STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GEORGE J. PERK, JR.	:	DECISION DTA NO. 817123
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Period January 1, 1993 through June 30, 1994.	:	

Petitioner George J. Perk, Jr., 715 Ashley Avenue, Brielle, New Jersey 08730, filed an exception to the determination of the Administrative Law Judge issued on April 19, 2001. Petitioner appeared by David Bunning, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a letter in lieu of a formal reply. 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 is entitled to summary determination in its favor on the ground that the material facts presented show that petitioner's request for a conciliation conference with the Bureau of Conciliation and Mediation Services was untimely.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, George J. Perk, the following notices of deficiency:

(a) A Notice of Deficiency, identified by Assessment ID L-015464924-3, dated August 17, 1998, asserting a penalty due in the amount of $13,907.04 for the periods ended January 15, 1994 through June 30, 1994. The Notice of Deficiency is addressed to "Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727."

The Notice of Deficiency states that "You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98." The notice then states, in part, "[i]f we do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action."

(b) A Notice of Deficiency, identified by Assessment ID L-015464921-6, dated August 17, 1998, asserting a penalty due in the amount of $6,071.49 for the periods ended April 30, 1993 through December 31, 1993. The Notice of Deficiency is addressed to "Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727."

The Notice of Deficiency states that "You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98." The notice then states, in part, "[i]f we do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action."

(c) A Notice of Deficiency, identified by Assessment ID L-015464923-4, dated August 17, 1998, asserting a penalty due in the amount of $20,860.56 for the periods ended January 15, 1994 through June 30, 1994. The Notice of Deficiency is addressed to "Perk - George J Jr, 137 Stone Fence Rd, Bernardsville, NJ 07924-1727."

The Notice of Deficiency states that "You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 11/15/98." The notice then states, in part, "[i]f we do not receive a response to this notice by 11/15/98: This notice will become an assessment subject to collection action."

All three notices of deficiency indicated that they were being issued in connection with Mr. Perk's position as an officer or responsible person of American Futures Group, Inc. Petitioner claims he never received such notices of deficiency.

Petitioner did receive three notices and demands for payment dated December 18, 1998, addressed to him at P.O. Box 832, Bernardsville, New Jersey 07924-0832. It was from the receipt of such notices that petitioner filed a request for a conciliation conference.[1]

The Division submitted a copy of petitioner's Request for Conciliation Conference, dated December 17, 1998. Petitioner requested the conference alleging that American Futures Group, Inc. had paid at least some, if not all of the tax asserted due against him. Additionally, petitioner argued he never received the notices of deficiency with respect to the alleged liabilities and had not been afforded the opportunity to contest them. Petitioner did receive a notice of deficiency dated August 17, 1998, regarding a proposed assessment of $1,893.15 for the periods ended

[1] Petitioner's representative suggests that the Division mailed the notices and demands before the date that appears on them, since petitioner filed his request for a conference the day before the date which appears on the notices and demands. No further evidence on this point was introduced into the record.

April 30, 1993 to December 31, 1993, and requested a conference on November 5, 1998 which was then pending. Further, petitioner argued that he was not a person required to collect or pay over the taxes in issue. A copy of the Federal Express envelope bearing the Conciliation Request was attached to the request, bearing a ship date of December 17, 1998.

A Conciliation Order Dismissing Request, dated February 19, 1999, was issued by the Bureau of Conciliation and Mediation Services ("BCMS"), bearing the following explanation:

> "The Tax Law requires that a request be filed within 90 Days from the date of the statutory notice. Since the notices were issued on August 17, 1998, but the request was not mailed until December 18,1998, or in excess of 90 days, the request is late filed."

A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order.

The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office, for each of the three assessments. These affidavits describe the general procedures for the preparation and mailing of the notices of deficiency, and describe how such procedures were followed in this case. The affidavits of Ms. Mahon and Mr. Baisley address all three notices in issue.

The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable,

Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record, ("CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are 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. Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the sealed, stamped envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A postal employee signs and affixes a postmark to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number of the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

In support of its position that the procedures outlined in Finding of Fact "7" were followed in this case, the Division has also submitted a copy of the CMR listing the notices at issue in this matter. The CMR consists of 40 pages with 11 entries on each page, with the exception of page 40 which bears 9 entries. It shows a printed date of "08/07/98" on each of the 40 pages. On page one the printed date has a line through it and above it is handwritten the date of "8-17-98." There is a consecutive listing of 438 certified control numbers beginning with P 911 002 315 and ending with P 911 002 752. There is a Postal Service postmark of August 17, 1998 on each page of the CMR. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 438. Below the phrase "TOTAL PIECES RECEIVED AT POST OFFICE" is a handwritten "438" and a set of initials.

