STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CHRISTOPHER TUREK	:	DETERMINATION DTA NOS. 810796
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period January 1, 1982 through May 31, 1988.	:	AND 810797

Petitioner, Christopher Turek, Horns Park Road, Hyde Park, New York 12538, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period January 1, 1982 through May 31, 1988.

On May 24, 1993 and June 10, 1993, respectively, petitioner by his duly appointed representative, Stewart Buxbaum, C.P.A., and the Division of Taxation by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel), signed a waiver of hearing consenting to have the issue of timeliness of the petitions determined on submission. On June 11, 1983, the Division of Taxation submitted its documentary exhibits. Petitioner filed a letter brief on August 1, 1993. The Division of Taxation filed a letter brief October 7, 1993 and petitioner filed his reply letter brief October 19, 1993. After due consideration of the evidence and arguments filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation has established proper mailing to petitioner of a notice of determination asserting omnibus penalty ("penalty notice") thereby creating a presumption of receipt.

II. Whether the Division of Taxation has established proper mailing of Conciliation Order No. 092094 ("the order") to petitioner thereby creating a presumption of receipt.

III. In the event proper mailing of the penalty notice and the order are established, whether petitioner has proven by clear and convincing evidence that he did not receive either, or both,

thereby rebutting the presumption of receipt and entitling him to a hearing.

FINDINGS OF FACT

Petitioner, Christopher Turek, operated Turek Landscaping. The Division of Taxation ("Division") issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated August 31, 1988, for the period January 1, 1982 through May 31, 1985 in the amount of $14,058.07, plus penalty and interest. On the same date, the Division issued to petitioner a second notice of determination asserting sales and use taxes for the period June 1, 1985 through May 31, 1988 in the amount of $4,915.28, plus penalty and interest.

On or about November 18, 1988, petitioner mailed a Request for Conciliation Conference, dated November 16, 1988, regarding the above assessments to the Division's offices at 30 Russell Road, Albany, New York. On the same day, petitioner and his then representative, Geraldine R. Hurley, also mailed to the same address two petitions by certified mail ("the 1988 petitions") purporting to challenge the same two notices of determination before the Division of Tax Appeals. Petitioner signed both of these petitions and also signed the Request for Conciliation Conference.[1]

Instructions in the first paragraph of petitioner's Request for Conciliation Conference (Form TA-9.1) state, in relevant part, that:

> "If you disagree with an action taken by the Department of Taxation and Finance . . . you may protest by filing a Request for Conciliation Conference or by filing a Petition for a Tax Appeals Hearing." (Emphasis added.)

At the bottom of this request, just below the location where petitioner signed his name, the proper address to which a Request for Conciliation Conference is to be mailed is set forth in bold print, i.e., "Bureau of Conciliation and Mediation Services, Building 9, W.A. Harriman Campus, Albany, NY 12227."

The Administrative Law Judge takes official notice that petition forms (Form TA-10

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[1]In the record there is also a copy of a request for conference dated, November 16, 1988, attached to a copy of an envelope addressed to "Bureau of Conciliation and Mediation Services, Bldg. 9, W.A. Harriman Campus, Albany, NY 12227". The envelope is postmarked November 18, 1988. No explanation has been offered for this mailing.

[9/87]) used to file the 1988 petitions included the correct address for the Division of Tax Appeals printed thereon, i.e., Supervising Administrative Law Judge, Division of Tax Appeals, W.A. Harriman Campus, Albany, New York 12227.[2]

Both petitioner's Request for Conciliation Conference and his two 1988 petitions were mailed to the incorrect addresses. Petitioner offered no explanation for why he and his then representative mailed these documents to 30 Russell Road, Albany, New York.

The Division's offices at 30 Russell Road forwarded the Request for Conciliation Conference to the Bureau of Conciliation and Mediation Services ("BCMS"). There is no indication in the record as to what happened to the two petitions that had been erroneously sent to the Russell Road address.

On June 7, 1989, a conference was held before John M. Jones, Conciliation Conferee, with regard to the above notices of determination. An unsigned copy of the Conciliation Order (CMS No. 092094) is in evidence, and is dated December 22, 1989. Petitioner claims he never received this order.

An affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in BCMS, sets forth the Bureau's procedures for preparation and mailing of conciliation orders. This affidavit establishes that a clerk in the Bureau, as part of her regular duties, verifies the names and addresses of persons who are to receive conciliation orders and affixes sequential certified mail control numbers to each envelope. The clerk writes the "certified control number" for each addressee's envelope on a Certified Mail Record ("CMR"). The clerk then takes the conciliation orders and the CMR to the Division's mail room and deposits them in the "Outgoing Certified Mail" basket. The certified mail envelopes and the CMR are taken by a mail room employee to a United States Post Office for mailing. Upon delivery to the United States Postal Service, a postmark stamp is affixed to the CMR showing the date of mailing. The CMR is then returned

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[2]In 1988, the Division of Tax Appeals had not yet moved to its present location in Troy, New York.

to BCMS and maintained as a permanent record.[3] Attached to the Chyrywaty affidavit is page three of a five-page CMR. This one-page CMR reflects 14 conciliation orders, including Conciliation Order No. 092094, were delivered to, and accepted by, the United States Postal Service. The CMR shows the postage and fees paid for mailing of Conciliation Order No. 092094 and that the envelope containing said order was addressed to petitioner at Horns Park Road, Hyde Park, New York 12538 and bore certified control number P-150017415. The signature of the United States postal employee accepting the subject certified mail is present on the CMR. The postal stamp affixed to the CMR evidences that a Conciliation Order (CMS No. 092094) was delivered to, and accepted by, the Capitol Annex Branch, United States Post Office, Albany, New York, on December 22, 1989.

The Division issued to petitioner a third notice of determination, dated January 10, 1989,asserting omnibus penalty for the period June 1, 1985 through May 31, 1988 in the amount of $10,000.00 based on petitioner's operation of a landscaping business without obtaining a Certificate of Authority under Articles 28 and 29 of the Tax Law. Petitioner did not request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of this assessment being issued. Petitioner claims that he never received this penalty notice.

An affidavit of Lisa Middleton, an employee of the Division's Albany District Office, sets forth that office's general procedures for preparation and mailing of assessments, and, in particular, the procedures followed in preparation and mailing of the instant penalty notice. Ms. Middleton deposes that she prepared the penalty notice and typed petitioner's address at

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[3]It is noted that the Certified Mail Record and the Post Office's Certified Mail Log (Postal Service Form 3877) both contain the taxpayer's name, address, postage fees, certified mail control number (article number), the number of pieces of mail, the signature of a postal employee, and postal date stamp of the branch office of the United States Postal Service to which the mail was delivered. Since this identical information is contained on both forms, and both forms are maintained in the regular course of business of the Division, they are both referred to infra as a "CMR".

Horn Park Road, Hyde Park, New York 12538 on the envelope, inserted the penalty notice in the envelope to be mailed by certified mail, return receipt requested.

A Return Receipt Card (Postal Service Form 3811) (hereinafter "green card") was attached to the envelope. Petitioner's name and address, certified mail control number (No. 41138) and notice of determination number were typed onto the CMR (Postal Service Form 3877). The certified mail control number (also known as the "article number") was also written on the envelope and the green card. The envelope was then stamped "Certified Mail, Return Receipt Requested."

The envelope and CMR were then taken to the Division's mail room where proper postage was applied, and the Division's postal clerk delivered the envelope and CMR to an employee of the United States Postal Service. The postal employee stamped a copy of the CMR (Postal Service Form 3877) with a postal service cancellation date stamp. The CMR was then returned to the Division and maintained as part of its permanent records.

The one-page CMR attached to the Middleton affidavit reflects that a single certified mail envelope bearing Certified Control No. 41138 was delivered to the Roessleville Branch of the United States Postal Service on January 10, 1989. This CMR was date stamped "January 10, 1989" by the Roessleville Branch of the United States Postal Service, Albany, New York. Also attached to the Middleton affidavit is a copy of the return receipt, or green card, bearing Certified Control No. 41138. This return receipt is post/date stamped "January 20, 1989" by the United States Postal Service at Hyde Park, New York, and signed by Christopher Turek.

On May 7, 1992, petitioner, through his present representative, Stewart Buxbaum, filed the two petitions initiating the instant proceeding by mailing same, by certified mail, to the Division of Tax Appeals at its offices in Troy, New York.

The first petition challenges the two assessments issued in 1988 (see Finding of Fact "1"). The second petition filed May 7, 1992, challenges the penalty assessment (Finding of Fact "9").

Petitioner has neither alleged nor offered proof to show that the Conciliation Order was not signed.

Petitioner did not allege, and offered no evidence to show, that the mailing of the Conciliation Order or the penalty notice was not in accord with the requirements of the Tax Law and regulations. He has merely alleged non-receipt of these notices.

Petitioner alleged, but did not offer evidence to prove, that he never received the Conciliation Order or the penalty notice.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner claims he received neither the Conciliation Order No. 092094 (which sustained the two 1988 assessments), nor the penalty assessment issued in 1989. Based on the claimed non-receipt of these two notices, petitioner urges that he is entitled to a hearing on the merits on both of the instant petitions.

With regard to the Conciliation Order, petitioner argues that even if he had received the Conciliation Order, the Division has not proved that the order was signed.[4]

In addition, petitioner argues: a) he was not "informed" of his rights to have a hearing in the Division of Tax Appeals in lieu of a conciliation conference; and b) that the failure of the Division to forward the two incorrectly addressed 1988 petitions to the correct address of the Division of Tax Appeals, precluded petitioner from selecting a hearing in the Division of Tax Appeals as his mode of appeal. The remainder of the allegations in this petition, while relevant to a determination on the merits, are not germane to the timeliness issues presented here.

The Division argues that both the Conciliation Order and the penalty assessment were properly issued and that petitioner has failed to timely petition for relief before the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. Tax Law § 1138 addresses the authority of the Commissioner of Taxation and Finance to make assessments for sales tax due and the taxpayer's right to challenge such assessments:

"[n]otice of . . . [a] determination [of tax due] shall be given to the person liable for

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[4]This argument was raised for the first time in petitioner's letter-brief.

> 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 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]; emphasis added).

B. As an alternative to applying directly to the Division of Tax Appeals for a hearing, a taxpayer may, within the same 90-day period, first request an informal conciliation conference at the Division's Bureau of Conciliation and Mediation Services (Tax Law §§ 170[3-a][a]; 1138[a][1]; see, 20 NYCRR 4000.3[c]; 4000.5[c]).

C. If a taxpayer fails to timely challenge an assessment either by requesting a conciliation conference or by filing a petition with the Division of Tax Appeals, the assessment becomes fixed and final (Tax Law § 1138[a][1]; see Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174 [3d Dept 1989]).

D. If properly mailed, a notice of assessment is presumed to be received, and the 90-day period is deemed to begin on the date the notice is mailed:

> "Any notice authorized or required under the provisions of this article [28] 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" (Tax Law § 1147[a][1]; emphasis added).

E. If the Division can establish that the penalty notice was mailed in a manner prescribed by the statute, a presumption of receipt by petitioner is created (Tax Law § 1147[a][1]).

F. Similarly, proof which establishes the existence of an office practice and procedure followed by the Bureau of Conciliation and Mediation Services in the regular course of its business, which shows that Conciliation Order No.092094 was duly addressed and mailed, creates a presumption that the Conciliation Order was received by petitioner (News Syndicate Co., Inc. v. Gatti Paper Stock Corporation, 256 NY 211,214, 176 NE 169 [1931]; Nassau Insurance Co. v. Murray, et al, 46 NY2d 828,829, 414 NYS2d 117,118 [1978]; A & B Service

Station, Inc. v. State of New York, 50 AD2d 973, 376 NYS2d 656, 658-659; Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643).

G. These presumptions (Conclusions of Law "E" and "F") are rebuttable, however, and can be overcome by a proof that petitioner never received the penalty notice or conciliation order ("the notices") (see, Nassau Insurance Co. v. Murray, et al, supra;Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 690, 484 NYS2d 517; Engel v. Lichterman, supra). However, a taxpayer's mere denial of receipt, without more, is not sufficient to overcome either presumption (Nassau Insurance Co. v. Murray, et al, supra;Matter of T. J. Gulf, Inc., State Tax Commission, May 29, 1985, confirmed 124 AD2d 326, 508 NYS2d 97).

H. The first issue to be addressed is whether the Division has established that the notices were properly mailed. A notice is "mailed" when it is delivered to the custody of the United States Postal Service for mailing (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

The Tax Appeals Tribunal stated in Matter of Bryant Tool and Supply (Tax Appeals Tribunal, July 30, 1992) that:

> "[w]hen addressing a proof of mailing issue, the Division may prove the date of mailing by demonstrating the use of a standard mailing procedure, in general, and by introducing evidence that this procedure was used when conducting the particular mailings at issue (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991, supra; see also, Cataldo v. Commr., 60 TC 522). The latter requires the Division to introduce direct evidence that the notice was mailed on the date claimed (Matter of Novar TV & Air Conditioner Sales & Serv., supra)."

I. With regard to the penalty notice, the Division has offered compelling evidence that not only was the penalty notice properly mailed, it was actually received by petitioner. Petitioner's receipt arises because the Division proved (by the affidavit of its employee, Lisa Middleton, describing the mailing procedures of the Albany District Office, which she followed in this case; a copy of the one-page CMR [Postal Service Form 3877] attached to the Middleton affidavit and containing the correct name and address of petitioner, and a United States Postal Service stamp with the date of January 10, 1989) that the notice of determination asserting

omnibus penalty was mailed on January 10, 1989.

In addition, the Division has proved actual receipt of the penalty notice by petitioner by placing in evidence the signed "Return Receipt" (PS Form 3811) stamped by the Hyde Park Post Office on January 20, 1989 and bearing the signature of petitioner. The 90-day period within which petitioner could timely file a petition with the Division of Tax Appeals or request a conciliation conference began to run from the date of mailing, i.e., January 10, 1989 (Tax Law §§ 1138[a][1]; 1147[a][1]). It is noted that petitioner's actual receipt of the penalty notice, while at the same time denying that fact, gives his claim of "non-receipt" of the Conciliation Order a "hollow ring".

J. Nevertheless, the issue of whether the Division has proven mailing of the Conciliation Order to petitioner must be addressed. In Matter of Accardo (Tax Appeals Tribunal, August 12, 1993) the petitioner asserted that the United States Postal Service Form 3877, submitted by the Division to prove the mailing of the notice of determination, was illegible and incomplete because it did not indicate the amount of postage and fees paid. As a result, petitioner argued, it was possible that the envelope addressed to the petitioner was returned for insufficient postage.

Similarly, petitioner herein argues that the Certified Mail Record attached to the Chyrywaty affidavit is incomplete because it is only page three of a five-page CMR and makes no specific mention of the document being sent.

This argument is without merit. Page three is the only page of the five-page CMR that is relevant to this proceeding. It refers to only the 14 pieces of certified mail appearing on that page. One of those pieces of certified mail has Certified Control No. P-150017415 and was mailed to petitioner on December 22, 1989 at Horns Park Road, Hyde Park, New York 12538. That being the case, the presence or absence of the other four pages of the CMR which referred to certified mail sent to other taxpayers is irrelevant to this proceeding.

In Accardo (supra), the Division's proof, as here, consisted of the affidavit of a Division employee familiar with the Division's mailing procedures, describing that procedure. Attached to the affidavit, as here, were photocopies of a CMR (Form 3877) containing the petitioner's

name and address and a postmark/date of receipt stamp. While the affidavit in Accardo was not a "model of clarity" and the copy of the CMR (Form 3877) was "extremely poor", the Tribunal concluded that when taken together, the Division had shown sufficient evidence of mailing to establish that the Division mailed the notice on the date claimed.

In Accardo, as in the instant matter, the Division's proof that the conciliation order was sent by certified mail included a properly completed CMR. A properly completed Form 3877 was regarded by the Tribunal as highly probative evidence that a notice was sent to the address specified "because it contains on one page the name and address of the taxpayer, the dated postmark and the signature of a Postal Service employee acknowledging receipt" (Matter of Accardo, supra). It is concluded here that the certified mail record of BCMS, which contains the same information referred to by the Tribunal, is equally probative.

K. The affidavit of Joseph Chyrywaty demonstrates that the item of certified mail referred to in the CMR was in fact Conciliation Order No. 092094. I conclude, as the Tribunal did in Accardo, that the Chyrywaty affidavit and the CMR, when taken together, establish that Conciliation Order No. 092094 was properly mailed to petitioner by certified mail on December 22, 1989. The Division has proven that the Conciliation Order was properly mailed to petitioner on December 22, 1989 (Nassau Insurance Company v. Murray, supra; Matter of T.J. Gulf, Inc. v State Tax Commission, supra). From this showing by the Division, petitioner's receipt of the Conciliation Order is presumed. The 90-day period within which petitioner could timely file a petition with the Division of Tax Appeals, with respect to the two notices covered by the Conciliation Order, began to run from that mailing date, i.e., December 22, 1989.

L. Although the Division has demonstrated proper mailing of both the penalty notice and the Conciliation Order and they are both presumed to have been received by petitioner (Nassau Insurance Company v. Murray, supra;Engel v. Lichterman, supra; Tax Law § 1147[a][1]), petitioner is still entitled to a hearing on these notices, if he can prove that he never received them (see, Matter of Ruggerite, Inc. v. State Tax Commn., supra). Merely alleging non-receipt, however, is not enough to overcome the presumption (Matter of T. J. Gulf, Inc., supra).

Petitioner herein has offered no proof to establish his non-receipt of the subject notices, and therefore has failed to rebut the presumption of receipt.

M. Petitioner's claim that he was not "informed" of his rights to have a hearing in the Division of Tax Appeals in lieu of a conciliation conference will be addressed briefly. Petitioner's claim is not credible, taken in the context of a case where he has signed and mailed the two 1988 petitions[5] along with his Request for a Conciliation Conference. Petitioner's claim is even more dubious when one looks at the first paragraph of the Request for Conciliation Conference which he signed. That paragraph expressly states, in pertinent part:

> "If you disagree with an action taken by the Department of Taxation and Finance . . . you may protest by filing a Request for Conciliation Conference or by filing a Petition for a Tax Appeals Hearing."

Under the circumstances, petitioner's claim cannot be given credence.

N. Next, the signature, or lack thereof, on the Conciliation Order will be addressed. To a large extent this question is academic, since petitioner has not shown that the Conciliation Order sent to him was unsigned. More importantly, I can find no authority (and none has been cited by petitioner) in the statute, regulations or case law which require, as a condition of its validity, that a Conciliation Order be signed. If the law and regulations do not require a signature on a Conciliation Order, I will not. It is sufficient that a Conciliation Order, as in this case, identifies the name of the taxpayer, name of the conferee, identifies the assessment numbers (or other subject of the conference), identifies the relevant time periods, adequately conveys the result of the conference, i.e., who won and who lost, contains the date, and is properly mailed to the taxpayer. Such an order, signed or unsigned, is adequate to carry out its purposes of (1) advising the taxpayer of the outcome, and (2) the date of the order. From this information a taxpayer, and in particular this petitioner, could calculate the number of days available within which to file a petition with the Division of Tax Appeals, if he so wishes. The signature of a conferee on such an order is a mere ministerial act, adding nothing of substance to

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[5]Albeit to the wrong address.

the order.

O. Finally, petitioner argues that his right to seek a hearing before the Division of Tax Appeals was somehow thwarted, because his two incorrectly addressed 1988 petitions were not forwarded to the Division of Tax Appeals. The fact is that there is no evidence in the record as to what happened to these petitions. All that is known is that petitioner mailed the 1988 petitions. We do not know if these two petitions were forwarded to the Division of Tax Appeals and lost in the mail, or never forwarded at all. The record is simply barren of facts on the question.

The Tax Appeals Tribunal has prescribed regulations (20 NYCRR Part 3000) and petition forms (TA-10 [9/87]) both of which set forth the correct address for filing petitions with the Division of Tax Appeals. Petitioner chose to ignore this information and instead mailed the petition to an improper address. That was his privilege, but he cannot hold the Division responsible for it. The effect of his failure to comply with the pertinent law and regulations governing the manner of filing these petitions was that the two 1988 petitions were never effectively filed with the Division of Tax Appeals. Nevertheless, petitioner did not lose his right to a hearing in the Division of Tax Appeals.

P. The Tax Law gives taxpayers an election of remedies upon the issuance of a statutory notice by the Division (Tax Law §§ 170[3-a][a], [b]; 2000 et seq). A taxpayer can, within 90 days of the date a statutory notice is issued, either file a request for conciliation conference with BCMS (20 NYCRR 4000.3) or file a petition with the Division of Tax Appeals (20 NYCRR 3000.3). Either action by a taxpayer tolls the running of the 90-day period of limitations for an assessment to become fixed and final (Tax Law §§ 1138[a][1]; 170[3-a][b]; 2006[4]; see, 20 NYCRR 3000.3[c]; 4000.3[c]).

The law does not make provision for a taxpayer to request a BCMS conference at the same time he is pursuing his hearing rights in the Division of Tax Appeals. If a taxpayer elects first to seek a BCMS conference but is dissatisfied with the Conciliation Order, he retains the right, within 90 days of the order, to file a petition in the Division of Tax Appeals (20 NYCRR

4000.5[c][4]). This petitioner improperly attempted to seek relief in both forums at the same time.

There is no evidence in this record as to what happened to petitioner's two incorrectly addressed petitions, but to the extent petitioner has suffered any injury by not sending the petitions to the correct address, the wound was self inflicted. Petitioner will not be permitted to avoid the consequences of his own conduct in failing to comply with the rules governing the filing of petitions in the Division of Tax Appeals by blaming the Division. This is especially so, since petitioner has failed to show any evidence of injury or prejudice in this case.

In fact, the record demonstrates that petitioner's right to challenge the 1988 assessments were protected by the very people he asserts deprived him of his hearing rights. Petitioner had a right within 90 days of the issuance of the statutory notices to either file a petition with the Division of Tax Appeals or to file a request for a BCMS conference. As we have seen, petitioner never effectively filed his petitions; however, his appeal rights were nevertheless protected when someone in the Division forwarded petitioner's Request for a Conciliation Conference to BCMS (Finding of Fact "6"). That action tolled the running of the statute of limitations and preserved petitioner's appeal rights with respect to those two assessments. Nor was petitioner forced to proceed in BCMS. Petitioner could have discontinued his request for a conciliation conference at any time prior to the issuance of the Conciliation Order, and would have had an additional 90 days from such discontinuance to file a petition with the Division of Tax Appeals (20 NYCRR 4000.6[a], [b]).

Petitioner did not discontinue his proceeding in BCMS. He appeared at the conference and Conciliation Order No. 092094 was the result. Once the Conciliation Order was issued, petitioner still retained his right to have the matter heard by the Division of Tax Appeals by filing a petition within 90 days from the day the order was issued. It is clear, from the above recitation, that petitioner's right to proceed in the Division of Tax Appeals has in all respects been protected.

Q. Petitioner had 90 days from the date the Conciliation Order was issued (from

December 22, 1989) to file a petition with the Division of Tax Appeals. Petitioner also had 90 days from the date the penalty assessment was issued (i.e., from January 10, 1989) within which to file a petition with the Division of Tax Appeals or request a conciliation conference. Petitioner waited nearly 2½ years (until May 7, 1992) from the date the Conciliation Order was issued and 3½ years from the date the penalty notice was issued to file the instant petitions. Accordingly, the subject petitions are untimely, all of the assessing notices covered by this proceeding are fixed and final, and the Division of Tax Appeals is without jurisdiction.

R. The petitions of Christopher Turek dated May 7, 1992 are dismissed.

DATED: Troy, New York
March 10, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE