STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of NELLOQUET RESTAURANT, INC. 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 March 1, 1986 through November 30, 1990.	:	
In the Matter of the Petition of JOSE BAQUET, OFFICER OF NELLOQUET RESTAURANT, INC. 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 March 1, 1986 through November 30, 1990.	:	DETERMINATION DTA NOS. 811548, 811549 AND 811550
In the Matter of the Petition of WILLIAM BAQUET, OFFICER OF NELLOQUET RESTAURANT, INC. 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 March 1, 1986 through November 30, 1990.	:	

Petitioner Nelloquet Restaurant, Inc., c/o Blaustein & Weinick, 1205 Franklin Avenue, Garden City, New York 11530, 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 March 1, 1986 through November 30, 1990.

Petitioner Jose Baquet, officer of Nelloquet Restuarant, Inc., 33 Libby Avenue,

Hicksville, New York 11801, 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 March 1, 1986 through November 30, 1990.

Petitioner William Baquet, officer of Nelloquet Restaurant, Inc., 16 Frevert Place, Hicksville, New York 11801, 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 March 1, 1986 through November 30, 1990.

A consolidated hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 15, 1993 at 1:15 P.M., with all briefs to be submitted by May 24, 1994. Petitioners appeared by Blaustein & Weinick, Esqs. The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly mailed notices of determination to petitioners Jose Baquet and William Baquet in compliance with the provisions of Tax Law § 1147(a)(1).

II. If not, whether the assessments issued to petitioners Jose Baquet and William Baquet should be cancelled.

III. Whether petitioners Jose Baquet and William Baquet timely filed petitions for an administrative hearing.

IV. Whether, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a), petitioner William Baquet was a person required to collect sales and use taxes on behalf of Nelloquet Restaurant, Inc. and, as such, was personally liable therefor.

V. Whether the Division of Taxation properly determined additional sales and use taxes due from Nelloquet Restaurant, Inc. for the periods at issue.

FINDINGS OF FACT

On February 8, 1994, petitioners submitted with their brief 121 proposed findings of fact,

each of which has been incorporated into the following Findings of Fact, except for the following:

(a) Proposed findings of fact "11", "15", "16", "19" through "24", "31" through "33", "40" through "43", "47" through "49", "51", "54" through "58", "63", "66" through "73", "79" through "102", "109" through "113" and "121" are rejected because they relate solely to Issue IV which, based on Conclusion of Law "F", infra, cannot be addressed in this determination;

(b) Proposed findings of fact "18", "26", "29", "52", "53", "75", "76", "105", "106", "108" and "114" through "118" are rejected as being conclusory in nature;

(c) Proposed finding of fact "36" is rejected as not being supported by the record; and

(d) Proposed findings of fact "5", "28" and "77" are accepted in part and rejected in part as follows:

(1) That portion of proposed finding of fact "5" which states that "there is no correlation between missing guest checks and taxable sales receipts" is rejected as being conclusory;

(2) That portion of proposed finding of fact "28" which states that the signature on Postal Form 3811 is not that of William Baquet, but is the signature of Caesar Maldonado, is rejected as being conclusory; and

(3) The first sentence of proposed finding of fact "77" is accepted. The balance is rejected as being conclusory.

Pursuant to an audit of Nelloquet Restaurant, Inc. ("Nelloquet") which began in January 1989, the Division of Taxation ("Division"), on September 6, 1991, issued four notices of determination and demands for payment of sales and use taxes due to Nelloquet as follows:

Period	Tax	Penalty	Interest	Total
3/1/86 - 8/31/89	$61,881.86	$18,564.56	$33,248.54	$113,694.96
9/1/89 - 11/30/90	17,103.68	4,109.50	2,703.36	23,916.54
3/1/86 - 8/31/89	--	6,188.19	--	6,188.19
9/1/89 - 11/30/90	--	1,710.37	--	1,710.37

Each of these notices of determination was sent, by certified mail, to Nelloquet at its business

address of 3491 Merrick Road, Wantagh, New York 11793. Nelloquet acknowledges receipt of these notices of determination; each was the subject of a timely request for conciliation conference (see, Conciliation Order CMS No. 118661 in Exhibit "B").

On the same date (September 6, 1991), the Division issued four notices of determination and demands for payment of sales and use taxes due to each of Jose Baquet and William Baquet, as officers of Nelloquet, in the exact amounts and for the same periods as those issued to Nelloquet (see, Finding of Fact "1"). Each of the notices of determination issued to Jose Baquet and William Baquet was addressed to such petitioners at 3491 Merrick Road, Wantagh, New York 11793 (Nelloquet's address).

Jose Baquet and William Baquet deny receipt of any of these notices of determination. Petitions seeking administrative review of these assessments were received by the Division of Tax Appeals on January 8, 1993 (the petitions filed on behalf of each of these petitioners were signed by their representative, Mark R. Blaustein, Esq., on January 6, 1993).

At various time prior to the issuance of the assessments, Nelloquet and the Division executed consents extending the period of limitation for assessment of sales and use taxes as follows:

Date Executed	Period Extended	Date for Assessment
6/16/89	3/1/86 - 8/31/86	12/20/89
11/12/89	3/1/86 - 5/31/87	9/20/90
8/1/90	3/1/86 - 5/31/88	6/20/91
5/9/91	3/1/86 - 11/30/88	12/20/91

On March 27, 1989, the Division's auditor sent an appointment letter to Nelloquet which scheduled an audit of its books and records for April 26, 1989 (the audit was subsequently rescheduled for June 19, 1989) and requested that all books and records pertaining to the period under audit (March 1, 1986 through February 28, 1989) be provided to the auditor. At various stages during the audit, additional written requests for books and records were made (see, Exhibit "U") and one of these requests advised Nelloquet that the audit period had been extended through the quarter ended November 30, 1990.

Nelloquet's recordkeeping consisted of a "one-write" system, i.e., rather than

maintaining separate journals, all records were kept in one ledger. The auditor stated that the one-write system did not have a method of accounting for cash expenditures (only check disbursements were shown).

A purchase analysis was performed which indicated cash payouts. Letters were sent by the auditor to all vendors from whom Nelloquet's books indicated it had made purchases. A letter was sent to one vendor (Two Cousin's Fish Market) which was not reported in Nelloquet's records (the auditor found a notation pertaining to this vendor somewhere in Nelloquet's books). From the replies, the auditor determined that Nelloquet had purchased considerably more than indicated in its books (considerable cash payments were also found). The auditor, therefore, determined that a markup test on purchases could not be performed because he could not ascertain if there were other suppliers not on the books or if there were additional vendors from whom purchases were made in cash. The auditor testified that if he had performed a markup test utilizing the margin of error found in cash purchases and verifications applied to purchases reported by Nelloquet, the resulting assessment would have been greater than the amount at issue herein.

The auditor determined Nelloquet's books and records to be inadequate for the performance of a detailed audit based upon the following:

(a) Sales could not be reconciled from sales invoices (missing guest checks) to deposits to tax returns;

(b) Purchase records were found to be incomplete since not all purchases were recorded (see, Finding of Fact "5"; and

(c) Gross sales and purchases per records were not found to be in substantial agreement with the amounts reported on Nelloquet's Federal income tax returns.

Based upon the auditor's determination that Nelloquet's books and records were inadequate, he decided to perform a guest check analysis. The month of December 1988 was initially selected for a test period analysis.

The auditor analyzed the sequence of guest check numbers used by Nelloquet's waitresses

in December 1988. A total of 921 guest checks were accounted for; 899 guest checks from this numbered sequence were missing. Of the 899 missing guest checks, 308 were found to have been used in November 1988 and 185 in January 1989. A review of the guest checks used in these surrounding months revealed that none of the missing 899 guest checks were used in the beginning of November or at the end of January.

The 921 guest checks used in December were determined to be 63.78% of the invoices found. The 921 guest checks totalled $49,881.33, or an average guest check sale of $54.16. Applying the 63.78% to the missing invoices (406) resulted in 259 guest checks not accounted for; multiplying the 259 unaccounted for guest checks times $54.16 (average sale) resulted in additional sales for December 1988 of $14,027.44. Audited taxable sales were, therefore, determined to be $63,908.77 ($49,881.33 + $14,027.44). The margin of error ($63,908.77 divided by $32,271.29 reported taxable sales) was 98%. The auditor gave an adjustment for two guest checks per day which could have been used for other purposes. Also taken into account in the auditor's calculation was the fact that no guest checks existed for two days in December (figures for corresponding days of the week were utilized).

The auditor found that Nelloquet's sales per guest checks for January and February 1989 were fairly consistent with the amounts reported on its sales tax returns for these two months. To adjust for what the audit report stated "seemed to be an aberration in the sales for December 1988," the auditor decided not to use the error previously determined (98%). Instead, an error rate of 45.7% was used. This error rate was determined by dividing audited taxable sales of $63,908.77 by sales per guest checks of $49,881.33 (sales per the 921 guest checks used in December rather than by the amount of taxable sales reported of $32,271.29). The result (28.12%) was applied to sales per guest checks for January and February 1989 and total quarterly sales reported of $117,303.00 (rather than just the reported sales for December 1988) were used as a denominator; thus, an error rate of 45.7% (instead of 98%) was determined.

Taxable sales of $2,160,436.00 were reported for the audit period. Additional taxable sales were determined to be $987,319.25 ($2,160,436.00 x .457), with additional tax due

thereon (at 8%) of $78,985.54, the total additional tax assessed pursuant to the notices of determination issued to petitioners (see, Findings of Fact "1" and "2").

At the hearing, the Division introduced an affidavit of Arline Henson (Exhibit "P"), the section head of the sales tax audit section of the Nassau District Office. This affidavit stated that part of her responsibilities was to ensure that notices of determination were correctly prepared and mailed and, as such, she gained personal knowledge and familiarity with the Nassau District Office's procedures.

Ms. Henson's affidavit set forth the procedures for preparation of the notices of determination and for the mailing of the notices. She identified the personnel involved with the preparation and mailing of the notices at issue herein. With respect to the notices issued to petitioners Jose Baquet and William Baquet, the affidavit stated, in paragraph 12 thereof, as follows:

> "When the Domestic Return Receipt (Postal Form 3811) was received back from the taxpayer, Mr. [Lawrence] Meyer [Senior Mail and Supply Clerk] date-stamped the copies of the Postal Form 3800's on the aforesaid 8 1/2" by 11" sheet in the mail log corresponding to the article number on the Domestic Return Receipt to signify the date of receipt. Attached as Exhibit 'C' is a copy of the 8 1/2" by 11" sheet from the mail room's mail log containing the copies of the Postal Form 3800's pertinent to this matter, which have been date-stamped to show that they were received in the mail room on September 6, 1991, and date-stamped again to show receipt of the corresponding Postal Form 3811 (return receipt) in the Nassau District Office on September 11, 1991."

Ms. Henson stated "with certainty" that the envelopes enclosing the subject notices of determination were picked up by Mr. Meyer, taken to the mailroom of the Nassau District Office, had proper postage affixed and were mailed by certified mail on September 6, 1991. She also stated that the items of certified mail were received by Jose and William Baquet or their agent(s) on or about September 7, 1991.

Attached to Ms. Henson's affidavit were the worksheets prepared by the auditor, certified mail receipts (PS Forms 3800) and domestic return receipts (PS Forms 3811) containing a signature indicating that the certified mailings were received at the address (3491 Merrick Road, Wantagh, New York 11793). The signatures on the PS Forms 3811 do not appear to be the signatures of either Jose or William Baquet.

The Division also introduced the affidavit of the auditor, Dennis Simmons (who was present and who testified at the hearing), which confirmed Ms. Henson's description of the office procedures utilized to issue the notices of determination to petitioners Jose Baquet and William Baquet.

Approximately 13 to 15 years ago, Jose Baquet started the business of Nelloquet Restaurant. Previously, he had lost his job and had encountered difficulty in finding work. In an effort to help his father, William Baquet provided capital and financing necessary to open the restaurant. On several occasions, William Baquet advanced monies to his parents to keep the restaurant in operation. Jose's wife, Maria, and older son, Joseph, also worked at the restaurant.

During the audit period and for years both prior and subsequent thereto, Jose (and Maria) Baquet resided at 33 Libby Avenue, Hicksville, New York 11801 and William Baquet resided at 16 Frevert Place, Hicksville, New York 11801. Jose Baquet filed New York State resident income tax returns for the years 1989 (filed in 1990) and 1990 (filed in 1991) with the aforesaid address (see, Exhibit "5").

William Baquet filed New York State resident income tax returns for the years 1989 (filed in 1990) and 1990 (filed in 1991) with the aforesaid address listed thereon (see, Exhibit "6"). A check for the payment of his 1989 tax liability ($791.00) accompanied the return. The check, payable to New York State Income Tax, was endorsed and cashed.

Caesar Maldonado was the bookkeeper at the restaurant. Ann Porpora began working at Nelloquet Restaurant in 1978 or 1979. She worked as a bartender/cashier at the restaurant for a period of 13 years.

In her position as bartender/cashier, she witnessed the signature of Caesar Maldonado on many occasions and stated that she could definitely identify it. At the hearing, she testified that the signature on line 5 of each of the PS Forms 3811 (one addressed to Jose Baquet; the other to William Baquet) was the signature of Caesar Maldonado. William Baquet never authorized Caesar Maldonado to act on his behalf or appointed him his agent for any purpose.

At the hearing, Jose Baquet testified that the signature on line 5 of the PS 3811

addressed to him was not his. He does not recall signing the form nor does he recall ever having received any notification from the Division regarding sales tax owed by the restaurant. Jose Baquet testified that he believes that the signature on the PS 3811 form may be that of Caesar Maldonado.

William Baquet testified that the signature on the PS 3811 relating to the notice of determination issued to him was not his and, in addition, that he never received such notice of determination.

The notices of determination issued to Nelloquet Restaurant were received by the accountant for the restaurant, Paul Gaynes, who subsequently (and timely) filed a request for a conciliation conference. Mr. Gaynes testified that the notices of determination issued to Nelloquet were delivered to his office by either Jose Baquet, Joseph Baquet or Caesar Maldonado. As to the notices of determination issued to Jose Baquet and William Baquet, Mr. Gaynes testified that he did not receive either of them. There was no indication on the notices issued to Nelloquet that additional notices had been issued to Jose Baquet or William Baquet, individually.

The Division's auditor inquired as to the home addresses of Jose Baquet and William Baquet. These addresses appear on the Sales Tax Audit Report Information Sheet (see, Exhibit "R"). The audit report was completed prior to the issuance of the notices of determination. The auditor stated that the address of William Baquet (listed on the audit report) was furnished by Paul Gaynes, possibly from a tax return.

Nelloquet did not use books of guest checks (stacks of checks were used instead). Waitresses were given 5 to 10 guest checks per day. The guest checks were not in sequential order (Ann Porpora testified that "it was like somebody dropped a box of checks on the floor and however they were picked up, this is how they were given out").

The audit workpapers (Exhibit "S") reflect the following scenario with respect to the issuance of guest checks:

a. Check #16073 dated and issued December 7;

b. Check #16076 dated and issued December 30; and

c. Check #16080 dated and issued December 10.

In the performance of his audit, the auditor examined guest checks issued by a particular server (Liz) who, on December 2, 1988, issued the following guest check numbers: 20367, 20391, 20392, 18158, 18187, 18191 and 21957.

The auditor admitted, based on the foregoing, that there was a random nature to Nelloquet's issuance of the guest checks. He could not determine whether or not there were unused guest checks which could account for the amount of missing guest checks (see, Finding of Fact "6").

Ann Porpora, Nelloquet's bartender/cashier, testified that the restaurant was not open for lunch. She stated that the average seating at a table in the restaurant was two. The price for the salad bar served at the restaurant was $10.95. She testified that, at the end of a particular evening, either Jose Baquet or Caesar Maldonado would receive the sales receipts.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners' position is as follows:

(a) The Division improperly issued the notices of determination to petitioners Jose Baquet and William Baquet. The notices should have been mailed to their addresses appearing on their last-filed income tax returns rather than to the address of a business in which they may or may not have been active;

(b) These notices of determination were not received by petitioners Jose Baquet and William Baquet. Petitioners contend that the PS Forms 3811 were signed by Caesar Maldonado, but Mr. Maldonado never gave the certified mailings (the notices of determination) to petitioners nor did he turn them over to Nelloquet's accountant, Paul Gaynes. Citing Matter of Karolight, Ltd. (Tax Appeals Tribunal, February 8, 1990), petitioners contend that since the notices were not mailed to petitioners' last known address and were never actually received by them, the notices were invalid and should, therefore, be dismissed;

(c) Petitioner William Baquet was not a person required to collect sales and use taxes on behalf of Nelloquet and, as such, is not personally liable therefor; and

(d) The auditor utilized a patently unreasonable audit method to estimate Nelloquet's taxable sales. Because the guest checks were issued in such a random and nonsequential order, concluding that missing guest checks constituted sales is unreasonable. Petitioners contend that a more reasonable approach would have been to apply a markup test to the restaurant's purchases.

The position of the Division may be summarized as follows:

(a) The certified mailings containing the assessments issued to Jose Baquet and William Baquet were received at Nelloquet's address on September 7, 1991 as evidenced by the signatures on the PS Forms 3811. Since the Division's evidence establishes that the notices of determination were mailed by certified mail on September 6, 1991 and were received on September 7, 1991, petitions received on January 8, 1993 were untimely and the Division of Tax Appeals, therefore, has no jurisdiction over these matters (Tax Law § 2006[4]). Accordingly, the assessments must be sustained in their entirety;

(b) The proper address, in the instance of a sales tax assessment, is the address contained on the last sales tax return filed, not that on personal income tax returns. The Division, in its brief (at pages 16 and 17 thereof) further states that if the "return" as used in Tax Law § 1147(a), in the case of a responsible officer assessment, does not refer to a sales tax return filed by the vendor, the Division would still be authorized to mail a responsible officer assessment to the address on the business' sales tax return because that address would be "such address as may be obtainable";

(c) The evidence presented clearly indicates that William Baquet was a responsible officer of Nelloquet pursuant to Tax Law §§ 1131(1) and 1133(a); and

(d) The audit methodology employed in the assessment of additional sales taxes due from Nelloquet was "reasonably calculated to reflect the taxes due" and the assessment should, therefore, be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of a determination of sales tax due shall be given to the person liable for the collection or payment of the tax and that such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 90 days after giving notice of the 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.

In lieu of seeking an administrative hearing with the Division of Tax Appeals, a taxpayer may first request a conciliation conference with the Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]).

The request for a conciliation conference must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals and there can be no extension of those time limitations (20 NYCRR 4000.3[c]). As noted above, the applicable time limitation herein is 90 days (Tax Law § 1138[a][1]).

B. Tax Law § 1147(a)(1) provides as follows:

> "Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The 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."

In the present matter, petitioners Jose Baquet and William Baquet do not dispute that the Division mailed the notices of determination by certified mail; however, they contend that the notices were not mailed to the proper address, i.e., that the proper address for each petitioner was the address appearing on their last-filed income tax return rather than the restaurant business address, which is what the Division used in this matter. In addition, these petitioners maintain that they never received the notices of determination. Therefore, it is contended that the improper mailing (to the wrong address) coupled with the absence of receipt mandates

dismissal of these notices.

C. Where the timeliness of a filed petition or request for a conciliation conference is at issue, the burden rests with the Division to demonstrate proper mailing, which may be accomplished by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).

The Division may prove the date of mailing by establishing its customary procedure for the mailing of such notices and by introducing evidence that this procedure was used in mailing the notices at issue (Matter of Katz, supra; see also, Cataldo v. Commissioner, 60 TC 522, 524, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533).

In Matter of Air Flex Custom Furniture (Tax Appeals Tribunal, November 25, 1992), the Tribunal stated:

> "A properly completed Postal Service Form 3877 represents direct documentary evidence of the date and the fact of mailing (see, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, T.C. Memo 1992-268, 63 TCM 2955; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, exact compliance with the Form 3877 procedures reflects compliance with the Division's own procedures and raises a presumption of official regularity in favor of the Division (see, Wheat v. Commissioner, supra).
>
> "A failure to comply precisely with the Form 3877 mailing procedure may not be fatal if the evidence is otherwise sufficient to prove mailing (see, Coleman v. Commissioner, supra; Wheat v. Commissioner, supra). Where the Division relies upon imprecise mailing procedures and other corroborative evidence, the presumption of official regularity does not apply. The crux of the matter is that the Division must introduce evidence showing that the notice of determination was properly delivered to the Postal Service for mailing (see, Coleman v. Commissioner, supra)."

In the matter at issue herein, the Division has introduced the affidavits of Arline Henson and of the auditor, Dennis Simmons, which set forth the procedures followed in the issuance of the notices of determination. In addition, and of greater significance, was the introduction of PS Forms 3811 which indicate that the notices of determination were, in fact, received at the address thereon (the restaurant's address). As previously noted (see, Conclusion of Law "B"), petitioners do not dispute that the Division mailed the notices of determination, by certified

mail, on September 6, 1991; petitioners maintain, however, that they were not sent to the proper address, i.e., each petitioner's last known address as contained on the last return filed by each, and further maintain that, as a result thereof, the notices of determination issued to these petitioners (Jose Baquet and William Baquet) were never received and, accordingly, could not have been and were not timely protested.

D. The evidence indicates that the Division mailed the notices of determination, by certified mail, to Jose Baquet and William Baquet on September 6, 1991.

However, as noted in Conclusion of Law "B", Tax Law § 1147(a)(1) requires that mailing must be made "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" (emphasis added).

These petitioners (Jose Baquet and William Baquet) were not required to and did not, in fact, file sales tax returns; Nelloquet Restaurant was the required filer. Petitioners seek an interpretation of Tax Law § 1147(a)(1) which would mandate that the notices be sent to the address set forth on the last personal income tax return filed by each. It is uncontroverted that the Division had knowledge of their home addresses, both from personal income tax returns and from notations made in the audit file (see, Findings of Fact "9" and "13").

Despite having in its files the home address of each of these petitioners prior to the issuance of the notices of determination, both from personal income tax returns filed by Jose Baquet and William Baquet and from information in the Nelloquet audit file obtained by the auditor, the Division chose to mail the jurisdictional notices to these individuals at the business address. While it is true that these notices apparently were received at the 3491 Merrick Road address (see, Findings of Fact "7" and "10"), there is no evidence that they were received by petitioners Jose Baquet and William Baquet.

The record contains no indication that either of the individual petitioners requested or authorized the Division to send any correspondence intended for these individuals to the

business address. The Division had home addresses for these individuals, yet chose not to use them.

As previously noted, the mailing of a notice pursuant to Tax Law § 1147(a)(1) is presumptive evidence of its receipt by the person to whom it is addressed. However, this presumption of receipt arises only upon presentation of proof by the sender that it has a routine office practice and procedure for mailing the notices which demonstrates that the notices were, in fact, properly addressed and mailed (Matter of T. J. Gulf v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97). In the present matter, the Division has demonstrated that it had and that it utilized standard office practices and procedures; where it has failed is in demonstrating that the notices were properly addressed.

While the basis of the assessments against Jose Baquet and William Baquet derived from their alleged involvement with Nelloquet, these assessments, in fact, were intended to assess tax against these persons individually. The liability of the corporate officers is separate and independent from that of the corporation (Matter of Yellin v. State Tax Commn., 81 AD2d 196, 440 NYS2d 382). The administrative procedures provided for determining tax due and collecting the tax apply separately to the corporation and its (allegedly) responsible officers (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, appeal dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845). That being the case, it is reasonable to require that, when the home addresses of these individuals are known by the Division in advance of the issuance of these assessments and when there is no indication that the individuals requested that correspondence be sent in care of the business address, mailing would at least be attempted at the home address before resorting to other alternatives, i.e., mailing to the business.

The Division argues that the signatures on the PS Forms 3811 are a clear indication that the notices were received on September 7, 1991. While it is true that a notice becomes valid if actually received by the taxpayer despite a failure to use the taxpayer's last known address (Matter of Agosto v. Tax Commn., 68 NY2d 891, 508 NYS2d 934, revg 118 AD2d 894, 499

NYS2d 457; Matter of Riehm, Tax Appeals Tribunal, April 4, 1991, confirmed 179 AD2d 970, 579 NYS2d 228, lv denied 79 NY2d 759, 584 NYS2d 447), the evidence in this record does not indicate that these notices were, in fact, received by petitioners.

Both Jose Baquet and William Baquet appeared at the hearing and presented credible testimony that they never received the notices. The accountant, Paul Gaynes, testified that he received the notices of determination issued to the restaurant (either from Jose Baquet, Joseph Baquet or from Caesar Maldonado, the individual who, according to the testimony of both Jose Baquet and Ann Porpora, was the person who signed the PS Forms 3811 accompanying the certified mailings addressed to Jose Baquet and William Baquet) and timely protested the same; however, he testified that he never received the notices of determination issued to the individual petitioners. This evidence, therefore, serves to rebut any presumption of receipt of these notices by the individual petitioners. As the Tax Appeals Tribunal noted, in Matter of Combemale (Tax Appeals Tribunal, March 31, 1994), "[t]o deliver certified mail, the Postal Service employee must obtain the signature of the addressee or the addressee's personal representative (Domestic Mail Manual, §§ 912.5 and 911.4)." It appears, therefore, that proper U.S. Postal Service procedures were not followed herein.

Accordingly, it must be determined that the Division did not properly mail the notices of determination intended for Jose Baquet and William Baquet to their last known addresses and, in addition that these notices were never received by them.

In Matter of Karolight, Ltd. (supra) the Tribunal discussed the proper remedies, in instances where the notice of determination was not received by the taxpayer, by distinguishing between cases in which the Division demonstrated proper mailing to the last known address and cases in which it could not so demonstrate. The Tribunal stated:

> "If it was found that the notice of determination was properly mailed to petitioner Karolight, Ltd.'s last known address, the fact that it was returned to the Division marked 'unclaimed', coupled with a showing that the Postal Service failed to comply with its own mailing procedures, would have rebutted the presumption of receipt (Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, 946, aff'd, 64 NY2d 688, 485 NYS2d 517). Under these circumstances, the 90-day time period for requesting a hearing under section 1138 of the Tax Law would not have been triggered and petitioner would have been

entitled to a hearing (Matter of Ruggerite, Inc. v. State Tax Commn., supra).

> "If, however, it was found that the notice of determination was not mailed to petitioner Karolight, Ltd.'s last known address and petitioner Karolight, Ltd. never actually received the notice, the notice would be invalid (Matter of C. Riegel, Inc., State Tax Commission, April 26, 1986; see also, Shelton v. Commr., 63 TC 193). Under these facts, we would grant Karolight's request to dismiss the assessment absent a showing that a valid notice was remailed to Karolight, Ltd., during the three-year period of limitations."

Based upon the foregoing, the proper remedy herein is to cancel the assessments issued to Jose Baquet and William Baquet.

Assuming, arguendo, that it was determined that the notices were properly mailed by the Division to petitioners Jose Baquet and William Baquet, it would follow that the petitions filed by these petitioners would have been untimely (see, Finding of Fact "2") and the assessments issued to them would, therefore, be sustained in their entirety.

E. Under no circumstances can Issue IV (whether William Baquet was properly determined to be a person required to collect sales and use taxes on behalf of Nelloquet) be addressed herein. Based upon Conclusion of Law "D", the assessment against William Baquet is cancelled and there is, therefore, no need to address this issue. Even assuming, arguendo, that it was determined that the Division properly complied with the provisions of Tax Law § 1147(a) in its issuance of the notices to William Baquet, this issue could not be addressed. Under these circumstances (a determination that the notices were properly mailed to petitioner's last known address and/or that they were received by this petitioner), the Division of Tax Appeals would be without jurisdiction to address this issue since it would be clear that William Baquet's petition filed on January 8, 1993 (see, Finding of Fact "2") would be untimely to contest assessments issued on September 6, 1991.

F. Therefore, the only remaining issue to be addressed herein is Issue V (whether the Division properly determined additional sales and use taxes due from Nelloquet for the audit period).

Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may

be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). In such circumstances, the Division must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219), and the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

In Matter of Todaro (Tax Appeals Tribunal, July 25, 1991) the Tribunal set forth the applicable principles to determine the adequacy of a request for records as follows:

> "To determine the adequacy of a taxpayer's records the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., supra, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-980) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). The request for records must be explicit and not 'weak and casual' (Matter of Christ Cella, Inc. v. State Tax Commn., supra).
>
> "The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255, 256-57; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is 'virtually impossible (for the Division of Taxation) to verify taxable sales receipts and conduct a complete audit' (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43), 'from which the exact amount of tax can be determined' (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).
>
> "Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liqs. v. State Tax Commn., supra)."

In the present matter, it is clear that an adequate request for Nelloquet's books and records was made. In fact, such request was made on more than one occasion (see, Finding of Fact "4").

G. Having found, therefore, that the Division made adequate requests for the books and records of Nelloquet, it must next be determined whether the resort to external indices was

proper.

Tax Law § 1135(a)(1) provides that "[e]very person required to collect tax shall keep records of every sale . . . ." 20 NYCRR 533.2(b)(1) provides, in pertinent part, as follows:

> "Every person required to collect tax, including every person purchasing or selling tangible personal property for resale must keep records of every sale, amusement charge, charge for dues or occupancy, and all amounts paid, charged or due thereon, and of the tax payable thereon. The records must contain a true copy of each:
>
> "(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;
>
> "(ii) guest check, hotel guest check, receipt from admissions such as ticket stubs, receipt from dues; and
>
> "(iii) cash register tape and any other original sales document."

Upon review of Nelloquet's books and records, the auditor found that guest checks were missing and purchase records were incomplete (see, Finding of Fact "6"). Resort to external indices was, therefore, proper. Petitioners do not contend that the auditor improperly resorted to external indices to estimate Nelloquet's taxable sales for the audit period; they do, however, object to the method utilized (the guest check analysis) and contend that a markup test on purchases would have yielded a more reasonable result.

H. As to the specific methodology utilized, it is well established that while the audit method selected must be "reasonably calculated to reflect the taxes due" (Club Marakesh v. Tax Commn. of the State of New York, 151 AD2d 908, 910, 542 NYS2d 881, 883, lv denied 74 NY2d 616, 550 NYS2d 276), such method need not be immune from attack as imprecise (see, Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681). "[W]here the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (Meyer v. State Tax Commn., 61 AD2d 223, 228, 402 NYS2d 74, 78, lv denied 44 NY2d 645, 406 NYS2d 1025).

When the audit methodology is challenged on the ground that it is arbitrary and capricious, the record must contain sufficient evidence to allow a trier of fact to determine whether the audit had a rational basis (Matter of Grecian Square v. State Tax Commn., supra).

Moreover, the Division must be able to respond meaningfully to inquiries regarding the audit methodology and results in order to provide petitioner with an opportunity to meet its burden of proving that the methodology used was unreasonable (see, Matter of Basileo, Tax Appeals Tribunal, May 9, 1991). Once these criteria are met, the burden is upon the taxpayer to show by clear and convincing evidence that the audit methodology was unreasonable or that the results were unreasonably inaccurate (Matter of Meskouris Bros. v. Chu, supra). In the present matter, the Division presented the detailed testimony of the auditor and introduced into evidence the audit report and workpapers which explained the methodology used, the reasons therefor and the results therefrom.

In response, petitioners contend that a more reasonable audit method would have been to perform a purchase markup. The auditor explained (see, Finding of Fact "5") why a markup test could not have been performed herein. Even assuming that a purchase markup test was a viable option, the fact that a different audit method might have yielded a different result does not satisfy petitioners' burden of proof (see, Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454; Matter of Shukry v. Tax Appeals Tribunal, 184 AD2d 874, 585 NYS2d 531).

Nelloquet contends that, because it failed to use guest check books or to distribute guest checks to its waitresses in a sequential manner, the performance of a guest check analysis yielded a flawed result. The Division's auditor, however, expanded the initial test period and made adjustments to the result in an effort to take into account the random nature by which Nelloquet utilized guest checks. Absent books and records to controvert the result herein, it must be found that petitioners have failed to sustain their burden of proving, by clear and convincing evidence, that the method used and/or the assessment itself was erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., supra).

I. The petitions of Jose Baquet, officer of Nelloquet Restaurant, Inc., and William Baquet, officer of Nelloquet Restaurant, Inc., are granted and the notices of determination and demands for payment of sales and use taxes due issued to such petitioners on September 6,

1991 are hereby cancelled.

J. The petition of Nelloquet Restaurant, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued to this petitioner on September 6, 1991 are sustained in their entirety.

DATED: Troy, New York
November 23, 1994

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE