

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ORRIN SEGUIN	:	DETERMINATION
D/B/A CLUB 37	:	DTA NO. 808312
	:	
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.	:	

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Petitioner, Orrin Seguin d/b/a Club 37, R.D. 3, Box A221, Plattsburgh, New York 12901, 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 held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 1, 1991 at 9:15 A.M., with all briefs to be submitted by August 30, 1991. Petitioner's brief was filed on May 31, 1991. The Division of Taxation's answering brief was filed on July 9, 1991, and petitioner's reply brief on August 30, 1991. Petitioner appeared by David J. Marshall, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether petitioner timely protested a Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

II. Whether an affidavit of an employee of the Division of Taxation was properly admitted into evidence, and, if so, whether it may serve to contravene testimony offered by petitioner and his accountant in support of the petition.

FINDINGS OF FACT

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 21, 1985 against petitioner, Orrin Seguin d/b/a Club 37,

assessing sales and use taxes due of \$16,489.41, plus interest, for the period September 1, 1982 through May 31, 1985. Petitioner conceded that this statutory notice was received by him on August 22, 1985.<sup>1</sup> In June 1985, petitioner sold his bar and grill known as Club 37 (which he had operated in Massena (St. Lawrence County) for approximately 15 years) to the Lambert Corporation. It appears that, as a result of the bulk sale of the business, an audit was performed. The audit report noted that:

"[s]ince the time to assess the purchase was about to expire, assessments were issued against both the purchaser [the Lambert Corp.] and seller [petitioner] on August 21, 1985."

Petitioner asserts that within a few days after he received the notice of determination he went to his accountant, David Leary, and gave him a copy of it. Petitioner testified that his accountant protested the

assessment by sending the following letter dated October 25, 1985 to the Utica District Office<sup>2</sup> of the Division of Taxation:

"This letter of protest is being filed on behalf of the above named taxpayer [petitioner] for your Notice of Determination and Demand for Payment of Sales

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<sup>1</sup>The Division of Taxation introduced an affidavit of Michael Bellair, a Sales Tax Auditor III, whose duties included the preparation and mailing of notices of determination generated by the Utica District Office. Mr. Bellair described the general mailing procedures followed in the Utica office and attached a copy of a so-called certified mailing record which shows a listing for the statutory notice at issue herein. It is observed that this certified mailing record does not bear a stamp of the United States Postal Service to show when it was received by the Postal Service from the Utica District Office. However, the photocopy of the Postal Service Form 3811 (return receipt) attached to Mr. Bellair's affidavit shows that the statutory notice at issue herein was delivered on August 22, 1985 and signed for by Lisa Laprade, petitioner's secretary.

<sup>2</sup>The protest letter shows the following address:

"N.Y.S. Dept. of Taxation & Finance  
State Office Building  
207 Genesee Street  
Utica, New York, 13501".

and use tax [sic] U-BS-121-01, Notice number S850821000U dated 08/21/85. At this time we would request a conference to discuss the findings of the recent audit of said taxpayer. If there are any additional forms or petitions to be filed by the taxpayer please advise both the taxpayer and this office as to what must be done.

Thank you for your assistance in this matter."

The notice of determination at issue did not provide, on its face, an address to which a protest of the assessment should be submitted.<sup>3</sup> In fact, Utica is designated in the space on the notice for "Office" and the following words appear in bold type, "Make payment promptly at the office shown above."

David Leary, who has been petitioner's accountant since the early 1970's, testified that petitioner, in late August of 1985, brought the notice of determination for his review. In response, he prepared the protest letter dated October 25, 1985 described in Finding of Fact "2", supra, which he said he "dictated". It is not known why he waited two months from his meeting with petitioner to take steps to submit a protest. Mr. Leary recalled that his father, Jay W. Leary, took the protest letter to the Post Office for mailing. David Leary also testified that he saw a receipt stamped by the Post Office showing the mailing of the protest letter as well as "the return receipt, the green card" which came back after delivery of the protest letter to the Utica District Office. David Leary testified that in late 1989 he was asked, for the first time, to look for the postal receipts, but was unable to find them.

David Leary testified that he, not his father, was primarily responsible for petitioner's account. However, David Leary is not a certified public accountant or a public accountant, and he was, as a tax practitioner, an employee of his father's small accounting firm. Because his father was the firm's sole certified public accountant, it appears that after the death of Jay W.

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<sup>3</sup>Petitioner testified that he did not know whether a "Notification of Your Rights to Protest", a Tax Appeals Bureau Form TA-9.1 (4/82), which then provided advice and guidance on contesting an action taken by the Department of Taxation and Finance, was included with the statutory notice. Such notification would have advised petitioner to protest an action taken by the Department by filing a petition with the former Tax Appeals Bureau at its Albany office. It is observed that such form was attached to petitioner's petition dated June 8, 1990.

Leary on September 12, 1987, the accounting firm's operations were substantially modified. David Leary testified that after his father's death, most of the firm's records were placed in storage, and Mr. Leary suspects that the postal receipts were misplaced or lost in the process.

In response to the question of the Division of Taxation's representative whether this was the "first tax matter that you were involved with where a protest was made?", David Leary replied, "I'm not sure". Furthermore, it was Mr. Leary's understanding at the time that the Utica District Office was "where you send everything", including a protest.

Sometime in February 1986, petitioner received a subpoena dated February 13, 1986 requiring him to appear on February 25, 1986 with regard to the assessment at issue herein. The subpoena noted that petitioner's "failure to respond to previous notices from the Department of Taxation and Finance has resulted in the issuance of this subpoena to appear at the office named above [Utica District Office]." The subpoena was issued by Donna Bahry, as Deputy Tax Commissioner. It is noted that near the top of the subpoena, in a prominent position, the following telephone number was provided: (315)793-2504.

Petitioner testified that as soon as he received the subpoena he went to see David Leary:

"I said, Dave, what's going on? I said, 'I got a subpoena to show up here [Utica] on the 25th' and, I said, 'I haven't even had a hearing yet'.

He said, 'just a minute'. And he got on the telephone. And he called somebody. And all I heard him say was that you do not have to appear on the 25th of February. The matter is being discussed and they'll let us know what they're going to do. And that satisfied me for the time because I was very concerned about going down there on the 25th of February."

David Leary testified that he phoned Donna Bahry who said there was no need to appear for the subpoena. The following testimony of Mr. Leary with regard to the timely filing of the protest letter was brought out by leading questions on direct examination:

"Attorney Marshall: In 1986 when you had this conversation with this person, what did they tell you?

David Leary: They said there was no need to appear at the subpoena, that they had -- I'm trying to remember now. There was no need for Orrin to appear for the subpoena. That they had on their files some of the information and that some of the files were in another office, which I took at that time to mean Albany.

Attorney Marshall: And did they indicate that they had an appeal letter that

they had received?

David Leary: Yes.

Attorney Marshall: In 1985?

David Leary: Yes.

Attorney Marshall: Did they also indicate at that time that Orrin would be receiving a hearing?

David Leary: Yes.

Administrative Law Judge: You're saying 'they'. Who is 'they'?

Attorney Marshall: He's indicated that Donna Bahry was the person he thought he speak [sic] to.

Administrative Law Judge: A she, right? She indicated that there was this letter [protest letter dated October 25, 1985] in her file?

David Leary: I believe so, your Honor. Yes."

Petitioner introduced into evidence a photocopy of a page from David Leary's New York Telephone bill of itemized calls from February 20, 1986 to March 17, 1986. The fourth itemized call shows a three-minute phone call on February 21, 1986 at 4:01 P.M. to Utica, New York to the phone number shown on the face of the subpoena, (315)793-2504. However, David Leary testified that he made no contemporaneous notes of his phone conversation.

After the phone conversation of February 21, 1986, petitioner testified:

"I didn't do anything for quite some time except write a letter much later in the year, when I hadn't heard anything. And I don't have a copy of that letter, but I did get an answer back."

The "answer back" was a letter dated December 22, 1986 from Dawn Roemmele of the Central Sales Tax Section in Albany which provided as follows:

"We acknowledge receipt of your letter of October 25, 1986<sup>4</sup> requesting a meeting in connection with the above mentioned Notice [notice of determination dated August 21, 1985].

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Dawn Dromirecki, formerly known as Dawn Roemmele, candidly admitted during her testimony that the 1986 is in error and should read 1985. The reference was to petitioner's protest letter of October 25, 1985.

We have forwarded your letter to our Utica District Office with a request for them to contact you and arrange for a mutually satisfactory informal meeting appointment date.

You should, at that time, be prepared to submit evidence to substantiate any adjustment to the above mentioned Notice. In addition, should you designate an individual to represent you at this meeting, a properly completed Power of Attorney must be presented.

In all future correspondence regarding this matter, please refer to protest number PR-BS-366, line I."

This letter dated December 22, 1986 from Dawn Roemmele to petitioner was prepared at the request of John Bartell, who at the time was a Tax Technician I in the Bulk Sales Unit in Albany. According to Mr. Bartell's testimony, when he picked up the bulk sales file concerning this matter, he saw a copy of petitioner's protest letter of October 25, 1985. Assuming it was "a timely-filed protest", Mr. Bartell gave the case to Dawn Roemmele to process which resulted in the letter dated December 22, 1986 to petitioner, supra. Mr. Bartell testified that, in early 1987, the Utica District Office sent the matter back noting that a timely protest had not been filed.

Petitioner testified that he sent photocopies of the protest letter dated October 25, 1985 to various Division of Taxation employees involved in this matter in November of 1989. He testified that he did not send any other photocopies of the protest letter to Division of Taxation employees at an earlier time. What appeared to prompt petitioner to send

photocopies of the protest letter was the issuance of a warrant dated October 25, 1989 against him which noted that tax in the amount of \$16,489.41, plus penalty and interest, had been found due to the State. The warrant, which was issued by the Tax Compliance Division located at the Utica District Office, provided the name and telephone number for Chester F. Baryla, a Tax Department employee. Petitioner testified that he phoned Mr. Baryla who advised him that he had the original of the protest letter dated October 25, 1985 in his file.

It is petitioner's testimony that it was not until November 1989 that he was advised by a Division of Taxation employee that the original protest letter dated October 25, 1985 had not been timely received. According to petitioner, "[t]he only time that it was ever said that they

had not received it was from [John Bartell]" in November 1989.

Petitioner then consulted an attorney and on April 17, 1990 filed a Request for Conciliation Conference which was denied by a conciliation order dated May 25, 1990 for the following reason:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on August 21, 1985, but the request was not mailed until April 17, 1990, or in excess of 90 days, the request is late filed."

The testimony of petitioner and his accountant, David Leary, was contradicted by evidence introduced by the Division of Taxation. The Division of Taxation introduced into evidence an affidavit<sup>5</sup> dated

April 22, 1991 of Donna Bahry who stated in her affidavit:

"That it is my recollection that I never received, acknowledged receipt of or indicated in any manner that the Department had received a timely protest letter in connection with the notice S850821000U [the notice of determination dated August 21, 1985]."

Ms. Bahry also indicated in her affidavit that she reviewed the "Utica District Office Tax Compliance Unit file involving this matter" before concluding that a timely protest letter was not "received by the Utica District Office Tax Compliance Division" (emphasis added). In her affidavit, Ms. Bahry also stated that she had a conversation with "Robert Mason, Sales Tax Auditor...with the Utica District Office Sale [sic] Tax Unit who reviewed the Utica District Office Sales Tax Unit file." Ms. Bahry seems to imply by this statement (although it was not explicitly noted in her affidavit) that the Utica District Office Sales Tax Unit also did not receive a timely filed protest letter.

Attached to Ms. Bahry's affidavit is a photocopy of the "activity sheet" of the Utica District Office Tax Compliance Unit included in its file on petitioner. The activity sheet, in

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<sup>5</sup>Petitioner's representative was provided with a copy of this affidavit approximately two weeks before the hearing.

fact, consists of five pages of notes under a column labeled "Action" which reference specific entry dates, commencing September 29, 1982 and ending March 29, 1991. (There appears to be a final, nearly illegible entry next to the date 4/1, although 4/1 appears to be crossed out.) It is observed that there is no entry referencing the phone conversation of February 21, 1986 noted in Finding of Fact "5", supra. The entry<sup>6</sup> closest in time to this date is the

following:

"5/14/86: Called TP re 285, 385 demands, 283 - 485 B/S seller, and 485 & 186 del. TP said his acct had supposedly called someone re subpoenas -- audit protested per TP (no info on AR or in file). TP will call acct then call back. (Note: reached TP at POB phone #). (K. Skelly)

TP called back. Said acct talked to someone re subpoenas on 2/21/86 (subp show<sup>7</sup> no notes). Protest on audit was mailed 2/27/85 (?) -- TP doesn't think any ack rec'd -- will have acct send copy of protest.<sup>8</sup> TP will send copy 485 filed A no remit, final ret. TP sold bus 5/28/85, now wkg as mgr. (K. Skelly) [emphasis added]."

Petitioner testified that he "had no contact with anybody from the Department until November 1989, with any phone calls." When the Division of Taxation's representative

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<sup>6</sup>The abbreviations and coded language are those of an individual named K. Skelly, who signed his or her name in parenthesis after the action noted. There appear to be two entries made on this date because the name K. Skelly was signed twice.

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This word is a best guess since it is nearly illegible.

<sup>8</sup>

Petitioner testified, as noted in Finding of Fact "8", supra, that he did not send to any Division of Taxation employee a photocopy of the protest letter dated October 25, 1985 until November 1989. However, it is observed that petitioner's accountant, David Leary, did not testify whether or not he sent a photocopy of the protest letter to any Division of Taxation employee. In contrast, in petitioner's reply brief, his representative argued as follows:

"No other letter or copy of the letter of October 25, 1985 was sent by petitioner or any agent of the petitioner until three years later in 1989 when petitioner sent another copy of the 1985 letter."



explicitly questioned petitioner concerning the May 14, 1986 phone conversation described by K. Skelly, supra, petitioner responded: "I can't recall."

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that he timely filed by certified mail the protest letter dated October 25, 1985. Petitioner's representative argues in his brief as follows:

"The Utica Department [sic] admitted to Mr. Seguin's accountant on February 13, 1986 that they had the October 25, 1985 letter.

A copy of this said letter appeared in the Albany files in May of 1986 and this was not any copy that Mr. Seguin had sent. The Tax Department in Utica did receive the October 25, 1985 letter and even admitted it."

Petitioner rejects the affidavit of Ms. Bahry as hearsay and, moreover, it "is false and incorrect".

In contrast, the Division of Taxation argues that petitioner failed to establish by clear and convincing evidence that the Division duly received the protest letter dated October 25, 1985. It also contends that the protest letter was ineffective because it was sent to an incorrect address.

#### CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1), as in effect in 1985, provides that a notice of determination of additional sales tax due:

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the tax commission<sup>9</sup> for a hearing...."

B. As noted in Footnote "1", supra, the Division of Taxation's mailing record did not have a postmark on it which indicated the date of

mailing of the notice of determination. As a result, the mailing record was inadequate to prove

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The current statutory provision substitutes "division of tax appeals" for "tax commission" to reflect the establishment of the Division of Tax Appeals, which became responsible for the administration of the administrative hearing process commencing September 1, 1987 (Tax Law § 2000 et seq.).

the date of mailing of the notice (cf., Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Powers, Tax Appeals Tribunal, September 26, 1991). However, as noted in Footnote "1", supra, the photocopy of the return receipt shows that the notice was delivered on August 22, 1985 and signed for by petitioner's secretary. Therefore, it is reasonable to treat August 21, 1985, the day before receipt (and the date on the notice of determination), as the date of mailing of the notice. Consequently, petitioner was required to "apply to the tax commission for a hearing" within 90 days of August 21, 1985 or by November 19, 1985.

C. Tax Law § 1147(a)(2) provides as follows:

"If any return, claim, statement, notice, application, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subdivision shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section. This subdivision shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulation of the tax commission." (Emphasis added.)

D. 20 NYCRR former 535.1(b), as in effect in 1985, provided in part as follows:

"Mailing of documents by taxpayers. (1) Any document required to be filed under the provision of Article 28 or under a tax enacted pursuant to the authority of Article 29 of the Tax Law and administered by the Tax Commission will not be considered to be timely mailed or timely filed unless the document is mailed in accordance with the following requirements:

(i) The document must be contained in an envelope or other appropriate wrapper and must be properly addressed to the Tax Commission, bureau, office, officer or person with which or with whom the document is required to be filed.

(ii) The envelope containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be

deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service.

(iii) The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing.... If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed period or on or before the prescribed date for filing such document in accordance with this Subchapter, the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail. Accordingly, the sender assumes a risk that the envelope containing the document will bear a postmark date stamped by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document), but see paragraph (3) of this subdivision with respect to the use of registered mail or certified mail to avoid this risk....

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(3)(i) If an envelope or wrapper containing a document is sent by United States registered mail, the date of such registration is treated as the postmark date and the date of delivery.

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(iii) If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of delivery."

E. The Tax Appeals Tribunal in Matter of WSD United Transportation, Inc. (July 27, 1989 [citing its earlier decision in Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988]) noted that:

"Section 1147(a)(2) of the Tax Law has been interpreted to hold that proof of ordinary mailing is insufficient to prove timely filing of a petition where there is no actual delivery of the petition (Matter of Sipam Corporation, *supra*). Tax Law section 1147(a)(2) is modeled after Internal Revenue Code section 7502. Both sections provide that when a taxpayer effects delivery of a petition for hearing through the United States Postal Service and such delivery occurs after the prescribed period, the postmark appearing on the face of the envelope will be deemed the date of delivery. In addition, both sections provide that use of registered mail is prima facie evidence that the document was delivered and that regulations may allow for the use of certified mail instead of registered mail [citation omitted].

In that section 1147(a)(2) is patterned after section 7502 of the Internal Revenue Code, it is helpful to look to the Federal courts' interpretation of section 7502 for guidance. These courts have consistently held that where there is no actual delivery of the petition, proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing (Miller v. United States, 784 F2d 728 [6th Cir 1986]; Deutsch v. Commr., 599 F2d 44, 46 [2d Cir 1979])."

F. In the matter at hand, the Division of Taxation denies that the protest letter dated October 25, 1985 was actually delivered to it within 90 days of the issuance of the statutory notice. The records of the Division of Taxation and the testimony of its witnesses and the affidavit of Mrs. Bahry do not support a finding that the protest letter was timely filed. Rather, as noted in Finding of Fact "11", supra, K. Skelly's notation indicates that as of May 14, 1986 no protest letter had been received and that the taxpayer, as of such date, "will have acct send copy of protest." Furthermore, Ms. Bahry's affidavit, which denies timely receipt of the protest letter, was properly admitted into evidence (cf., Matter of Kucherov v. Chu, 147 AD2d 877, 538 NYS2d 339; Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, 459, lv denied 68 NY2d 602, 505 NYS2d 1026). Consequently, the petitioner must prove the timely delivery of its protest letter (assuming for a moment that the protest letter may be viewed as an application for a hearing to the tax commission).

G. Petitioner has failed to meet the burden of proving actual delivery of the protest letter within 90 days of the issuance of the statutory notice. The U.S. Tax Court decision in Storelli v. Commissioner (86 TC 443) provides guidance in reaching this conclusion. The taxpayers in Storelli claimed that they mailed their petition, within 90 days of the mailing of a notice of deficiency, by United States certified mail on July 26, 1984. In support of their position they introduced the following evidence: a copy of their law firm's check register showing a check payable to the U.S. Tax Court; a copy of the law firm's photocopy log showing that photocopies were charged to the Storellis on July 26, 1984; a copy of the law firm's postage log showing \$2.62 in postage was charged on July 26, 1984 to the Storellis for private meter postage; a copy of the law firm's clients' ledger verifying charges made to the Storellis account on July 26, 1984; and a copy of the law firm's bank reconciliation showing that the check payable to the United States Tax Court had not been paid. But like the petitioners herein, the taxpayers in Storelli were unable to produce a copy of their certified mail sender's receipt. As a result, despite the above-described evidence introduced by the Storellis, in addition to affidavits of "their counsel and another interested person to prove the petition was timely mailed by certified mail", the Tax

Court concluded:

"[W]here the petition is never received by the Court -- a copy of the postmarked U.S. certified mail sender's receipt which also shows the proper address of the Court must be produced in order for petitioners to be entitled to rely on section 301.7502-1(d)(1), Proced. & Admin. Regs., pertaining to prima facie evidence of delivery."

H. Similarly, in the matter at hand, for petitioner to be entitled to rely on 20 NYCRR former 535.1(b), as in effect in 1985, pertaining to prima facie evidence of delivery, petitioner must produce a copy of the postmarked U.S. certified mail sender's receipt. Petitioner must bear the risk of his accountant's inability to locate such receipt.

I. In Storelli, supra, the Tax Court emphasized the following insightful and persuasive point made in Wood v. Commissioner (41 TC 593, affd 338 F2d 602):

"[U]nless taxpayers are held to strict proof of compliance with the statute and regulations, the temptation would be great to conveniently misplace the sender's receipt for certified mail and attempt to prove by virtually uncontestable oral testimony of the sender, who would in most cases be prejudiced, that the receipt was postmarked on time."

J. In light of the Conclusions of Law, supra, it is not necessary to determine whether the protest letter dated October 25, 1985 may be viewed as an adequate application to the former State Tax Commission for a hearing as required by Tax Law § 1138(a)(1).

K. The petition of Orrin Seguin d/b/a Club 37 is dismissed.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE