STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of RONALD BOWEN D/B/A RON'S DISCOUNT LIQUOR	:	DETERMINATION DTA NO. 808168
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, 1982 through May 31, 1985.	:	

Petitioner, Ronald Bowen d/b/a Ron's Discount Liquor, 684 East 92nd Street, Brooklyn, New York 11236, filed a petition 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, 1982 through May 31, 1985.

A hearing was commenced before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 18, 1991 at 10:45 A.M. and was continued to January 15, 1992 at 10:45 A.M. and thereafter to April 30, 1992 at 1:15 P.M. Before the conclusion of this matter and after careful review of the record created herein, the Administrative Law Judge determined that in the interest of administrative expediency the hearing issues should be bifurcated, and placed the parties on notice in correspondence dated June 8, 1992. It was the decision of Administrative Law Judge that a determination should be rendered first on the issues raised by the parties with regard to timeliness and jurisdiction. The Administrative Law Judge thereafter set a briefing schedule with all briefs to be submitted by the parties by September 11, 1992. Petitioner submitted a brief on July 20, 1992. The Division of Taxation responded with its brief on August 23, 1992 and theDivision of Tax Appeals received petitioner's reply on September 8, 1992. Petitioner appeared by Fischbein, Badillo, Wagner & Itzler (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B.

Infantino, Esq., of counsel).

ISSUES

I. Whether the notice of determination issued by the Division of Taxation to petitioner was jurisdictionally defective and therefore invalid.

II. Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

Ronald Bowen ("petitioner") operated a retail liquor store known as Ron's Discount Liquor at 474 Flatbush Avenue, Brooklyn, New York during the period in question.

Following an audit of petitioner's business, which took place between 1985 and 1988, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1988 asserting additional tax due of $64,152.66, plus penalty and interest of $32,076.33 and $48,471.17, respectively, for a total amount due of $144,700.16 for the taxable period September 1, 1982 through May 31, 1985. The notice provided the following explanation:

> "The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law and are based on an audit of your records."

The notice reflects the assessment of tax for 11 separate sales tax quarters indicating an equal amount of tax due of $5,832.06 for each of the quarters, totalling $64,152.66. In addition, a 50% penalty for each quarter, plus interest, was assessed as described above.

Petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes on May 2, 1988. Such consent indicated that for the taxable period September 1, 1982 through August 31, 1985 the tax could be determined any time on or before December 20, 1988.

Petitioner filed a request for a conciliation conference on February 27, 1990, as is evidenced by a copy of an envelope mailed to the Bureau of Conciliation and Mediation Services ("BCMS") stamped by the U.S. Postal Service on February 27, 1990, having been received by BCMS on March 5, 1990. Among the claims made by petitioner in his request for conciliation conference he states that the notice of determination, though dated December 20,

1988, was not mailed to petitioner by certified mail until January 19, 1990. He enclosed a copy of an envelope showing such date with his request.

On May 4, 1990, BCMS issued a Conciliation Order dismissing petitioner's request for conciliation conference indicating that since the notice was issued on December 20, 1988, but the request was not received until March 5, 1990, or in excess of 90 days, the request was deemed late filed. Petitioner thereafter filed a timely petition with the Division of Tax Appeals.

The Division issued an answer in this matter on September 9, 1991 indicating that the Division had conducted an audit of petitioner's sales and use tax liability for the period in issue. The Division further stated by its answer that it "estimated the sales tax liability of the petitioner from the information available including claimed resale and tax exempt certificates."

Jeannie Chan, a tax auditor with the New York City Department of Finance, was assigned to perform the sales tax audit in this matter. Ms. Chan summarized her findings and the method of performing her audit in her field audit report which was submitted into evidence as part of a substantially complete audit file. According to the field audit report, gross sales per taxpayer's records could be reconciled with sales tax returns and Federal income tax returns. A reconcilable difference was attributed to nontaxable sales for which the auditor requested sales invoices, and resale and exempt certificates. Initially, petitioner indicated he had not been maintaining such records; however, about six weeks later, petitioner informed the auditor that he had located sales invoices and exempt certificates and produced the same. The auditor issued sales confirmations to the customers whose names were provided by petitioner on such documents. According to the auditor's testimony, of the nine confirmations issued, the five returned to the auditor all revealed that such sales had never occurred and, in some cases, names appearing on some certificates were fictitious. Nontaxable sales of $777,608.43 totalled from petitioner's sales invoices were disallowed by the auditor resulting in additional tax assessed in the amount of $64,152.66. Ms. Chan's testimony indicated that she added together all of the claimed nontaxable sales and then divided by the total number of quarters in the audit period to arrive at additional taxable sales. She thereafter applied the 8¼% tax to arrive at additional tax

due. Thus, each of the taxable quarters listed on the notice reflected the same amount of tax due in spite of the fact that the actual tax due per quarter was available from the information provided by petitioner's sales invoices. Ms. Chan testified that her original purpose for preparing the schedule which was ultimately used as the basis for the tax assessed was to attribute to each alleged tax-exempt organization a total amount of sales. Having attained a total amount of tax due, she did not thereafter prepare a tax schedule which indicated a breakdown of taxes per quarter.

On July 3, 1986 (after she received back the sales confirmations), Ms. Chan referred this matter to the New York City Department of Finance's Investigative Unit. The file was maintained by the Investigative Unit between that time and (at the earliest date) October 21, 1988 when an intradepartmental memorandum was prepared by fraud investigator Donald Ashman. The intradepartmental memorandum prepared by Mr. Ashman indicated that the investigative unit had contacted 10 tax-exempt organizations whose names were provided by petitioner and to whom petitioner alleged having sold liquor on a tax-free basis. The sales purportedly made to these organizations during the audit period exceeded $777,000.00. The contact by the Investigative Unit revealed that the organizations had not conducted business transactions with petitioner's liquor store. The memorandum indicates that petitioner was interviewed by two fraud investigators at his place of business. The result of such interview was stated as follows:

> "When questioned about the responses from the ten organizations that claimed to have done no business with his store, the taxpayer had no answer. The only statement made by the taxpayer is that, he considers himself an absentee store owner, and has been one for the last 10 years. At no time did the taxpayer attempt to justify or explain the denial of sales between the 10 organizations and his place of business."

Petitioner provided a brief amount of testimony in this matter. He indicated that the first time he was aware that there was a claimed discrepancy in his sales tax liability was when he was informed by his accountant. However, petitioner did not indicate when that occurred. Petitioner testified that the State placed a levy on his bank account at Manufacturers Hanover Trust and petitioner introduced into evidence a Tax Compliance levy bearing a warrant number

corresponding to the notice of determination at issue herein for an unpaid balance of tax in the amount of $64,152.66, plus statutory additions, dated October 25, 1989. He testified that he never received a notice of determination when it was purportedly mailed. Petitioner introduced into evidence a photocopy of an envelope addressed to him at his business address bearing a U.S. Postal Service stamp of January 19, 1990 with an indication that it was sent by certified mail, bearing certified mail number 917992. By his testimony, petitioner stated that in this envelope was a copy of the notice of determination and his receipt of that copy was the first time he had received it.

During 1988, in particular on or about the date the notice of determination was purportedly issued, petitioner was not in his liquor store on a daily basis. In fact, he was not at the store location even as often as once a month. He testified that his daughter was maintaining the business operations of the store at that time.

The store location encompasses three retail units: petitioner's liquor store, a grocery story and a beauty parlor, physically located together at 474 Flatbush Avenue. Someone must be present to accept the delivery of mail, otherwise it is placed under the door. Mr. Bowen testified that oftentimes the grocery store operator would be the recipient of his mail until someone opened the liquor store. Although the liquor store was scheduled to open generally at 10:00 A.M., petitioner testified to an unpredictable schedule of opening by his daughter at "10:30, 11:00, and when the mood hit her." With regard to the envelope introduced into evidence date stamped January 19, 1990, petitioner surmised that his daughter was the recipient of such delivery (at the liquor store) since he was not present at the business on a regular basis.

A brief examination of petitioner was conducted by the Administrative Law Judge as follows:

> ADMINISTRATIVE LAW JUDGE: "Did Ms. Chan ever indicate to you or to you through Mr. Fitzpatrick [petitioner's accountant] that the books weren't complete enough or that she was unable to make some computations on the basis of the books?"
>
> MR. BOWEN: "No. We produced some non-taxable sales and my understanding, the only understanding of anything wrong from Ms. Chan is that she had problems in verifying those sales, wasn't getting a correlation from the people.

Trying to contact the people that made the purchases and she had trouble in contacting them and that was the only discrepancy I ever was told that was going on." (Tr., p. 94-95.)

The sworn affidavit of Jeannie Chan was introduced into evidence by the Division detailing the steps taken to create and mail the notice of determination at issue herein. Ms. Chan executed such affidavit on November 8, 1991 and its contents are reproduced in their entirety below:

"1. That I am an Associate Tax Auditor employed by the New York City Department of Finance, Sales Tax Division, at 345 Adams Street, Brooklyn, New York 11201, and have so been employed for 7 years.

"2. That from August 1, 1985 through November 14, 1988, I performed a sales tax audit of Ronald Bowen d/b/a Ronald Bowen (Discount Liquors), located at 474 Flatbush Avenue, Brooklyn, New York 11225.

"3. That attached hereto and made a part hereof are copies of the following documents from the audit file in this matter, which were prepared by me in the regular course of my duties: Field Audit Report, DO-1637 (1 page); Sales Tax Audit Worksheet (1 page); Notice of Determination and Demand for Payment of Sales and Use Taxes Due (1 page); Tax Field Audit Record (5 pages); and, Certified Mail Record (1 page).

"4. That my regular duties then included and do still include, the preparation of Notices Of Determination And Demand For Payment Of Sales And Use Taxes Due.

"5. That on October 28, 1988, at the conclusion of this audit, I prepared the attached Sales Tax Audit Worksheet, and signed it.

"6. That the file was then reviewed by Associate Tax Auditor Larry Brandwein who determined the date for the proposed Notice of Determination (12/20/88), and wrote it upon the Sales Tax Audit Worksheet.

"7. That Mr. Brandwein selected that date, (12/20/88), in keeping with the policy of my office, which was to date Notices of Determination with the next date that was 20 days after the closing of the current sales tax quarter (9/1/88 - 11/30/88).

"8. That, as was the practice of my office at the time, Mr. Brandwein then transferred the Sales Tax Audit Worksheet to Elaine Lockit, a clerk typist who then, as part of her regular duties: assigned a Notice Number to the worksheet, and wrote it thereon; transferred the information from the worksheet to a New York State Department of Taxation and Finance from [sic], and thereby created the attached Notice of Determination and Demand for Payment of Sales and Use Taxes Due; and, prepared by typing the petitioner's name and address on an envelope for certified mailing by the U.S. Postal Service.

"9. That as part of my regular duties, I thereafter verified the information on the newly created Notice of Determination and Demand for Payment of Sales and

Use Taxes Due with that of the address on the envelope and the Sales Tax Audit Worksheet, folded the Notice of Determination and inserted, it in the envelope, and then delivered the filled envelope to the certified mail receptacle in the mail room of my office building.

"10. That employees of the mail room, as part of their regular duties, then: affixed the appropriate amount of metered postage to the envelope; affixed a certified mail tag to the envelope and sealed it; and, prepared the attached certified mail record (PS Form 3877). (Portions have been redacted to protect the confidentiality of other taxpayers.)

"11. That among other things, the certified mail record contains the following information: 'Name and Address of Sender'; indication of 'Certified' mail; postage fees; and, 'Total Number of Pieces Listed by Sender' (4). It should be noted that the 'Name and Address of Sender', which is typed denotes the 'Bureau of Tax Collection'; this is the designation used by the mail room for all outgoing pieces of certified mail listed on N.Y.C. Dept. of Finance certified mail records.

"12. That, in addition to writing by hand, the above information on the certified mail record, the mail room employee then assigned to each article a 'Number of Article' from a list of certified mail numbers, supplied by the post office, and wrote these in the appropriate left-hand column of the sheet; the article numbers were then written on the certified mail tags attached to the corresponding items of sealed mail.

"13. That on November 14, 1988, an employee of the mail room then delivered these 4 articles of sealed mail and the certified mail record to the local United States Post Office in Brooklyn, where they were checked and matched against the names, addresses and article numbers on the certified mail record by a postal employee, who then accepted these pieces of mail, noted the 'Total Number of Pieces Received at Post Office', signed his name to the certified mail record, and affixed the branch's 'date stamp', indicating receipt.

"14. That thereafter, employees of the mail room as is their regular practice picked up the certified mail record from the post office and delivered it to me; I then placed it in the audit file, as is my regular practice.

"15. That, a search of the audit file indicates, at no time was the Notice of Determination returned to my office as 'refused' or otherwise 'undelivered'.

"16. That, based upon the foregoing, my experience as an auditor, and my familiarity with the practices and procedures of the New York City Department of Taxation and Finance, I am certain that the subject Notice of Determination (Notice Number S881220920K) was delivered to and received by the United States Postal Service, in Brooklyn, New York, for certified mailing, on November 14, 1988."

After the preparation of her affidavit, Ms. Chan was requested to appear personally and provide testimony about her involvement with petitioner's sales tax audit. She indicated by her testimony that in reviewing the affidavit there were two items with which there was a slight discrepancy. The first was in Item "12" of her affidavit, where she had stated that "article

numbers were then written on the certified mail tags attached to the corresponding items of sealed mail." She corrected such information by stating that the certified mail number was written directly on the envelope and no mail tag actually existed. In addition, in Item "16" of the affidavit she makes reference to the "New York City Department of Taxation and Finance" and corrects the agency name so it is properly reflected as New York City Department of Finance.

Ms. Chan was cross-examined by petitioner's representative in approximately 100 pages of transcript on this four-page affidavit and the procedures enumerated therein. The only additional slight discrepancy noted by Ms. Chan was with reference to Item "14" where she indicated receipt of the certified mail record after it is stamped by the Post Office. What Ms. Chan actually receives for her audit file is a copy of the certified mail record, including the page on which a particular taxpayer's name appears. It is that copy that she placed in her file.

Additional testimony was provided by Chandra Panchmia, who acted as the auditor's section head during the audit in question. Mr. Panchmia independently confirmed that it is common practice for the notice of determination to be sent out before the section head or team leader "signs off" on the field audit report. Mr. Panchmia expressed no surprise that the notice of determination in this matter, dated December 20, 1988, was purportedly mailed on November 14, 1988. He explained that until sometime in the latter part of 1989 his office routinely computed the interest up to the 20th day of the current tax quarter and mailed the notice "whenever appropriate". He indicated that if interest was in fact overpaid, the Division would refund the same. Mr. Panchmia additionally confirmed all of the pertinent steps of the preparation and mailing of the notice as set forth by Ms. Chan in her affidavit.

Petitioner introduced into evidence two certified mail logs, each bearing U.S. Postal Service stamps dated November 14, 1988. Each page indicates a mailing to Ronald Bowen. The first of the two documents, bearing article number 932995, indicates a document was mailed by the New York City Department of Finance to Ronald Bowen d/b/a Ronald Bowen (Discount Liquors) at 474 Flatbush Avenue, Brooklyn, New York. The total number of pieces

of mail listed by the sender (New York City Department of Finance) was stated to be "4". The Postal Service thereafter indicated that the total number of pieces received at the Post Office was the same number and a scribbled signature appears in the "Postmaster" box.

The second document indicates three pieces of mail listed by sender and the same number of pieces received at the Post Office, with the same Postmaster signature. That document indicates that article number 932994 was sent to Mr. Ronald Bowen on November 14, 1988 at his home address of 684 East 92nd Street, Brooklyn, New York. Both forms indicated that the documents described thereon were sent by certified mail.

Petitioner introduced into evidence two pages from a publication described as the Domestic Mail Manual. Section 912.1 of each of the two issues of the Domestic Mail Manual (Issue 22, dated 1/22/87, and Issue 39, dated 6/16/91) contains information regarding certified mail procedures. The section noted by petitioner is 912.1(b) indicating the following:

> "Mailers may be authorized to use specially designed and privately printed Forms 3800 [receipt for certified mail]. The certified mail endorsement block must be printed in green using the same size and format. The certified number must begin with the letter P . . . ."

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that although the notice in issue clearly apprised petitioner of the amount of tax assessed, that the tax could be challenged through the hearing process and that a petition for the same must be filed within 90 days, it did not indicate that the tax was estimated. Thus, the notice is void as jurisdictionally defective.

Petitioner next argues that the Division failed to prove that the notice of determination was actually mailed to petitioner on the date in question. Petitioner asserts that the Division has failed to show it maintained any regular procedures and, certainly, that any such procedures were followed.

The Division points out that in this case the auditor did not resort to external indices, but rather disallowed as unverified the exempt sales claimed on audit which petitioner could not substantiate. The Division asserts that the record establishes that petitioner knew of the audit and the audit methodology before the notice was issued. Petitioner has not specified the manner

in which any alleged prejudice has occurred. Thus, petitioner's argument that the notice is jurisdictionally defective (and that the "box" was not checked) must be dismissed.

As to the issue of mailing, the Division maintains that it has clearly established, through an affidavit of procedures as well as direct testimony, that procedures clearly existed in this case and were followed in every respect. Thus, the Division is entitled to enjoy a rebuttable presumption that the subject notice of determination was delivered to petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 1138(former [a][1], [2]) provided as follows:

> "If a (1) return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same.
>
> "(2) Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days."

B. Tax Law § 1138, as quoted above, first provides that the tax shall be determined "from such information as may be available" before the tax may be estimated on the basis of external indices. In this case, the auditor utilized information available and provided by petitioner. Despite the fact that the notice was somewhat inaccurate as to the tax deficiencies on a quarterly basis because of improper averaging over the entire audit period, the totals were based not on an estimate but on actual sales invoices provided by petitioner. There was no estimate in this case. The assessment is based on actual records of claimed nontaxable sales that petitioner could not substantiate. Petitioner was not entitled to be apprised of an "estimated audit" since the method employed in this case was not one that was estimated on the basis of external indices as described in the second portion of Tax Law § 1138(a)(1). In this case, the

notice issued adequately apprised petitioner of the total deficiency asserted for the period in issue and of the need to pursue his administrative remedies to contest the assessment (see, Matter of DJH Construction v. Chu, 145 AD2d 716, 535 NYS2d 249; Matter of Pepsico v. Bouchard, 102 AD2d 1000, 477 NYS2d 892). Petitioner's reliance on Matter of Cheakdaipejchara (Tax Appeals Tribunal, April 23, 1992) is completely misplaced and his argument that the notice was jurisdictionally defective is wholly devoid of merit. Even if the notice in this case should have included a statement that the tax resulted from an estimate, the absence of such statement does not render the notice invalid. A similar issue was raised by the petitioner in Matter of A & J Parking (Tax Appeals Tribunal, April 9, 1992) where the Tribunal held that the omission of a statement indicating that the tax was estimated does not invalidate an otherwise proper notice in the absence of proof that the taxpayer was actually prejudiced by the omission. The evidence here establishes petitioner was not so prejudiced. He was advised that there was a discrepancy between the sales invoices and the claimed nontaxable status of such sales. He was aware that confirmations had provided contrary information than was provided by petitioner. Petitioner was given an opportunity to address these items and provide proof of nontaxability. The only proof provided was information that could not be independently verified or proved to be falsified. There is clearly an absence of any prejudice to petitioner in this matter.

C. A notice of determination finally and irrevocably fixes the tax unless the person against whom it is assessed, within 90 days after giving of the notice of determination, applies to the Division of Tax Appeals for a hearing, or unless the Commissioner of Taxation and Finance of his own motion shall redetermine the same (Tax Law § 1138[a][1]). As an alternative to proceeding directly to a formal hearing, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services in the Department of Taxation and Finance (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a], 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment, in this case 90 days (Tax Law §§ 170[3-a][a]; 1138[a][1];

see, 20 NYCRR 4000.3[c]). A notice is mailed when it is delivered to the custody of the United States Postal Service for mailing (Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991). When the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (Matter of Novar TV & Air Conditioning Sales & Serv., supra; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commr., 89 TC 321). A presumption of delivery will not arise unless or until sufficient evidence of mailing has been proffered (see, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Matter of Katz, Tax Appeals Tribunal, November 14, 1991). Proper mailing by the Division requires a showing that standard procedures have been established for the issuance of such notices by one with knowledge of such procedures, and evidence must be introduced to show that such procedures were followed in the particular case in issue (Matter of Katz, supra; Matter of Novar TV & Air Conditioning Sales & Serv., supra). For example, in Matter of Rosen (Tax Appeals Tribunal, July 19, 1990), the Tribunal held as sufficient proof of mailing the affidavit of a Division employee and a copy of the certified mailing record. The affidavit explained the general mailing procedures, identified the certified mailing record and described how the record evidenced that the notices in question were in fact issued to the petitioners in that case.

In this case, not only did the Division offer the affidavit of Jeannie Chan, the person whose regular duties included the preparation of the notice of determination, but it provided her testimony as well as that of her supervisor, Chandra Panchmia. Ms. Chan set forth in detail all of the steps which led to the issuance of the notice of determination including the selection of the date placed on the notice. She was responsible for placing the newly-created notice of determination in an envelope and delivering it to the mailroom in her office building. She described the creation of the certified mail record which was submitted into evidence bearing petitioner's name on the date the Division claims to have mailed the notice to him, with the appropriate number of pieces of mail accounted for, a signature by a postal employee, as well as

a U.S. Postal Service stamp dated November 14, 1988. Both Ms. Chan and Mr. Panchmia expressed with certainty the regularity of the procedures as well as the fact that such procedures were followed in this case. The testimony of both the auditor and the section head were found to be credible in this regard. Petitioner's representative overzealously attempted to establish, through his cross-examination of Ms. Chan and Mr. Panchmia, that what appeared to be somewhat unusual office procedures (a supervisory sign-off signature dated after issuance of the notice, and the notice bearing a date subsequent to the alleged date of mailing) were falsehoods intending to deprive petitioner of his due process rights. This could not be further from the truth. At best, his futile efforts and protracted cross-examination of Ms. Chan in particular only lent more credence to her testimony as to the office procedures. There is no doubt that she substantially, if not fully, complied with the established procedures in this case.

A properly completed Postal Service Form 3877 (and other similar mailing documents bearing a postmark) represents direct documentary evidence of the date and the fact of mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; see, Coleman v. Commr., 94 TC 82; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). A failure to comply precisely with the Form 3877 mailing procedure may not be fatal if the evidence is otherwise sufficient to prove mailing (id.). If in fact the numbers contained on the certified mail record should be preceded by a "P", this single fact in and of itself is not fatal to the proof of mailing burden placed upon the Division. It is concluded that the evidence, together with the testimony, submitted by the Division fully satisfies the Division's burden that the notice in question was properly mailed to petitioner. Regardless of whether one measures from November 14, 1988 or December 20, 1988, the 90-day time period had long lapsed.

D. The petition of Ronald Bowen d/b/a Ron's Discount Liquor is dismissed.

DATED: Troy, New York
April 22, 1993

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE