

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
OFFICEMAX, INC.	:	DECISION
for Revision of Determinations or for Refund of Sales and	:	DTA NOS. 818769
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	AND 818770
Period September 1, 1992 through February 28, 1996.	:	

Petitioner OfficeMax, Inc., 3605 Warrensville Center Road, Cleveland, Ohio 44122, and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on July 3, 2003. Petitioner appeared by Morrison & Foerster, LLP (Paul H. Frankel, Esq. and Michael A. Pearl, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition to petitioner's exception and a brief in support of its exception. Petitioner filed a reply brief and a brief in opposition to the Division of Taxation's exception. The Division of Taxation filed a reply brief. Oral argument, at the request of the parties, was heard on September 28, 2004 in Troy, New York.

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

ISSUE

Whether the notices of determination assessing tax, penalty and interest should be dismissed because they were mailed to an incorrect address.

FINDINGS OF FACT

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

1. Petitioner, OfficeMax, Inc. (“OfficeMax”), is a retailer of office supplies, office equipment and office furniture. The company has retail stores and delivery centers throughout the United States. During the period in issue, September 1, 1992 through February 28, 1996, petitioner had approximately 25 stores in New York.

2. In January 1995, the Division of Taxation (“Division”) commenced a sales tax field audit of OfficeMax for the period September 1, 1992 through May 31, 1995. With petitioner’s consent, the audit period was extended through February 28, 1996.

3. Initially, the Division and petitioner considered the use of a statistical sampling method with the assistance of electronic data processing. This approach was later abandoned because of the inadequacy of petitioner’s retention of computer records such that petitioner could not regenerate reports.

4. During the audit, petitioner executed a series of consents to extend the statute of limitations for assessing tax. The last consent extended the statute of limitations through June 20, 2000 in order to allow petitioner to have time to review the Statement of Proposed Audit Change.

5. The Division made several requests for books and records. One such request was made in a letter dated July 25, 1995 wherein the Division requested that petitioner make available on the appointment date, August 15, 1995, all of its books and records pertaining to its sales and use tax liability for the period under audit.

6. The field audit report shows that petitioner's address is 3605 Warrensville Center Road, Cleveland, Ohio 44122. This is where the auditor made most of her visits. In the course of her audit, the auditor dealt with Gregg Flaesgarten, Dick Alshaw, Karen Pollard and, starting in September 1999, Nichole Gallagher. There were also a couple of brief meetings with a Mr. Goodman. Ms. Gallagher and Mr. Goodman were cooperative during the audit, petitioner's records were auditable and there were adequate internal controls. However, certain records were missing, not kept in order by state or, in the case of store closing reports, destroyed because they were not reliable.

7. In order to determine the amount of sales and use taxes due, the Division decided to use both detailed and estimated methodologies. Petitioner signed a form authorizing the use of a test period method for sales and recurring expense purchases. The auditor examined the sales and use tax accrual accounts in detail and found that \$20,246.51 was due.

8. The capital account was also examined in detail. Petitioner made available three-ring binders with all asset invoices for all of the states. After reviewing all of the invoices, the auditor determined that use tax was due in the amount of \$208,401.56. She assessed tax on items where tax had not been paid or accrued. The most significant problem was that petitioner was buying items out of state and not accruing the tax.

9. A test period method using seven months was selected to determine the amount due on expenses. The Division had planned to use each April and October during the audit period since these were not particularly high or low months. However, petitioner was unable to locate certain microfiche records and the test period became October 1992, April 1993, November 1993, April 1994, October 1994, May 1995, and November 1995. Petitioner agreed to the new test period.

10. The auditor reviewed a chart of accounts and selected those accounts she wished to examine. The auditor then examined petitioner's general ledger and microfiche and printed out the activity for each account number that she had selected for the seven months. The volume was great because petitioner could not regenerate reports.

11. The auditor made a list of vendors so that OfficeMax could select the boxes it needed to get the desired invoices. The auditor explained to petitioner that if she found a vendor who was properly charging tax, she would not need to review invoices from the vendor for the next month. The auditor selected 40 or 50 accounts to examine and then projected the results to the entire audit period. During the audit, petitioner did not object to this methodology.

12. Following a review of invoices, the Division determined that additional tax was due on centralized purchases such as catalogues and grand opening expenses because the Division could not verify that tax had been paid. The centralized purchases were allocated to New York. For printed materials, the allocation was based upon New York stores to total stores. For grand opening expenses, the allocation was based upon total New York stores opened to total stores opened during the audit period. During the audit, petitioner did not explain to the auditor any of the procedures for how it used tax exempt certificates.

13. The additional sales and use taxes due on expenses was \$726,876.84. This amount included invoices and cash payouts where there was no backup because the cashiers' closing reports were destroyed.

14. A one-month test of exempt sales was proposed for the month of November 1994. However, data for this month was unavailable. Therefore, the month of November 1995 was agreed upon as the test month. Using the exempt sales report, the Division examined all available certificates and assessed tax on all transactions where a certificate was not obtained or the tax key was overridden by the use of a default key and the customer was not known. The additional sales tax assessed on unsubstantiated exempt sales was \$616,187.54.

15. Petitioner appeared to have a casual attitude toward the audit. It had a number of audits in progress and this was regarded as one of many. When Ms. Gallagher started, the auditor started getting more information but Ms. Gallagher encountered resistance from her company.

16. During the audit, the auditor sent petitioner the work papers and had discussions with petitioner's tax department regarding the progress of the audit.

17. On or about March 13, 2000, the auditor sent petitioner a Statement of Proposed Audit Changes for Sales and Use Tax, with supporting schedules, that stated that tax, penalty and interest were due in the amount of \$4,528,111.38. In response, Mr. Mike Tilton, vice-president, corporate tax, sent a letter dated March 20, 2000, which stated that petitioner had been able to resolve all of the issues except penalty in the amount of \$601,755.17 which he felt should be abated because the liability was the result of reasonable cause and not willful neglect. Mr. Tilton pointed out that the error percentage of tax due on exempt sales was less than 1.6 percent of the

total sales during the audit period and that while OfficeMax exercises due care in obtaining exemption certificates and verifying exempt sales, the number of transactions makes complete compliance extremely difficult. In a second undated letter Mr. Tilton explained that OfficeMax was in agreement with the fixed asset and exempt sale portion of the audit. However, OfficeMax disagreed with the method used to allocate the grand opening expenses and the amount of tax assessed on the advertising expenses.

18. In a letter dated April 19, 2000, the auditor told Mr. Tilton that she requested a breakdown of a particular account from Ms. Gallagher before issuing the statement of proposed audit adjustment but Ms. Gallagher was not getting cooperation from OfficeMax's advertising department. The auditor also stated that she felt that penalties were properly imposed because OfficeMax's business approximately doubled but the liability went up by more than 575 percent. The letter explains that in the interest of resolving this matter, she would be willing to abate the penalties for settlement purposes only. The auditor cautioned OfficeMax that if petitioner continued to disagree with the audit, the penalties would be reimposed.

19. The auditor's team leader, Ms. Sydoriak agreed that penalties were properly imposed because of the difficulties incurred regarding the retrieval of documents. In a conversation, Ms. Pollard, petitioner's employee, explained to Ms. Sydoriak that OfficeMax had problems because of its policy of putting money into opening stores and not in its tax department. As a result, it did not have sufficient staff to deal with records and audits. One reason the audit took a long time to complete is that the auditor had to go through boxes which were sitting in warehouses looking for records which were not there.

20. The auditor addressed the concerns raised by petitioner, and on April 19, 2000, the Division issued a revised Statement of Proposed Audit Change for Sales and Use Tax which stated that tax was due in the amount of \$1,722,462.54 plus interest in the amount of \$1,045,759.36 for a balance due of \$2,768,221.90. Penalty was not imposed on this document.

21. Petitioner disagreed with the revised Statement of Proposed Audit Change. However, it agreed to pay the sales portion of the audit and the minimum interest on the agreed amount of tax. In accordance with this understanding, on May 19, 2000 the auditor sent petitioner by facsimile a new Statement of Proposed Audit Change for that portion of the audit which was accepted by petitioner. This statement assessed tax in the amount of \$616,187.54 plus interest in the amount of \$368,529.04 for a balance due of \$984,716.58. On May 19, 2000, the statement was signed by Mr. Tilton. A notation stating "Agreed Portion Audit Only" was written on the statement directly above a table setting forth the tax and interest which were assessed. Directly above the line where Mr. Tilton signed there was a paragraph which provided, in part, "I may consider these findings final unless I hear from the Department to the contrary within 60 days after receipt of this signed consent." At the time the auditor agreed to send this statement to petitioner, it was informed that the Division would issue a separate assessment for penalty and interest.

22. Each statement of audit change was sent to 3605 Warrensville Center Road, Cleveland, Ohio 44122.

Preparation and mailing of the notices of determination

23. As a result of petitioner's agreement with the sales tax portion of the audit and disagreement with other portions of the revised audit adjustments, the Division decided to issue three notices of determination. The first notice was for the agreed upon sales tax plus minimum interest and is not in issue in this matter. The second notice assessed additional interest and penalties upon the sales tax portion of the audit. As outlined in the auditor's letter of April 19, 2000, this notice was issued because petitioner did not agree to the entire audit adjustment. The third notice asserted tax, penalties and statutory interest on the use tax portion of the audit.

24. The auditor was not in a position to generate and mail the notices of determination on her own. All notices had to be created by the Division's Case and Resource Tracking System ("CARTS") and mailed from Albany, New York.

25. The auditor needed 30 days prior to the expiration of the statute of limitations in order to prepare the diskette which would then be uploaded into CARTS. By uploading the assessments, it meant that she had to obtain information from the database regarding how she wanted the assessments to be created. These are called sequences and, in this instance, there were three of them. The first sequence was for the agreed tax. The second sequence was for the excess interest and the penalties and the third was for the balance of the audit. The three sequences generated three assessments. Thereafter, the auditor verified that the correct taxpayer was identified, that she was using the correct taxpayer's identification number and that the audit period was correct. The paperwork was reviewed by the auditor's team leader and, upon approval, the disk was given to clerical personnel whereupon it would be imputed into the system to be uploaded into the CARTS system.

26. An auditor does not tell CARTS where to mail a notice of determination and the computer screen viewed by the auditor does not show the taxpayer's mailing address which would be used to mail a notice of determination. Consequently, at the time she did the uplink, the auditor did not know that the notice would be sent to an Illinois address.

27. Prior to the preparation of the diskette for uploading into the CARTS system, the auditor had printed out petitioner's mailing address which was shown on the Division's Taxpayer's Indicative Data System ("TIDS"). The TIDS's screen listed petitioners' mailing address as P.O. Box 228070, Cleveland, Ohio 44122-8070. This was the same mailing address that petitioner had used on its letterhead in its correspondence with the auditor. The auditor believed that the notices of determination were being sent to this address and that it was a current address.

28. When the auditor was doing the upload, there was a notation which said "nixie 1" which bore the date of January 20, 2000. At the time of the upload, the auditor did not know that nixie 1 meant that an address was not valid. At the time of the hearing, the auditor did not recall if she saw the nixie when she was doing the upload.

29. In the beginning of July, the auditor received a telephone call from Alice Chiappellone, one of petitioner's contact people, stating that she had not received the notices. At this point, the auditor was not concerned and asked Ms. Chiappellone to check with the tax department in Cleveland or find out if they were "stuck" in the mailroom. The auditor asked Ms. Chiappellone to get back to her if there was a problem. In August, Ms. Chiappellone told the auditor that she had still not received the notices. When the auditor heard this, she became concerned because she was worried that petitioner would lose its right to protest the notices. The

auditor wanted to make sure that the taxpayer had the notice numbers so that it would not lose its rights. On August 24, 2000, the auditor sent Ms. Chiappellone, by overnight mail, a post-it with the notice numbers and a request for a conciliation conference so petitioner could file a protest. The auditor also asked the field audit management office to send Ms. Chiappellone copies of the assessment because the auditor could not regenerate them. On August 30, 2000, the notices were mailed to petitioner at its mailing address in Cleveland, Ohio.

30. As a matter of standard practice, the auditor does not receive a copy of the notice of determination.

31. The return address on the envelope used to mail the notices in July 2000 was the Buffalo District Office. Therefore, if the assessments at issue in this matter could not be delivered, they would have been returned to the Buffalo District Office and handed over to the auditor. When Ms. Chiappellone called, the letters had not been returned so the auditor was not concerned. She anticipated that someone in petitioner's mailroom had them.

32. After the notices were mailed a second time, the auditor and another individual on her audit team started examining computer screens and discovered that petitioner had a different address on its highway use tax returns and the computer associated the assessment numbers with that address. The auditors realized that the notices had gone to the address on the highway use tax returns. After calling a number of people, the auditors learned that since the Ohio address had a nixie, it went to the next address on the system.

33. As part of her inquiry, the auditor requested information from the individual who supervised the mailroom in Albany, New York, James Baisley, as to where the notices were mailed. In response, Mr. Baisley sent the auditor two United States Postal Service forms

3811-A which showed that the notices were delivered to petitioner's highway use tax address in Barrington, Illinois on June 6, 2000 and June 15, 2000, respectively. The forms show that each notice was sent to OfficeMax Inc., c/o Idealease Inc., 28W144 Industrial Ave. #116, Barrington, Illinois 60010-5939. Mr. Baisley also sent the auditor two USPS forms 3849 which indicated that the notices were delivered to the Barrington, Illinois address on June 6, 2000 and June 15, 2000, respectively. The forms contained the signatures of the individuals who received the certified mail.

34. The June 12, 2000 notice was date stamped received by petitioner "September 5, 2000." The notice of June 2, 2000 was date stamped by petitioner "September 21, 2000."

35. Petitioner subsequently requested a conference with the Bureau of Conciliation and Mediation Services. In separate conciliation orders, dated July 20, 2001, the requests were denied and the statutory notices were sustained.

The Relationship between CARTS and TID

36. Notices of determination are generally issued by CARTS. After an auditor uploads the information that becomes part of the CARTS system, CARTS uses the information to generate the notices of determination.

37. In order to obtain the mailing address, the billing system in CARTS calls another system known as TID, taxpayer indicative data, which provides the mailing address for billing. After the notices are printed, the entire batch of notices is sent to a unit to prepare them for mailing. Copies of the notices of determination are not sent to the auditor at the time that CARTS generates the notices for mailing.

38. CARTS prints notices in batches which range in size from 3,000 to 30,000 notices. There is no manual review of the notices of determination. If a notice of determination is undelivered or returned by the Post Office, it is not returned to CARTS. The undelivered notices go to either the nixie unit, which is on the W.A. Harriman Campus in Albany or the District Office.

39. An individual in a clerical position input information regarding OfficeMax with an Illinois address into the system. No one checked the address because it is an automated process.

40. The TID system sets forth the taxpayer's name, identification number and address. It also includes nonfinancial data that may be present for the specific taxes such as a business creation date, filing frequency and activation date. TID and CARTS are separate systems. CARTS obtains a current address for a particular mailing from TID. There can be different mailing addresses for different taxes for the same taxpayer.

41. The TID system distinguishes between a taxpayer's physical address and mailing address. The two addresses are not necessarily the same.

42. A taxpayer is entered on the TID system through an enrollment process. For sales tax, this involves completing a sales tax registration form and being authorized to do business as a sales tax vendor in New York state. The certificate of registration may have multiple listings such as the physical address, the mailing address and a listing of multiple locations that the taxpayer may have in New York State.

43. The address that TID uses can come from many sources such as the taxpayer, the representative or other agencies such as the Department of State or Department of Labor. It can also come from the Postal Service or vendors.

44. TID handles approximately 20,000 to 30,000 change of addresses annually. At the time of the hearing, TID had 42 million addresses on file.

45. A nixie is an indication that an address is not valid. A nixie 1 indicates that it is the first time that it is entered into the system. Here, the TID system showed that a nixie 1 was entered on January 20, 2000. The TID system also showed that a nixie 2 was entered on August 2, 2000. The nixie 2 referred to the address entered as Tax Department, P.O. Box 228070, Cleveland, Ohio. A nixie 2 will interface with the return processing system. In some instances, it will stop the mailing of returns and notices.

46. During the billing process, TID is called upon with a specific routine that asks for the current address of the taxpayer. When there is a nixie on the address, the computer employs an algorithm which prompts the computer to look for another address that would be considered valid. The Barrington, Illinois address was considered a valid address.

47. Other than the person who is entering the address, there is no one who verifies whether the address is correct.

Prompt Tax

48. Prompt Tax is a processing system which the Division uses for electronic payments and filings. Taxpayers who make large payments are required to participate. The prompt tax system is much smaller than CARTS or TID. It processes transactions for about 15,000 taxpayers annually. Petitioner is a mandatory filer under the Division's Prompt Tax Program.

49. Prompt Tax has a separate enrollment process. In addition to the registration process, it must collect the same information as on the TID system, such as the contact person within the

company and the filing and payment option that the person is selecting. Petitioner's enrollment form shows an address of 3605 Warrensville Center Road, Shaker Heights, Ohio 44122.

50. Prompt Tax has a primary contact person because the nature of electronic transactions is so dynamic that whenever there is an error or a need to contact the taxpayer, there is also a sense of urgency because millions of dollars are at stake. On sales tax, the contact person is contacted once a month in order to describe the current transaction, due dates and issues with the taxpayer's account. Prompt Tax handles the payment realm and all of the back office interfaces into the audit maintenance systems. When a taxpayer is selected for an audit, it is passed on to the Audit Division. Prompt Tax makes a practice of sending receipts for the payment of taxes.

51. Each time a payment is made through Prompt Tax, a confirmation is sent to the taxpayer. Prompt Tax does not interface with CARTS. However, it does interface with TID. Nixies are not transferred to the prompt tax system. Consequently, petitioner's Prompt Tax address at 3605 Warrensville Center Road, Shaker Heights, Ohio 44122 continued to be used by Prompt Tax to send out payment confirmations.

52. Once a batch of notices is generated by CARTS, two copies of the certified mail record ("CMR") along with the batch of notices are transferred to personnel under the supervision of Ms. Geraldine Mahon, Principal Clerk. The CMR is a list of the notices that are being mailed by certified mail. The certified numbers run in consecutive order. For each piece of mail, the CMR shows the certified mail number, the notice number, the party the item is addressed to and the mailing address. The date which appears in the corner of the document is the date the CMR was printed. Ms. Mahon keeps one copy of the CMR until the other CMR comes back from the post office with a postmark date stamped on it.

53. The certified numbers on the CMR correspond with the numbers that appear at the top of the notices. The certified number is visible after it is placed into the envelope so that the Postal Clerk can see it.

54. Ms. Mahon's unit received a seven-page CMR with a printed date of May 23, 2000. Above this date, the date of June 2 is handwritten. The date printed on the upper left hand corner of the CMR is the date that the CMR was printed. The handwritten date is the date that the documents were mailed. The seventh page of the CMR shows that a document with notice number L 017915174 and certified mail number P 911 205 902 was sent to OfficeMax Inc. c/o of Idealease Inc. in Barrington, Illinois. Each page of the CMR bears the stamp of the Colonie Center Post Office.

55. The Notice of Determination which corresponds with this entry in the CMR is dated June 2, 2000 and is addressed to OfficeMax Inc. c/o Idealease in Barrington, Illinois. The notice is dated June 2, 2000 and assesses sales and use tax in the amount of \$1,106,275.00 plus interest in the amount of \$1,115,353.82 and penalty in the amount of \$342,196.04 for a balance due of \$2,563,824.86. The notice bears certified mail number P 911 295 902 and assessment number L-017915174-3.

56. Ms. Mahon's unit received a 41-page CMR bearing a printed date of June 2, 2000. This date is crossed off and new date of June 12, 2000 was inserted because that is the date that the notices were mailed.

57. Page 41 of the certified mail record dated June 12, 2000 shows that correspondence with certified mail number P911006657 and notice number L 018009132, was addressed to OfficeMax Inc. c/o Idealease Inc., 28W144 Industrial Ave. #116, Barrington, Illinois 60010-

5939, not to an address in Ohio. The Notice of Determination which corresponds to this entry in the certified mail record is dated June 12, 2000 and bears the same certified mail number as is set forth on page 41 of the CMR. The notice is addressed to OfficeMax Inc. c/o Idealease Inc. in Barrington, Illinois and assesses penalty and interest in the amount of \$407,504.38. Each page of the CMR bears the stamp of the Colonie Center Post Office.

58. On June 2, 2000, Ms. Mahon's unit made up a form 8084 which tells the mailroom that there were a certain number of letters which have to be mailed by certified mail on a certain date. The mailroom is also told if the piece of mail needs a return envelope and, if so, what type of return envelope to use. Ms. Mahon's unit needs a lead time of six or seven days between the date that the CMR is printed and the date on the notices in order to get the work completed.

59. The Postal Service stamps the date of mailing on the certified mail record. Thereafter, this record is returned to Ms. Mahon. Initially, Ms. Mahon receives two copies of the certified mail record. She keeps one in her office until she receives the second one back with the date of mailing on it.

60. Ms. Mahon follows the same procedure for all mailings. Someone in the post office affixed the postmark. She does not verify addresses and it is not the responsibility of anyone in her office to verify addressees. Her responsibility is to make sure that they have bills or documents that correspond with the document in the mail log and send them to the mailroom.

61. Mr. LaFar is the principal supervisor of the Division's outgoing mailroom. When Ms. Mahon's unit is finished with its tasks, the mail and CMR are taken to Mr. LaFar's unit.

62. Certified mail is kept in sequential order according to the certified number. The United States Postal Service has approved of the Division's practice of using the CMR in the

place of United States Postal Service Form 3811. The Division checks the first and last numbers against the CMR to determine if they are correct and, when it is a large mailing, the Division will perform a random check to make sure that certain numbers are there and that they are in order.

63. The mail itself has to go through an inserting machine where it is folded and placed in an envelope. The mail is then weighed to make sure it has the right postage on it. Thereafter, the mail is then sealed.

64. The mail and CMR are brought to the post office. After the postal clerk checks the CMR to make sure that it is correct, the postal clerk will stamp each page and circle the total number of pieces received. The clerk is also supposed to initial the page which contains the total number of pieces received. When this process is completed, the certified mail record is returned to Ms. Mahon. Individual offices within the Division decide if they want a return receipt on the envelope.

65. Mr. LaFar's unit does not check addresses or receive verification that notices were delivered.

The Illinois Address

66. OfficeMax had an arrangement with a company called Idealease Inc. ("Idealease") to rent a truck in New York. Under their contract, Idealease provided the equipment and OfficeMax operated the equipment. In 2000, there was a truck operated by one of petitioner's stores which required the filing of a highway use tax return. Under the terms of its full-service lease agreement, it was the responsibility of Idealease to file the return and pay the required amount. Idealease would then issue to petitioner an invoice for the amount due. The only return filed by Idealease for OfficeMax was for highway use tax. The highway use tax returns had the

following address: OfficeMax Inc., 28W144 Industrial Ave. #116/IDE, Barrington, IL 60010-5939.

67. OfficeMax has never given Idealease the authority to act as an agent for OfficeMax to receive tax notices. OfficeMax was not a sister corporation or subsidiary of Idealease. They did not have any common ownership.

Petitioner's Last Sales and Use Tax Returns Prior to the Issuance of the Notices

68. Petitioner filed a New York State and Local Sales and Use Tax Return for Part-Quarterly Filers for the period March 1, 2000 through March 31, 2000. Petitioner's address is listed as 3605 Warrensville Center Road, Shaker Heights, Ohio 44122, and the return is dated April 20, 2000. In a letter dated April 27, 2000 which was addressed to petitioner at the address shown on its sales tax return, the Division acknowledged receipt of the payment which accompanied the return for the month of March.

69. Petitioner filed a New York State and Local Sales and Use Tax Return for Part-Quarterly Filers for the period April 1, 2000 through April 30, 2000. Petitioner's address is listed as 3605 Warrensville Center Road, Shaker Heights, Ohio 44122 and the return is dated May 20, 2000. In a letter dated May 25, 2000, which was addressed to petitioner at the address shown on its sales tax return, the Division acknowledged receipt of the payment which accompanied the return for the month of March. This was the last return filed by petitioner before the notices of determination were issued.

Petitioner's Tax Compliance Efforts

70. A substantial portion of petitioner's sales tax adjustment arose from the use of a "default" key. Under this procedure, the customer, who was exempt from tax, would have gone

to the store, entered his or her name and address on a log and signed in a designated location. The transaction date, dollar amount and transaction number would also be written on the log. The customers would have also completed an exemption certificate at the store. The store was responsible for having the certificate on file. Through the use of a default key by the cashier on the cash register, tax would not be charged on the transaction.

71. At the beginning of the audit period, each store kept a separate file of exemption certificates. However, as time progressed, petitioner started keeping the certificates at its corporate office. Thereafter, if a customer approached the cash register without the proper documentation, a cashier could utilize the default key in order to avoid having the customer make a scene. The customer would be asked to fill out a log. In order to discourage the use of the default key, OfficeMax would impose a charge on the stores for the use of the default key.

72. An internal memorandum of OfficeMax, dated July 11, 2000, stated that in the Fall of 1997 petitioner realized that its method of accepting and tracking customers who were exempt from sales tax was not adequate to satisfy the customer and minimize the risk that OfficeMax was incurring in assessments. It was explained that the current system, which began in 1995, was not sufficiently flexible to allow for the increase in the number of stores, increased catalogue sales and the development of the internet. In order to resolve this difficulty, petitioner proposed to implement a new system, known as Burden of Proof (“BOP”) which would serve as a database for tax exempt certificates and screen tax exempt customers in a friendly manner that would satisfy the requirements of New York. In a letter dated August 18, 1999, the Division advised petitioner’s accounting firm that it was giving tentative approval for the BOP software.

However, as of the date of the hearing, the new system has not been fully approved by New York State and the BOP system was not in place.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by addressing the notice of determination dated June 2, 2000. In reviewing the statutory provisions that outline the proper procedure for the mailing of notices to taxpayers, along with pertinent case law, the Administrative Law Judge concluded that the June 2, 2000 notice was invalid.

In reaching this result, the Administrative Law Judge noted that petitioner consistently used its Warrensville Center Road address on its sales tax returns and this was not the address to which the June 2, 2000 notice was sent. Moreover, relying on *Matter of Combemale* (Tax Appeals Tribunal, March 31, 1994), the Administrative Law Judge stated that the record established that petitioner did not receive the incorrectly addressed notice within the period of time within which to protest the assessment. Thus, the Administrative Law Judge cancelled the June 2, 2000 notice.

Next, the Administrative Law Judge discussed the June 12, 2000 notice and emphasized that although such notice was not properly mailed to petitioner's Warrensville Center Road address, petitioner, nonetheless, did receive the June 12, 2000 notice in sufficient time to challenge the assessment and was afforded the right to a hearing.

With respect to the issue of penalties, the Administrative Law Judge held that petitioner did not sustain its burden of proof to demonstrate that the imposition of penalties was improper. The Administrative Law Judge noted that the tax was assessed based upon four separate areas, i.e., unsubstantiated exempt sales, accruals, fixed assets and expenses. The Administrative Law

Judge stated that the only area even addressed by petitioner, in its argument to abate penalties, was with respect to its efforts of improving its record-keeping requirement as it pertained to exempt sales. Yet, even its attempt to demonstrate a lack of willful neglect in this area fell short of its burden to establish that the abatement of penalties is warranted.¹ Therefore, the Administrative Law Judge sustained the notice dated June 12, 2000 along with penalties and interest thereon.

ARGUMENTS ON EXCEPTION

Petitioner's exception focuses on the June 12, 2000 notice of determination. Petitioner asserts that, although it agrees with the Administrative Law Judge's finding that such notice was sent to the wrong address, the June 12, 2000 notice should be cancelled since such notice was not received within the 60-day period set forth in the signed May 19, 2000 Statement of Proposed Audit Change.

In its exception, the Division disagrees with the cancellation of the June 2, 2000 notice. The Division claims that both notices at issue were properly mailed to a current address of petitioner. The Division argues that Tax Law § 1147 provides flexibility in the mailing of notices of determination to either the address in the last return filed or in any application filed. Therefore, since the Barrington, Illinois address was used by petitioner to file its highway use tax returns, the Division asserts that such address was properly used in this case to mail to petitioner the two notices at issue.

¹Petitioner did not file an exception to this issue discussed in the determination of the Administrative Law Judge in conclusion of law "M."

The Division claims that both notices should be deemed valid since they were properly mailed to petitioner before the statute of limitations expired for assessing the tax. The Division argues that the proper mailing of the June 2 and 12, 2000 notices tolled the statute of limitations. Thus, even if it is held that the notices were not properly mailed, the Division contends that it is an undisputed fact that petitioner received both notices and the notice and hearing requirements under Article 28 of the Tax Law were met.

OPINION

Tax Law § 1138(a)(1) provides that a notice of determination be mailed by certified or registered mail to the taxpayer at its last known address. Section 1147(a)(1) of the Tax Law provides that:

[a]ny notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article 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. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.”

The Division focuses on the above-quoted language that states that the notice is mailed to the address given in the last return *or* in any application made by the taxpayer. The Division stresses that the Barrington, Illinois address was used in petitioner’s highway use tax application and return filings. This argument is without merit.

As discussed by the Administrative Law Judge in his determination, the Barrington, Illinois address belonged to Idealease. Idealease was merely a company from which OfficeMax rented a truck - no more. In the absence of any evidence, it is determined that Idealease was not

an agent for OfficeMax and the Division improperly mailed both the June 2 and June 12, 2000 notices to the Barrington, Illinois address.

Having determined that the notices were improperly mailed, our focus shifts to whether petitioner received the notices within sufficient time to protest them (*see, Matter of Agosto v. Tax Commn. of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [request for hearing denied because the taxpayers had actually received the notices within the period of limitations despite the address errors, yet failed to protest within 90 days after actual receipt of said notices]; *see also, Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447).

With respect to the June 2, 2000 notice, petitioner provided credible evidence that it was received by it on September 21, 2000 which evidence was not contradicted by the Division. Therefore, since the notice was not received within the 90-day statute of limitations period for challenging the assessment, we agree with the Administrative Law Judge's determination and conclude that the June 2, 2000 notice is invalid.

We next turn our attention to the June 12, 2000 notice. Petitioner received this notice on September 5, 2000 which date falls within the 90-day period to challenge the assessment. However, petitioner alleges that it is not the 90 days from mailing of the notice that is determinative in this case, but rather, a 60-day time frame from its execution of the Statement of Proposed Audit Change.

Petitioner argues that it agreed to the sales tax adjustments made on audit, by signing a Statement of Proposed Audit Change dated May 19, 2000 and paying the sales tax and statutory interest thereon. Such statement along with payment was date-stamped received by the Division

on May 23, 2000. Petitioner asserts that a statement of proposed audit change is one type of *consent* referred to in Tax Law former § 1138(c) which assesses the tax due prior to the issuance of a notice of determination. The language upon which petitioner highlights is a “person liable for collection or payment of tax . . . shall be entitled to have a tax due finally and irrevocably fixed . . . by filing with the tax commission a signed statement in writing . . . consenting thereto” (Tax Law former § 1138[c]).

Petitioner notes the language on the Statement of Proposed Audit Change which it executed that states: “I may consider these findings final unless I hear from the Department to the contrary within 60 days after receipt of this signed consent.” Thus, petitioner argues that the June 12, 2000 notice is invalid because it was not received by it within 60 days from the May 23, 2000 receipt by the Division of the execution of the Statement of Proposed Audit Change.

We refuse to narrowly interpret the language contained on the Statement of Proposed Audit Change as suggested by petitioner. Petitioner did know that the issue of penalties and interest thereon was not a resolved issue at the time that it executed the Statement of Proposed Audit Change. Thus, petitioner could not have reasonably relied upon the language that the findings were final. Moreover, in its effort to ascertain whether the notices were received by petitioner, the Division’s auditor informed petitioner that the notices had been mailed out on both June 2 and June 12, 2000. Thus, in the conversations that took place between the Division’s auditor and petitioner, petitioner knew that the findings in the Statement of Proposed Audit Change were not final since it was informed that notices of determination had been issued to it. Thus, we find that not only did petitioner hear from the Division that the findings were not

final, it also received the notice within the 90-day period within which to file a protest.

Therefore, we find that the June 12, 2000 notice is valid.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of OfficeMax, Inc. is denied;
2. The exception of the Division of Taxation is denied;
3. The determination of the Administrative Law Judge is sustained;
4. The petition of OfficeMax, Inc. is granted to the extent that the Notice of Determination dated June 2, 2000 is cancelled, but is otherwise denied; and
5. The Notice of Determination dated June 12, 2000 is sustained in its entirety.

DATED: Troy, New York
March 24, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner