or other evidence that any of the listed items have been deleted or "pulled" from the listing.

The affixation of the Postal Service postmark, the signature of the Postal Service employee, and the circling of the total pieces listed figure are to indicate that the 358 pieces of mail listed on the CMR were received at the post office.

The Division generally does not request, demand, or retain return receipts with regard to certified or registered mail.

The facts set forth above were established through affidavits dated August 1, 1997 made by Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination such as the one at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. Baisley's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS.

The fact that the Postal Service employee circled the total number of pieces received at the post office on the CMR to indicate that this was the number of pieces received (see, above) was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces or write in the number of pieces on the CMR to indicate the total number of pieces received.

In response to the Division's motion, petitioner submitted a memorandum in opposition and affidavits made by petitioner's representative and by Donna Adams, petitioner's former Director of Taxation. Petitioner's basic position is that it did not receive the Notice of

Determination. More particularly, however, petitioner maintains that there exist a number of procedural irregularities described hereafter concerning the mailing of the Notice of Determination. Petitioner argues that such irregularities, at a minimum, generate factual issues leaving resolution by summary determination inappropriate and that, ultimately, such irregularities support a conclusion that the mailing of the notice cannot reasonably be assumed to have occurred.

The specific irregularities complained of by petitioner are as follows:

a) Petitioner points out that the certified control number on the face of the Notice of Determination is P 911 005 109, and that the Mahon affidavit asserts that the same certified control number appears on page 32 of the CMR for the entry thereon corresponding to Service Merchandise. However, petitioner maintains that in fact the certified control number on the CMR for such entry is 911 005 109, i.e., that the "P" preceding the numbers is not present on the CMR. Examining the copy of page 32 of the CMR attached to petitioner's representative's affidavit reveals that a small portion of the leftmost column of the document is almost entirely obscured. That is, specifically and consistently, most of the first character of the entire leftmost column is not visible on petitioner's copy of page 32. However, such first character is clearly visible on all pages of the CMR included with the Division's motion papers, and that first character is, in fact, the letter "P", as set forth in the Mahon affidavit.

b) Petitioner also points out that the notice number set forth on page 32 of the CMR for the entry thereon corresponding to Service Merchandise is L-012480106, while the assessment I.D. number appearing in the upper right-hand corner of the notice itself is L-012480106-3. Petitioner goes on to note that the number appearing directly above petitioner's address on the

face of the Notice is L-012480106-C001-1.² In sum, petitioner questions the fact that the notice number on the CMR does not include the various suffix numbers listed on the face of the Notice of Determination.

c) Petitioner also questions the date change on pages 1 and 33 of the CMR. These changes are explained by Ms. Mahon as being manual (hand) changes made to the computer printed date on which the CMR was generated, and that these changes were made to conform the date of computer printing of the CMR to the date of actual mailing of the notices listed thereon. Petitioner asserts that Ms. Mahon's statement that such changes are made by mailroom personnel is speculative since she does not work in the Division's mailroom. Petitioner argues that there is no explanation or basis stated for Ms. Mahon's knowledge of why the manual date change is made, and thus there is no basis of knowledge explaining a critical element of the Division's proof of mailing.

d) Petitioner argues that neither of the Division's affiants have provided substantiation concerning the identity of the USPS employee who affixed the postmarks to each page of the CMR, circled the "total number of pieces" and signed page 33 of the CMR. Petitioner further maintains that the Division's affiants provide inconsistent explanations as to the significance of the USPS postmarks on the CMR. Specifically, Ms. Mahon avers that the postmark signifies the notice was actually sent on August 5, 1996, whereas Mr. Baisley avers that the postmark signifies the USPS received the notices listed on the CMR on such date. Finally, petitioner argues that the

²By way of comparison, the Notice and Demand dated November 29, 1996, to which petitioner responded by filing its Request for Conciliation Conference, lists the Assessment I.D. number L-012480106-3 in the upper right-hand corner of page 3 thereof, and lists the number L-012480106-C002-6 directly above petitioner's address on page 1 thereof.

affiants overstate the significance of the circling of the "total number of pieces," because there is no proof that the number of pieces of mail listed on the CMR were, without exception, the same pieces of mail listed on the CMR. Here, petitioner asserts that while the Baisley affidavit explains that mail room personnel check the envelopes, names and numbers against such information on the CMR, there is no evidence that such cross-referencing is performed by a USPS employee as opposed to a mere counting of the number of envelopes by the USPS employee.

e) Petitioner also argues that the face of the notice indicates that the notice was issued from the Division's Des Plaines, Illinois office and not from the Division's Albany, New York office. Presumably, petitioner bases this statement on the fact that the Division's address in the upper left hand corner of the notice reads:

New York State Department of
Taxation and Finance
Audit Division-Chicago D.O.-Sales Tax
1011 E. Touhy Ave-Suite 475
Des Plaines, IL 60018-5808

Petitioner maintains that the Division's affiants offer evidence as to the mailing practices of the CARTS Control Unit and Mail Processing Center in Albany, New York, but do not explain why a notice originating from the Des Plaines office would have been processed in the Albany office and mailed from the Colonie Center branch of the United States Postal Service in Albany, New York. Petitioner asserts that this set of circumstances gives rise to factual issues regarding the mailing of the notice.

In addition to the foregoing, petitioner accepts that a properly completed USPS Form 3877 represents direct documentary evidence of the date and fact of mailing. However, petitioner

notes that the Division has not produced such a form, and has produced no evidence that its CMR contains the same information as a USPS Form 3877 or that the CMR has been approved by the local postmaster as the equivalent of a Form 3877. Petitioner also maintains that the notice was not properly addressed in that the address used did not include the name Donna Adams, petitioner's former Director of Taxation. In this regard, petitioner asserts that during the course of the audit underlying the notice, the auditor met personally with Ms. Adams and was thus on notice that Ms. Adams was the corporate official responsible for petitioner's compliance with tax obligations and liabilities. Petitioner notes that the Division's letter scheduling the audit, as well as the Division's Statement of Proposed Audit Adjustments (issued prior to the Notice of Determination), were both addressed as follows:

Ms. Donna Adams
Service Merchandise Co., Inc.
P.O. Box 24600
Nashville, Tennessee 37202

Petitioner maintains that because the Notice of Determination was not likewise addressed to the attention of Ms. Adams, the notice was not properly addressed. The Division, for its part, included with its motion papers copies of petitioner's 1995 Form CT-245 ("Annual Maintenance Fee and Activities Return of Foreign Corporations Disclaiming Tax Liability") and petitioner's 1994 Form CT-3 ("General Business Corporation Franchise Tax Return"). These forms are indated as received by the Division on March 13, 1996 and September 15, 1995, respectively, and both bear the same address as appears on the Notice of Determination, to wit, Service Merchandise Company, Inc., P.O. Box 24600, Nashville, Tennessee 37202.

Petitioner also maintains that the Division has furnished to petitioner inconsistent evidence with respect to the mailing of the Notice of Determination. In this regard, petitioner made a Freedom of Information Act ("FOIA") Request with respect to this case. Petitioner complains specifically that, in response to its request, the Division's Records Access Officer furnished only one page, page 32, of the CMR whereas the CMR attached to Ms. Mahon's affidavit consists of 33 pages. Petitioner again notes the alleged "marked discrepancy" between the two CMR documents, apparently meaning both a) the 1 page versus 33 page difference and b) the alleged missing "P" preceding the certified control number on the one-page CMR furnished to petitioner (see above).

Finally, petitioner argues that it did not receive the Notice of Determination, was therefore unable to meaningfully pursue a challenge against the notice, and thus has been deprived of its due process right to contest the tax, penalty and interest determined to be due. Petitioner maintains that because the Division has not overcome petitioner's allegation that it did not receive the notice, petitioner cannot be precluded from the opportunity to contest the notice on the merits.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner alleged no errors of the Commissioner of Taxation and Finance in its petition. Petitioner's claims, in its brief, relate solely to timeliness of its request for a BCMS conference. Petitioner does not state what its claims of error would have been in BCMS, or the Division of Tax Appeals, if it had been successful on the timeliness issue.

In his determination, the Administrative Law Judge concluded that the Division had introduced adequate proof of its standard mailing procedures and also had presented sufficient

documentary proof that the Notice of Determination at issue herein was properly issued to petitioner on August 5, 1996. The Administrative Law Judge compared the proof presented in this case to that submitted in *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996). In *Roland*, the Tribunal determined that where the entry next to the heading "Total Pieces Received at Post Office" on the last page of the Division's CMR was blank and the number indicating the total number of pieces listed on the last page of the CMR was circled, the CMR was flawed because it did not indicate how many of the pieces listed were actually received at the post office. While the Division asserted in *Roland* that the circling of the total number of pieces listed indicated that all such pieces were actually received at the post office, the Tribunal concluded that such assertion was speculative because it did not state the basis of the affiant's knowledge for this assertion. In the present case, however, the Administrative Law Judge concluded that the circling of the number in the space next to the heading "Total Number of Pieces" was adequate proof that this was the number of pieces of mail actually received by the post office because the Division's affiant stated the basis of his knowledge.

Of the inconsistencies alleged by petitioner to exist in the mailing procedures, the Administrative Law Judge found them to be without merit. The Administrative Law Judge concluded that petitioner did not establish that the CMR was not properly completed in this case or was otherwise flawed. Thus, the CMR was direct documentary evidence of the date and fact of mailing of the notice in question.

The Administrative Law Judge did not agree with petitioner's claim that the Notice of Determination was not properly addressed because it was not mailed to Donna Adams, petitioner's former Director of Taxation and the corporate official responsible for petitioner's

compliance with tax obligations and liabilities. The Administrative Law Judge concluded that since Donna Adams was not the taxpayer in question in this matter, the Division was entitled to rely on the address used on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed. In this regard, the Administrative Law Judge noted that the address on the notice was the same as the address on the described returns filed by petitioner.

Additionally, the Administrative Law Judge did not accept petitioner's FOIA related arguments or petitioner's due process argument predicated on nonreceipt of the notice.

As a result, the Administrative Law Judge concluded that there were no material issues of fact in this proceeding. Thus, pursuant to section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.), the Division of Taxation was entitled to summary determination with respect to such notice.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in granting summary determination to the Division in this matter because genuine issues of material fact exist as to whether the Division mailed the Notice of Determination at issue to petitioner by certified mail on August 5, 1996 to petitioner's last known address.

Petitioner notes that in order to prove both the fact and date of mailing, the Division must present evidence of its standard mailing procedure for mailing of notices by certified mail and proof that the standard procedures were followed in mailing of the notice at issue. Petitioner argues that the CMR used by the Division to document its mailing is not the equivalent of a USPS Form 3877 nor is there evidence that it is an appropriate substitute for such form which

has been approved by the local postmaster as required by the USPS Domestic Mail Manual § S912.2.6. Thus, the record does not contain evidence that the CMR is a valid receipt reflecting the mailing of the Notice of Determination at issue herein by certified mail as required by Tax Law § 1147(a)(1).

Petitioner argues that there is no foundation in the record to demonstrate that the Division had a procedure relating to the manual changes made to the first and last pages of the CMR or that such a procedure, if it existed, was followed in this case. Petitioner argues that the manual changes made to the CMR by an unidentified Division employee raises an issue as to whether or not the Division actually mailed the notice at issue on August 5, 1996. Further, petitioner argues that the Division has failed to obtain a presumption of mailing because it did not show by competent evidence that it was a “postal employee” who indicated on the CMR the total number of pieces of mail received at the post office. Petitioner maintains that there is likewise no competent evidence in the record as to who signed the name “Howley” on the last page of the CMR nor is there any indication as to whether or not the alleged standard procedure of the Division for obtaining a postal employee’s signature on the CMR was followed in this case. Additionally, petitioner argues that there was no competent evidence presented as to the procedure for circling the number of pieces on the CMR or that any such procedure was applied in this case. Rather, the alleged basis of the purported knowledge as to the circling of the number of pieces is pure speculation by the affiant. Further, petitioner argues that the procedures of the CARTS control unit are limited to the processing of notices prior to shipment to the mailing section and the affiant has no knowledge nor can she describe procedures as to how the USPS receives the CMR from the Division. Thus, the CMR in this case is incomplete just as it was in

Matter of Brager (Tax Appeals Tribunal, May 23, 1996) and a material question of fact exists regarding the mailing of the notice at issue.

Petitioner also argues that the notice indicates on its face that it was issued from the Division's office in Des Plaines, Illinois and not from its Albany, New York office. Thus, petitioner argues that evidence as to the mailing practices of the CARTS Control Unit and Mail Processing Center in Albany, New York do not explain why a notice originating from Illinois was processed in the Albany office and mailed from a branch of the United States Postal Service in Albany, New York. Petitioner asserts that this set of circumstances gives rise to factual issues regarding the mailing of the notice.

Petitioner also argues that the Division should be precluded from relying on the 33-page CMR as its mailing record because the CMR furnished with the Mahon affidavit is different from and inconsistent with that which was provided by the Division in response to petitioner's FOIA request for all of the records regarding the alleged mailing of the notice at issue by the Division. Specifically, only page 32 of the CMR was provided by the Division in response to petitioner's FOIA request whereas the CMR attached to the Mahon affidavit consists of 33 pages. Petitioner argues that there is an inconsistency between the notice number appearing on the Notice of Determination at issue (L-012480106-C001-1) and that which is set forth on page 32 of the CMR (L-012480106). Petitioner argues that this calls into question whether the notice was mailed on August 5, 1996 as asserted by the Division.

Petitioner also argues that the Notice of Determination was not properly addressed as required by Tax Law § 1147(a) because it was not sent to the attention of Donna Adams, petitioner's former Director of Taxation. Petitioner argues that during the course of the audit the

Division was on notice that Ms. Adams was the corporate official responsible for petitioner's compliance with tax obligations and liabilities. As evidence of this, petitioner argues that the Division's letter scheduling the audit, as well as the Division's Statement of Proposed Audit Adjustments (issued prior to the Notice of Determination), were both addressed to Donna Adams at petitioner's address. Although the Administrative Law Judge concluded that the copies of petitioner's 1995 Form CT-245 ("Annual Maintenance Fee and Activities Return of Foreign Corporations Disclaiming Tax Liability") and petitioner's 1994 Form CT-3 ("General Business Corporation Franchise Tax Return") introduced by the Division both bore the same address for petitioner as appears on the Notice of Determination, each of these returns was signed by Donna Adams as petitioner's "elected officer or authorized person." Petitioner argues that the Notice of Determination was, therefore, not properly addressed.

Petitioner argues that in the event that the presumption of receipt provided by Tax Law § 1147(a) applies, it is not irrebuttable. Here, petitioner argues that genuine issues of fact exist as to whether the presumption of receipt, if applicable, has been adequately rebutted. This contention, argues petitioner, is not predicated on a mere denial of receipt but on the procedural irregularities identified hereinabove.

Finally, petitioner argues that since it did not receive the Notice of Determination, it was unable to meaningfully pursue a challenge against the notice and, thus, has been deprived of its due process right to contest the tax, penalty and interest determined to be due. Petitioner maintains that it cannot be precluded from the opportunity to contest the notice on its merits.

The Division, in opposition to petitioner's exception, argues that the Administrative Law Judge correctly determined the motion for summary determination in its favor.

OPINION

When a return required by Article 28 of the Tax Law is not filed, Tax Law § 1138(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" (*see, 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 the 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). 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 certified mailing record is substantively the same as the Postal Service Form 3877 (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). 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" (*see, Coleman v. Commissioner*, 94 T.C. 82; *Wheat v. Commissioner, supra*).

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.) provide that summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted

and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309), and the bare affirmation by counsel is without evidentiary value in this regard (*Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 NY2d 496, 398 NYS2d 1004). A party opposing the motion "must establish the existence of material facts of sufficient import to create a triable issue" (*Shaw v. Time-Life Records*, 38 NY2d 201, 379 NYS2d 390, 396). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (*Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990).

In this case, we agree with the Administrative Law Judge that the Division has met its burden of proof with respect to showing its standard procedure for the mailing of notices of determination and that its standard procedure was followed in this case. Further, we agree with the analysis and conclusion of the Administrative Law Judge that the inconsistencies alleged by petitioner to exist in the Division's mailing procedures are without merit.

Since the CMR is the only evidence in the record which supports the Division's position that its standard mailing procedure described in the affidavits was actually followed in this case in the mailing of the Notice of Determination at issue herein, the CMR is a crucial piece of evidence in this proceeding. As in *Roland*, the Division's affidavit in the present case states that the postal service representative circled the total number of pieces listed to indicate that this was

the number of pieces received by the USPS. However, unlike *Roland*, the affiant explains the basis of his knowledge that such an event actually occurred in the following statement:

My knowledge that the postal employee circled the “total number of pieces” for the purpose of indicating that 358 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.

In opposition to the Division’s evidence, petitioner offers no evidence in support of its position that mailing of the notice at issue did not actually occur on August 5, 1996 or that the Division failed to follow its procedures in mailing this notice. While petitioner argues that the circled number on the CMR is not prima facie evidence that it was placed there by an employee of the USPS or that it indicates receipt by the USPS of the pieces of mail indicated on the CMR, petitioner offers no evidence to contradict that put forward by the Division. Absent such evidence, petitioner has not raised an issue of fact requiring a trial.

Based on the foregoing, the determination of the Administrative Law Judge is affirmed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Service Merchandise Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Service Merchandise Co., Inc. is dismissed.

DATED: Troy, New York
January 14, 1999

/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