

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**IRWIN KUSHNER** :

DECISION  
DTA NO. 817039

for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law for :  
the Period July 5, 1997 through November 15, 1997 and :  
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 September 1, 1997 through November 30, 1997.

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Petitioner Irwin Kushner, 3 Pat Malone Drive, Suffern, New York 10901, filed an exception to the determination on remand of the Administrative Law Judge issued on September 27, 2001. Petitioner appeared by Stein Riso Mantel, LLP (Dennis L. Stein, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether the Division of Taxation is entitled to summary determination on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing before

the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency and notice of determination.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “11,” “13,” “14” and “21” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioner did not protest the notices in these matters within 90 days of the date the notices were issued, the Division of Tax Appeals lacks jurisdiction to review these notices.

Petitioner's petition, which was received by the Division of Tax Appeals on April 7, 1999, challenged two notices asserting deficiencies of withholding tax. It also challenged an assessment of sales tax. Two notices and demands, dated December 3, 1998, asserted deficiencies of withholding tax as follows:

Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
9/27/97	\$0.00	\$0.00	\$12,303.58	\$0.00	\$12,303.58
11/15/97	0.00	0.00	5,681.07	0.00	5,681.07

According to a Consolidated Statement of Tax Liabilities, which was attached to the petition, there is also an outstanding liability of sales tax in the amount of \$164,840.95 plus interest in the amount of \$19,961.70 and penalty in the amount of \$34,597.59 less payments or credits of \$945.00 for a balance due of \$218,455.24.

The petition included a copy of a conciliation order, CMS No. 172456, dated January 15, 1999, which denied petitioner's request for a conciliation conference because “the notices were issued on August 10, 1998, but the request was not received until December 14, 1998, or in excess of 90 days, the request is late filed.”

The Division included with its motion papers a copy of its answer to the petition, dated June 10, 1999, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, two notices of deficiency dated August 10, 1998 and a notice of determination dated August 10, 1999.

As noted, the Division submitted two affidavits pertaining to the mailing of the notices. The first affidavit was that of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center who attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service (“USPS”). Mr. Baisley states that after a notice is placed in the “outgoing certified mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to a branch of the United States Postal Service in the Albany area. The postal employee affixes a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley states that:

[h]ere the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail

record to indicate that this was the total number of pieces received at the Post Office. The U.S. Postmark on each page of the mail record is the official acknowledgment of the U.S. Post Office of the receipt of the pieces of mail recorded on the certified mail record. My knowledge that the postal employee circled the 'total number of pieces' for the purposes of indicating that 357 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phrase 'total pieces and amounts listed' if the number of pieces received equals that listed or 2) by writing the total number received after the phrase 'total pieces received at the Post Office.' (Baisley affidavit, p. 2.)

He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on August 7, 1998 an employee of the mail processing center delivered three pieces of certified mail addressed to Irwin Kushner to the Colonie Center Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the postmarked certified mail record delivered to and accepted by the Postal Service on August 7, 1998 for the records maintained by the Case and Resource Tracking System ("CARTS") control unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a

computer printout referred to as the “certified mail record.” Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to the mailing at issue consisted of 33 fan-folded (connected) pages and included the 3 notices issued to Irwin Kushner on August 7, 1998. She described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

Attached to Ms. Mahon’s affidavit, as exhibit “A,” is a copy of pages 1, 14 and 33 of the original certified mail record issued by the Division on August 8, 1998. The certified mail record includes notices L015453886, L015453887 and L015453888 issued to Irwin Kushner. According to Ms. Mahon, the certified control numbers run consecutively without any deletions. There are 11 entries on each page with the exception of page 33 which contains 5 entries. Ms. Mahon notes that portions of the certified mail record, which are attached to her affidavit, have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

The fifth paragraph of Ms. Mahon’s affidavit states:

[i]n the upper left hand corner of page 1 of the certified mail record the date July 30, 1998 was manually changed to August 7, 1993. The typewritten date, July 30, 1998, 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 July 30, 1998 to August 7, 1998 was made by personnel in the Department’s mail room, who changed the date so that it conformed to the actual

date that the Notices and the certified mail record were delivered into the possession of the U.S. Postal Service. (Mahon affidavit, p. 2.)

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. Ms. Mahon states that in this instance a Postal Service representative initialed page 33 of the certified mail record and affixed a postmark to each of the 33 pages.

As Ms. Mahon points out, page 14 of the certified mail record indicates that notices numbered L015453886, L015453887 and L015453888 were sent to Irwin Kushner, by certified mail using control numbers P 911 008 814, P 911 008 815 and P 911 008 816. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on August 7, 1998. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS control unit.

As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mail record and a copy of each of the notices. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." The upper right-hand corners of the pages are numbered 1, 14 and 33, respectively. The upper left-hand corner of each

page contains the printed date of “7/30/98.” On the first page, this date was crossed out and a new date of “8/7/98” was written above the original printed date. Each of the three pages contains columns labeled “Certified No.,” “Notice Number,” “Name of Addressee, Street and P.O. Address,” “Postage,” “Fee” and “RR Fee.” Certified numbers are listed in a vertical column on the left side of each page running successively. Page 14 contains three entries which set forth petitioner's name and address, notice numbers (L 015453886 through L 015453888) and certified control numbers (P 911 008 814 through P 911 008 816). The notice numbers and the certified control numbers correspond with those found on the notices which are attached to the affidavit of Ms. Mahon. On page 33, the “total pieces and amounts listed” is stated to be 357. Also, the number 357 is circled adjacent to the statement “total pieces received at the post office.” In addition, the total fee of \$481.95 is consistent with the mailing of 357 pieces of mail at a fee of \$1.35. A stamp of “August 7, 1998” from the Colonie Center Branch of the United States Postal Service appears on each of the three pages of the certified mail record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on page 33.

As exhibit B, the Division offered copies of two notices of deficiency and a notice of determination. Each of the notices of deficiency are dated August 10, 1998 and state that withholding tax is due. The first notice of deficiency lists assessment number L 015453886, states that the total amount due is \$5,681.07 and has certified mail number P 911 008 814 printed at the top. The second notice of deficiency lists assessment number L 015453887, states that the total amount due is \$12,303.58 and has certified control number P 911 008 815 printed at the

top. The notice of determination lists assessment number L 015453888, states that the total amount due is \$205,985.10 and bears certified control number P 911 008 816.

We modify finding of fact “11” of the Administrative Law Judge’s determination to read as follows:

In opposition to the motion for summary determination, petitioner’s representative, Dennis L. Stein, Esq., states that the Division concluded that petitioner was responsible for withholding and sales tax as an officer of U.S. Bus Manufacturing, Inc. According to Mr. Stein, petitioner first received notice of this determination on or about December 3, 1998 when he received a Notice and Demand for Payment of Tax Due. This notice contained a Consolidated Statement of Liabilities for the periods ended September 27, 1997, November 15, 1997 and November 30, 1997.

Upon receiving the Notice and Demand, petitioner filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services (“BCMS”) received the request on December 14, 1998. On January 15, 1999, BCMS dismissed the request as untimely, finding that the time to request a conference had expired.

Petitioner submitted an affidavit which confirmed that on or about December 3, 1998 he first received notice that the Division had determined that he was a responsible person for the withholding tax and sales tax liabilities of U.S. Bus Manufacturing, Inc. Mr. Kushner explained that he received the notice in the form of a Notice and Demand for Payment of Tax Due. Mr. Kushner further states that upon receipt of the notice, he immediately contacted his attorney and made a request for a conciliation conference. This request was denied on the grounds that he had not requested a conference within 90 days of an August 10, 1998 Notice of Deficiency. Petitioner concludes with the statement that he never received any of the notices purportedly sent on August 7, 1998 and he did not refuse to sign for any certified letters.<sup>1</sup>

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<sup>1</sup>We modified finding of fact “11” of the Administrative Law Judge’s determination by deleting sentences that were more accurately characterized as arguments rather than factual in nature.



After due consideration of the motion papers, affidavits and all pleadings and documents submitted, the Administrative Law Judge determined, on November 12, 1999, that the Division established its standard procedure for issuing notices of determination and deficiency and that this procedure was followed on August 7, 1998 in regard to the notices issued to petitioner. The Administrative Law Judge then concluded that the petition was untimely, granted the Division's motion for summary determination and dismissed the petition of Irwin Kushner.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

On exception, petitioner argued that the Administrative Law Judge erred in concluding that the Division had met its burden of showing the standards for issuing notices of deficiency and determination and that it followed its procedures in this case.<sup>2</sup>

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

In its decision, dated October 19, 2000, the Tax Appeals Tribunal ("Tribunal") held that the excerpts from the certified mail record did not establish that the mailing procedure, described by Ms. Mahon and Mr. Baisley, was followed. In this regard, the Tribunal pointed out that there was no way of associating the pages of the certified mail record which were provided. It also noted that the presence of a postmark on the page which listed petitioner's name is not sufficient to prove that an item listed on that page was delivered to the post office on the postmark date.

The Tribunal further explained that it was troubled by the Division's failure to offer evidence that it had mailed the notices to petitioner's last known address or that the address used was the address stated by petitioner on the last return filed by him. Lastly, the Tribunal expressed concern that petitioner may have informed the Division that he had a representative prior to the date of

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<sup>2</sup>We modified finding of fact "13" of the Administrative Law Judge's determination to delete references to arguments which are not properly included as factual findings.

issuance of the notices and that the representative was not served with a copy of the statutory notices. Thus, the Tribunal remanded the case back to the Administrative Law Judge since it found certain material and factual issues to exist.<sup>3</sup>

On December 20, 2000, the hearing on remand was convened on the issue of jurisdiction. On the basis of that hearing, the following additional findings of fact were made.

The notices at issue in this matter were addressed to petitioner at 1 Ackertown Road, Chestnut Ridge, N.Y. 10952-4902.

Petitioner and his wife filed a joint New York State Resident Income Tax Return for the year 1996. On the return, Mr. Kushner and his wife stated that their address was 1 Ackerton Road, Chestnut Ridge, New York 10952. Mr. Kushner's signature is dated August 14, 1997.

Petitioner and his wife filed a joint New York State resident income tax return for the year 1997 which stated that their address was 1 Ackerton Road, Chestnut Ridge, New York 10952. Petitioner's signature was dated October 14, 1998. The return included an Application for Automatic Extension of Time to File for Individuals which was dated August 13, 1998 by petitioner's representative. The application had the same address as was shown on the return to which it was attached.

In a letter dated December 3, 1998, petitioner's representative, Dennis L. Stein, advised the Tax Compliance Division that he was authorized to represent Mr. Kushner and was responding to a Notice and Demand dated December 3, 1998. The earliest date stamped on the letter, which accompanied a power of attorney form, is December 7, 1998. The power of

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<sup>3</sup>We modified finding of fact "14" of the Administrative Law Judge's determination to more accurately reflect the progression of this case through the Division of Tax Appeals.

attorney form stated that Mr. Kushner's address was 3 Pat Malone Drive, Suffern, New York and made reference to notice or assessment number L 015453887-3. The signatures of Mr. Kushner and the notary public were dated July 22, 1998.

On October 15, 1998, the firm of U.S. Bus Mfg. Co., Inc. filed a New York State General Business Corporation Franchise Tax Return for the year 1997. The return stated that the corporation's mailing address was 3 Pat Malone Drive, Suffern, New York 10901. Mr. Kushner was the only officer listed on the return's schedule pertaining to compensation of officers.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

Ms. Mahon is a principal clerk who supervises four units, one of which is engaged in mailing. This unit is responsible for picking up the notices with the corresponding certified mail record from the Information Systems Management ("ISM") department, where the notices are printed. The supervisor of the unit responsible for the mailing, Arthur Amour, receives the documents and examines them to make sure that nothing is missing. Because of the volume, Mr. Amour is not able to examine all of the documents. Rather, he usually examines the first and last document in the group. Thereafter, Mr. Amour prepares a work order known as an AD84 and clips it to the certified mail record. In this case, a box on the work order was checked for August 7, 1998 which is the date the documents were to be mailed. The notices are then taken in pallets or wagons to the mechanical section.<sup>4</sup>

The affidavit signed by Ms. Mahon was drafted by an individual in the Department's Office of Counsel. It is Ms. Mahon's practice to read affidavits before she signs them. However, she did not check with Mr. Armour to determine what specifically happened in this

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<sup>4</sup>We modified finding of fact "21" of the Administrative Law Judge's determination by clarifying the name of the department where the notices are printed.

case because the steps are the same for all affidavits. The procedure has never changed. Mr. Armour would have come to her if there was a problem with the procedure. Mr. Armour and Ms. Mahon are the only people who perform the mailing task at issue. Thus, if Mr. Armour was unavailable, Ms. Mahon would perform the task.

Ms. Mahon has no first hand knowledge of what happened when the certified mail record involved in this matter arrived in her office.

The date of July 30, 1998, which is printed on the certified mail record, is the date the document was printed. The reason for the difference in dates between the certified mail record and the dates on the notices, i.e., August 10, 1998, is to allow extra time for a mailing in the event that an unanticipated problem, such as a printer breaking, occurs.

If a notice was returned by the post office it would go to the NIXIE Unit. Ms. Mahon does not have any way of knowing if a particular item is returned. Once the workers leave the certified mail record and the notices in the mail room, she does not have any personal knowledge of what happens next. Further, she does not have any personal knowledge of what the post office is told to do with the documents when the Division's employees go to the post office.

Mr. Baisley is responsible for interpreting the postal rules and regulations, making certain that the postal rules and regulations are followed and seeing to it that the mail is sent for the least amount of money. He does not see all of the certified mail records that go through his department. Mr. Baisley saw the certified mail record in this case for the first time in June 1999 which was at or about the time he signed an affidavit.

Up to 30 people process certified mail and it would be almost impossible to determine which employees processed this certified mail record.

The mail which Mr. Baisley's staff receives from a CARTS unit consists of the notices and the listing. The notices are in the same order as the mail log. Upon receipt of the notices and the certified mail record, a machine operator is assigned the task of using a machine to insert the notices into an envelope. Following receipt of this assignment, the machine operator, as a quality control check, will examine the first and last notices to make sure that listing corresponds with the notices. A person would not examine each of the notices contained on the certified mail record to determine if a notice was being mailed to each person listed.

When the notices are inserted into the machine, they are triple folded and placed into an envelope. There could be three notices for one taxpayer and six notices for another taxpayer. In order to accommodate the differences, the Division uses machines which are able to read small marks on the side of the papers which tell the machine what is the first and last pages of a notice. Postage is affixed to the envelopes as the notices are being inserted. In the process, the envelopes are sealed and a machine count of the number of envelopes is taken. When the envelopes are discharged by the machine, they are in the same order as the listing on the certified mail record. After the notices have been run through the machine, the operator compares the number of mailings with the listing. He also compares the first and last envelopes, as well as eight randomly selected envelopes in the middle of the group against the certified mail record. If any of the ten envelopes do not match the certified mail record, the whole job is returned.

The machines which place the notices into the envelopes have a safety mechanism which makes the machines stop if there is a mismatch, something jams or a piece of paper is torn.

As a quality control check, if there are less than a certain number of pieces of mail, the number of pieces of mail will be manually counted.<sup>5</sup> If there is a large mailing, the machine operator will pull 10 samples which will include the first and last notices and compare them with the certified mail record. When the quality control check is completed, the notices and certified mail record are sent to the post office.

If a piece of mail is not delivered, it is returned to Mr. Baisley's office. There is a record of what is returned. In anticipation of testifying at the hearing, Mr. Baisley made inquiries and determined that a NIXIE indicator had not been placed on the file indicating that the notices were not returned by the post office. He did not check for a NIXIE indicator prior to signing his affidavit in June 1999.

Mr. Baisley read his affidavit when it was given to him. However, he did not speak to anyone about what happened to the certified mail record. In addition, he did not review any records or make inquiries to determine if any mail sent to petitioner was returned.

After the quality control checks are performed, the envelopes and certified mail record are taken to the post office which performs a verification of the mail. The post office indicates on the Division's listing or its own form that it is accepting the mail through the use of a round stamp. This is the Division's certification that it delivered the notices and the certified mail record to the post office. An employee of the Division waits at the post office while an employee of the post office stamps each sheet. The employee of the Division then returns to his office with the certified mail record.

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<sup>5</sup> It is unclear what the cutoff for a manual count is. However, it appears to be either 100 or 200 pieces of mail.

Although he was uncertain, Mr. Baisley believes that it was probably a member of his staff who crossed out the July 30, 1998 date and wrote August 7, 1998 on the certified mail record.

At the hearing, the Division offered a complete copy of a redacted certified mail record which runs consecutively from page 1 to page 33. Pages 1, 14 and 33 of the complete certified mail record correspond with pages 1, 14 and 33 which were attached to the Division's motion. The certified mail numbers run consecutively on each page and from page to page. The original date on which the certified mail record was printed, July 30, 1998, is visible on each page. Page 14 of the certified mail record shows that 3 notices were issued to petitioner at 1 Ackerton Road, Chestnut Ridge, N.Y. 10952-4902.

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

Initially, the Administrative Law Judge addressed certain factual questions raised by petitioner. Petitioner argued that the Division should withdraw the affidavits of Mr. Baisley and Ms. Mahon on the ground that they contained statements that were contradicted by the testimony at the hearing.

With respect to the Mahon affidavit, the Administrative Law Judge concluded that, when examined in context, it is clear that the affidavit did not contradict the testimony she presented at the hearing. Similarly, petitioner argued that Mr. Baisley's testimony was contradicted by his affidavit on a few facts. Again, the Administrative Law Judge noted that petitioner's argument was based upon taking Mr. Baisley's testimony out of context. Accordingly, the Administrative Law Judge concluded that Mr. Baisley's affidavit is not contradicted by his testimony and that there is no basis for excluding the testimony of either Mr. Baisley or Ms. Mahon.

Next, petitioner argued that the Division's proof was deficient because the Division did not produce any evidence that the notices contained in the mail log were actually mailed to petitioner. In this regard, petitioner noted that neither Ms. Mahon nor Mr. Baisley reviewed anything before signing their affidavits and neither had any first hand knowledge that their units' procedures were followed in this case. The Administrative Law Judge rejected this argument noting "[t]here is no requirement to produce employees with personal knowledge of the mailing of each individual notice of determination" (*Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997).

The Administrative Law Judge pointed out that, throughout his brief, petitioner argued that many of the statements of Mr. Baisley and Ms. Mahon were not based on first hand knowledge. This was the same argument that was made in response to the Division's motion for summary determination. The Administrative Law Judge noted that petitioner cannot prevail by simply making this allegation. Rather, petitioner must present evidence to show that the mailing did not occur as claimed by the Division or that the Division did not follow its mailing procedures (*see, Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999). The Administrative Law Judge concluded that petitioner had failed to offer any evidence to satisfy this burden.

Petitioner also challenged the change in dates on the mailing log arguing that such procedure shows a serious defect in the Division's mailing procedure. Petitioner noted that the notices are dated August 10, 1998 whereas the date on the mailing log was changed to August 7, 1998. Petitioner also pointed out that Ms. Mahon did not have first hand knowledge of who made the change to the mailing log and Mr. Baisley was uncertain as to who made the change or



when it was made. The Administrative Law Judge rejected this argument and noted that there is no requirement that the Division be able to identify the individual who changed the date on the certified mail record.

Next, petitioner argued that the mailing record is deficient because it does not indicate how many pieces of mail were received at the post office. This argument too was rejected by the Administrative Law Judge. The Administrative Law Judge pointed out that Mr. Baisley stated that the Division specifically requested that postal employees either circle the number of pieces or write the number of pieces on the mailing record to show the total number of pieces received. The record in this matter shows that the number 357 is circled adjacent to the phrase “total pieces and amounts listed.” Further, the Administrative Law Judge noted, petitioner cited no authority for the proposition that the Division is required to identify the particular postal employee who received the Division’s mail.

The Administrative Law Judge next addressed issues which were articulated by the Tribunal in remanding this matter. Specifically, we highlighted the failure of the Division to offer the complete certified mail record. In response to this concern, the Division has submitted the complete certified mail record which runs sequentially from page 1 to page 33. The certified mail numbers run consecutively on each page and from page to page. The original date on which the certified mail record was printed, July 30, 1998, is visible on each page. In view of the forgoing, the Administrative Law Judge found that each of the pages offered as the certified mail record are from the same document.

The Administrative Law Judge also concluded that the Division established that the notices were sent to petitioner at the address which was stated on his last return (*see*, Tax Law

§§ 691, 1147). Petitioner's New York State income tax return for the year 1996, which was dated August 6, 1997 by petitioner's representative, lists the same address as was used on the notices. Apparently, petitioner remained at this address for a period of time after the notices were issued, because petitioner's New York State income tax return for the year 1997, which was dated October 13, 1998 by petitioner's representative, also lists the address which was used on the notices. The address of "3 Pat Malone Drive, Suffern, New York 10901," which appears on the power of attorney form and the petition, is actually the address of a corporation with which petitioner was affiliated. The Administrative Law Judge again noted that petitioner presented no evidence or argument that the notices were sent to the wrong address.

The last issue addressed by the Administrative Law Judge was whether the Division should have mailed a copy of the notices to petitioner's representative. This, in turn, depended on whether petitioner advised the Division that he had a representative prior to the issuance of the notices. The signature of the notary public on the power of attorney form, which appointed Mr. Stein to appear on petitioner's behalf, was dated July 22, 1998. However, the cover letter which accompanied the power of attorney form was dated December 3, 1998. The earliest indated stamp on the cover letter and power of attorney form show that these documents were received by the tax compliance section on December 7, 1998. In view of the foregoing, the Administrative Law Judge concluded that the Division was not on notice that petitioner had a representative until December 7, 1998 and it was not required to send petitioner's representative a copy of the notices on August 7, 1998.

Having resolved the issues raised by the Tribunal on remand, the Administrative Law Judge concluded that the Division had established August 7, 1998 as the mailing date of the

notices to petitioner. The Administrative Law Judge found that the Division is entitled to the presumption of receipt unless petitioner could rebut the presumption by showing that he did not receive the notices (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Esther Parking Corp.*, Tax Appeals Tribunal, December 18, 1997; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Here, petitioner did not present any evidence apart from the denial of receipt which is not sufficient to rebut the presumption. Accordingly, the Administrative Law Judge concluded that the petition was not timely filed by petitioner. The Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition.

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

Petitioner offers the same arguments here that he raised below, including that the mailing affidavits of Ms. Mahon and Mr. Baisley conflict with their testimony. Petitioner also argues that the testimony of Ms. Mahon and Mr. Baisley demonstrate that they did not have first hand knowledge of whether the Division's mailing standards were followed in this case.

Petitioner continues to argue that Ms. Mahon's affidavit contains information which is not corroborated by Mr. Baisley's affidavit or his testimony at the hearing.

Petitioner urges that Mr. Baisley's affidavit must be rejected because his testimony conflicts with his affidavit and because he lacks first hand knowledge of whether petitioner received proper notice.

Petitioner claims that Mr. Baisley cannot state what procedures are followed by the post office once the Division delivers the mail log and the accompanying mail to the post office. In this regard, petitioner submits that Mr. Baisley was unable to state which postal employee's

initials appear on page 33 of the mail log, whether the post office counts each envelope and matches them with the mail log or any other procedures followed by the post office regarding the certified mail. Petitioner notes that Mr. Baisley was unable to state who made the change to the mail log or when it was made.

Petitioner contends that the mailing log is flawed, because it does not indicate how many pieces of mail were actually delivered to the post office.

Petitioner argues that the Division has failed to prove that the notices contained in the mail log were actually mailed to petitioner.

### ***OPINION***

The Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner. Thus, we affirm the determination of the Administrative Law Judge for the reasons stated therein. We note that the burden of proof here was on petitioner to present evidence to show that the mailing did not occur as claimed by the Division or that the Division did not follow its own mailing procedures (*Matter of Service Merchandise Co., supra*). Petitioner has failed to satisfy that burden. Petitioner's arguments are not a substitute for evidence. Petitioner has offered no evidence below or any arguments here, which would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Irwin Kushner is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Irwin Kushner is dismissed.

DATED: Troy, New York  
June 27, 2002

/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