Petitioner George Perk's name is listed on page nine of the August 17, 1998 CMR. The certified number listed for the notices sent to petitioner are P 911 002 404, P 911 002 406, and P 911 002 407 which match the certified numbers shown at the top of petitioner's notices. The notice numbers listed on the CMR for petitioner's notice are L 015464921, L 015464923, and L 015464924, which match the numbers appearing on the notices. The name and address of

petitioner, George Perk, is listed next and also corresponds to the information set forth on petitioner's notices. There is a USPS postmark of August 17, 1998 on page nine of the CMR.

From the beginning of 1998 until May of that year, Mr. Perk resided at 137 Stone Fence Road, Bernardsville, New Jersey 07924, when he moved to 21 Mount Airey Road, Bernardsville, New Jersey 07924. In July 1998, petitioner then moved to 272 U.S. Route 46 West, Suite 106, Rockaway Boro, New Jersey 07866.

The Division submitted the first two pages of petitioner's 1997 New York State Nonresident and Part-Year Resident Income Tax Return (Form IT-203). The return, dated April 14, 1998, shows petitioner's address as 137 Stone Fence Road, Bernardsville, NJ 07924.

The Division also submitted the first two pages of an Amended Nonresident and Part-Year Resident Income Tax Return (Form IT-203-X) for 1997 bearing petitioner's name. The return shows petitioner's address as 272 US Route 46 W, Suite 106, Rockaway Boro, NJ 07866. The amended return is date stamped as received by the Department of Taxation and Finance on August 20, 1998.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that any party appearing before the Division of Tax Appeals may bring a motion for summary determination. Such motion shall 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], ***see also***, Tax Law § 2006[6]).

The Administrative Law Judge indicated that the basis of the Division's motion herein was that petitioner failed to file a timely request for a conciliation conference or petition for a

tax appeals hearing in protest of the notices of deficiency in issue. The Administrative Law Judge observed that when the Division issues a Notice of Deficiency of income tax, Tax Law § 681(a) requires that such notice must be mailed by certified or registered mail to the taxpayer at his last known address. Relying on applicable case law, the Administrative Law Judge pointed out that the Division is entitled to rely upon the address given 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. Further, where the Division establishes that its statutory notice of deficiency has been properly issued, the notice is valid and sufficient whether or not actually received.

The Administrative Law Judge noted that where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference filed with BCMS is at issue, the Division is required to establish that its original notice was properly mailed and the date of mailing. To do so, the Division must demonstrate evidence of its general mailing procedure and that this procedure was adhered to with respect to the notices in question. If the Division does this, a presumption of proper mailing arises. If the Division fails to carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed.

In this matter, the Administrative Law Judge concluded that the Division had established its general mailing procedures for the mailing of notices of deficiency through the affidavits of its employees. Further, the Administrative Law Judge concluded that the August 17, 1998 CMR demonstrated that the Division's mailing procedures were followed in regard to the specific notices at issue herein and that the Division had established that the notices of deficiency were mailed on August 17, 1998.

The Administrative Law Judge rejected petitioner's arguments that since the Division added four additional digits to petitioner's five-digit zip code, it did not mail the notices to petitioner's last known address. The Administrative Law Judge concluded that with the exception of the last four digits of the zip code, the address used by the Division (137 Stone Fence Rd, Bernardsville, NJ 07924-1727) was the address petitioner provided to the Division in his last filed return. The Administrative Law Judge found that the additional four zip code numbers did not change petitioner's address, but merely enhanced the accuracy of the delivery location. Relying on ***Matter of Karolight, Ltd.*** (Tax Appeals Tribunal, July 30, 1992), the Administrative Law Judge concluded that in any event, the failure to include a proper zip code did not mean that a notice was not mailed to the last known address.

The Administrative Law Judge rejected petitioner's arguments that the Division failed to prove proper mailing since the Division's affiants had no personal knowledge of the actual mailing of the notices at issue. The Administrative Law Judge, relying on applicable case law, held that the Division is not required to produce witnesses with personal knowledge of the mailing of the notices at issue.

Further, the Administrative Law Judge rejected petitioner's assertions that when petitioner filed his amended Form IT-203 on August 20, 1998, the Division should have mailed the notices and demands to petitioner at his new address within the 90-day period petitioner had to respond to the notices of deficiency. The Administrative Law Judge concluded that the Division did not act improperly in not mailing the notices and demands within that 90-day period.

The Administrative Law Judge also rejected petitioner's argument that, as a result of the decision ***Matter of Meyers v. Tax Appeals Tribunal*** (201 AD2d 185, 615 NYS2d 90, ***lv denied*** 84 NY2d 810, 621 NYS2d 519), he was entitled to a prepayment review of the notices and demands. In ***Meyers***, the Court held that Tax Law § 2006(4) imposes a duty to provide a hearing as a matter of right upon request, unless a right to such a hearing is specifically provided for, modified or denied by another provision of the Tax Law. Unlike ***Meyers***, here there was a prior opportunity for a hearing pursuant to Tax Law § 689(b) on the notices of deficiency. Having permitted the 90-day time period to lapse, the Administrative Law Judge found that petitioner did not have an additional right to a hearing upon the notices and demands.

Thus, the Administrative Law Judge concluded that pursuant to Tax Law § 681(b), petitioner had 90 days from the mailing of each Notice of Deficiency either to file a petition for a hearing with the Division of Tax Appeals or to file a request for a conciliation conference with BCMS. The last day on which petitioner could have made a timely request for a conference or filed a timely petition for a hearing was November 16, 1998. Since petitioner's request for a conference was not filed until December 18, 1998, it was untimely. The Administrative Law Judge found that there were no triable issues of fact in this case and granted the Division's motion for summary determination. The Administrative Law Judge also noted that petitioner might pay the disputed tax and, within two years from the date of payment, apply for a refund. If his request for a refund is denied, petitioner may then proceed with another petition for a hearing or request a conciliation conference.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that despite the requirements of Tax Law § 681(a), the Division did not mail the notices at issue to petitioner at his last known address. Specifically, the Division addressed such notices to petitioner using an incorrect zip code containing nine digits instead of the five digit code supplied by petitioner in his last-filed tax return. Petitioner maintains that an incorrect zip code can be considered immaterial only if the notice is actually received by the taxpayer. Where the notice is misaddressed and not received, a taxpayer is entitled to a hearing on the merits.

Petitioner asserts that the Division has failed to prove mailing of the notices by the affidavits of its employees, since none of them had any personal knowledge of the preparation or mailing of the notices at issue. Similarly, there is no evidence that the number "438", appearing at the end of the mailing record, was actually placed there by a postal employee. Petitioner argues that the Division could have cured the defective mailing by timely mailing notices and demands to petitioner at his correct address. In addition, petitioner argues that he is entitled to a prepayment review of the merits of the notices and demands issued to him. Relying on ***Matter of Meyers v. Tax Appeals Tribunal (supra)***, petitioner argues that his request for a conciliation conference was timely in relation to the mailing date of the notices and demands.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that it was entitled to summary determination since petitioner did not meet his burden of proof to show that petitioner's protest of the notices of deficiency was timely.

OPINION

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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) 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).

Tax Law § 681 authorizes the Division to issue a notice of deficiency of income tax to a taxpayer, to be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state, which will become an assessment of such tax 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. Tax Law § 691(b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequent thereto the taxpayer has notified the Division of a change in address. Tax Law § 681 does not require actual receipt by the taxpayer (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). The timely filing of a request for a conference or a petition is a jurisdictional prerequisite for review of a notice of deficiency (***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***, ***supra***). The Division must prove both the fact and date of mailing of the notice at issue (***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the postal service for mailing (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***Matter of Katz***, ***supra***). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (***see, Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111).

To demonstrate proper mailing, this Tribunal has held that 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 Internal Revenue

Service]" (***Wheat v. Commissioner, supra,*** 63 TCM, at 2958***, citing United States v. Zolla***, 724 F2d 808, 84-1 USTC ¶ 9175, ***cert denied*** 469 US 830, 83 L Ed 2d 59). When the Internal Revenue Service (hereinafter "IRS") is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

This Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (***Matter of Air Flex Custom Furniture,*** Tax Appeals Tribunal, November 25, 1992). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (***Coleman v. Commissioner,*** 94 T.C. 82, 91). Further, this Tribunal has found that a properly completed certified mail record is substantively the same as the Postal Service Form 3877 (***see, Matter of Montesanto***, Tax Appeals Tribunal, March 31, 1994).

The Division's proof in this case offered to establish the general procedure for the mailing of notices of deficiency pursuant to Tax Law § 681 consists of the affidavits of Geraldine Mahon and James Baisley. The Division's affiants describe a procedure which allows each page of the certified mail record to be associated with the other pages: the pages are connected when they are delivered to the USPS and remain connected when they are returned to the unit which generated the certified mail record (the CARTS Control Unit) and the

certified mail numbers run consecutively from page to page. Moreover, the number of pieces of mail listed on the certified mail record is totaled at the bottom of the last page and a postal employee enters the actual number of items received by the USPS and signs or initials the certified mail record. Exhibit "A" of the Mahon affidavit contains a copy of the 40-page computer-generated certified mail record. We conclude, as did the Administrative Law Judge, that exhibit "A" of the Mahon affidavit shows that the procedure articulated by the Division's affiants was followed in this case.

We reject petitioner's argument that by the addition of four digits to petitioner's five digit zip code, the Division failed to mail the Notices of Deficiency at issue to petitioner at petitioner's last known address. The Administrative Law Judge noted that the United States Tax Court, in ***Boothe v. Commissioner*** (T.C. Memo 1986-361, 52 TCM 135) and ***Zee v. Commissioner*** (T.C. Memo 1987-83, 53 TCM 108), concluded that the use of an incorrect zip code does not invalidate the notice at issue. Further, in ***Pickering v. Commissioner,*** (T.C. Memo 1998-142, 75 TCM 2152) the Tax Court held that "the principle that an incorrect zip code constitutes an inconsequential error with respect to the mailing of a notice of deficiency has been applied in the absence of evidence of actual delivery of the notice." In ***Matter of Karolight, Ltd. (supra)***, this Tribunal concluded that "the failure [in that case] to use the proper zip code did not result in the Division not mailing the notice to the 'last known address' of petitioner." Thus, if by adding four digits to the five-digit zip code contained on petitioner's last filed tax return the Division used an erroneous zip code when it mailed the notices of deficiency at issue to petitioner, there is ample authority on which to conclude that this was merely an inconsequential error with respect to the mailing of these notices by the Division.

However, there is no evidence in the record to indicate that the four digits added to petitioner's five-digit zip code were not correct for his address. "The ZIP (Zone Improvement Plan) Code system is a numbered coding system that facilitates efficient mail processing. . . . The most complete ZIP code is a nine-digit number consisting of five digits, a hyphen and four digits, which the USPS describes by its trademark ZIP + 4." (United States Postal Service Domestic Mail Manual, Issue 56, §§ A010.2.1, 2.2). Petitioner argues that any variation from the exact address contained on petitioner's last filed tax return results in a failure to use petitioner's last known address. We disagree. Petitioner provides no support for his position nor are we aware of any. Further, petitioner's position is not a logical one. To uphold petitioner's position would be to conclude that the Division was precluded from using even a simple five digit zip code when mailing a statutory notice to a taxpayer if the taxpayer had failed to include a zip code as part of its address on its last-filed tax return, or from correcting the inclusion of an incorrect zip code by a taxpayer. We hold, rather, that by adding an additional four digits to the zip code provided by petitioner, the Division was merely facilitating the "efficient mail processing" of the notices at issue by the United State Postal Service.

We also reject petitioner's argument that the Division failed to prove that it mailed the notices at issue because the employees who provided affidavits concerning mailing procedures had no personal knowledge concerning the mailing of the notices at issue. As the Administrative Law Judge correctly observed, the Tax Court has held that the IRS was not required to produce employees who personally recall each of the many notices of deficiency that are mailed (***see, Massie v. Commissioner***, T.C. Memo 1995-173, 69 TCM 2417, ***affd*** 82 F3d 423, 96-1 USTC ¶ 50,237). We have held that the Division must provide evidence as to its

general mailing procedure and evidence that this procedure was adhered to with respect to the notices in question (***Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra***) but have never required that such evidence be the testimony of one who has actually participated in mailing the notices at issue.

As to petitioner's argument that he is entitled to a prepayment review of the notices and demands dated December 18, 1998, we agree with the Administrative Law Judge that Tax Law § 2006(4) imposes a duty to provide a hearing as a matter of right upon request, unless a right to such a hearing is specifically provided for, modified or denied by another provision of the Tax Law. Here, there was an opportunity for a hearing provided pursuant to Tax Law § 689(b). After the 90-day time period provided by Tax Law § 681 lapsed, petitioner does not have an additional right to a hearing upon the issuance of the notices and demands. ***Matter of Meyers v. Tax Appeals Tribunal (supra)*** does not call for a contrary result.

As a result of the foregoing, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of George J. Perk, Jr. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of George J. Perk, Jr. is dismissed.

DATED: Troy, New York
December 13, 2001

/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