

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
JENNY OIL CORPORATION	: DETERMINATION
	: DTA NO. 812723
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Periods September 1,	:
1983 through September 30, 1983 and June 1,	:
1984 through June 30, 1984.	:

Petitioner, Jenny Oil Corporation, c/o Richard V. Kennon, 66 Drum Hill Road, Wilton, Connecticut 06897, 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 periods September 1, 1983 through September 30, 1983 and June 1, 1984 through June 30, 1984.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on December 2, 1994 at 9:30 A.M., with all briefs due by April 4, 1995. Petitioner, appearing by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel), submitted a brief on February 6, 1995. The Division of Taxation, appearing by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), submitted its brief on March 14, 1995. Petitioner submitted a reply brief on March 31, 1995. The reply brief due date of April 4, 1995 commenced the running of the six-month statutory period for issuance of this

determination.

ISSUES

I. Whether petitioner's request for a conciliation conference was timely filed.

II. Whether petitioner's representative had filed a power of attorney which entitled him to a copy of the notice sent to petitioner.

III. Whether the Notice of Determination was jurisdictionally defective and therefore is invalid.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Jenny Oil Corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S901114819M) dated November 14, 1990 in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90 for the period March 1, 1984 through August 31, 1984.¹ Under "Explanation" the box was checked next to the statement:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(A)(1) OF THE TAX LAW."

The "Explanation" section also contained the following:

"50E Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law and are based upon available records and

¹The Notice of Determination was addressed to "Jenny Oil Corporation, P.O. Box A, Katona, New York 10536."

information:

<u>PERIOD ENDING</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>	
<u>PENALTY DUE</u>	<u>INTEREST DUE</u>		
05/31/84	0484	\$124,720.59	\$
62,360.30	\$143,540.54		
08/31/84	0185	485,909.28	
242,954.64	528,098.55"		

In the lower left hand corner of this Notice of Determination, the following initials appear: "MD:AF".

In addition, on November 14, 1990, the Division issued two other notices of determination pertaining to Richard V. Kennon and Robert H.

Kennon, as officers of Jenny Oil Corporation. The first Notice of Determination (Notice No. S901114820M) was issued to Richard V. Kennon for sales and use taxes in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90 for the period March 1, 1984 through August 31, 1984.² Under "Explanation" the box was checked next to the statement:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(A)(1) OF THE TAX LAW."

The "Explanation" section also contained the following:

"60E You are liable individually and as President of Jenny Oil Corporation under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>PERIOD ENDING</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>
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²The Notice of Determination was addressed to "Richard V. Kennon, As President of, Jenny Oil Corporation, Three Westview Lane, Katonah, New York 10536."

<u>PENALTY DUE</u>	<u>INTEREST DUE</u>		
05/31/84	0484	\$124,720.59	\$
62,360.30	\$143,540.54		
08/31/84	0185	485,909.28	
242,954.64	528,098.55"		

The following initials appeared in the lower left hand corner of this notice: "MD:AF".

A Notice of Determination (Notice No. S901114821M) dated November 14, 1990 was issued to Robert H. Kennon for sales and use taxes due in the amount of \$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09 for a total amount due of \$1,587,583.90.³ As in the case

of the Notice of Determination issued to Richard V. Kennon, the box was checked next to the statement concerning the estimation of the tax. The "Explanation" section also contained the following:

"60E You are liable individually and as Vice-President of Jenny Oil Corporation under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:

<u>PERIOD ENDING</u>	<u>PERIOD DESIG.</u>	<u>TAX DUE</u>	
<u>PENALTY DUE</u>	<u>INTEREST DUE</u>		
05/31/84	0484	\$124,720.59	\$
62,360.30	\$143,540.54		
08/31/84	0185	485,909.28	
242,954.64	528,098.55"		

The following initials appeared in the lower left hand corner of the notice: "MD:AF".

On July 15, 1993, the Division's Tax Compliance Central

³The Notice of Determination was addressed to "Robert H. Kennon, As Vice-President of, Jenny Oil Corporation, 22 Topland Road, Hartsdale, New York 10530."

Office issued a Consolidated Statement of Tax Liabilities to "Jenny Oil Corp., c/o Epstein Feintisch & Co., 2381 Hylan Blvd, Staten Island, NY 10306-3199." Included under Section A of the Consolidated Statement of Tax Liabilities was the following,

inter alia:

<u>Type</u>	Current Assessment Balance ID Credits	Tax Period Ended Due	Tax Amount <u>Assessed</u>	Interest Amount <u>Assessed</u>	Penalty Amount <u>Assessed</u>	Assessment Amount	Payments/ <u>Assessed</u>
Sales		L-004673963-2		06/30/84	\$610,629.87		
\$1,154,931.95		\$305,314.94		0.00	2,070,876.76		

The Division submitted as its Exhibit "C" a Request for Conciliation Conference ("request") dated September 2, 1993, which referenced Notice/Assessment ID L-004673963-2 and was sent by petitioner to the Bureau of Conciliation and Mediation Services ("BCMS") by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated September 2, 1993. BCMS received the request on September 7, 1993. As the basis for the request, petitioner's representative wrote:

"1. Petitioner denies any knowledge of ever receiving prior Tax Assessments or Notices of Determination/Deficiency for the taxes now allegedly subject to collection.

"2. Petitioner denies owing the taxes, penalties and interest listed as outstanding and subject to collection according to the Taxpayer's Collection Notice, dated July 15, 1993, attached as Exhibit No. '1'.

"3. The Taxpayer Collection Notice does not provide sufficient information to explain the basis for the alleged tax deficiency.

"4. Petitioner's due process rights have been

substantially contravened by the Department's failure to provide adequate information to enable Petitioner to fully respond to the Taxpayer Collection Notice.

"5. Petitioner reserves the right to file additional objections upon receiving appropriate information from the Tax Department."

By Conciliation Order (CMS No. 136141) dated February 25, 1994, the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on November 14, 1990 and the request was not received until September 7, 1993, or more than 90 days from the date of the notice, the request was untimely filed.

Petitioner filed a petition with the Division of Tax Appeals dated March 8, 1994 by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated March 8, 1994. The petition was received by the Division of Tax Appeals on March 11, 1994.

Petitioner is seeking a review of the Conciliation Order which denied the request for a conciliation conference pertaining to the Notice of Determination which assessed sales and use taxes for the periods September 1, 1983 through September 30, 1983 and June 1, 1984 through June 30, 1984. The petition challenges the assessment of \$2,070,876.76 in tax, penalties and interest. The petition states, in pertinent part:

"1. The Conciliation Order lists the Notice Number as L004673963, whereas the Assessment ID No. on the Taxpayer Collection Notice is L-004673963-2. Petitioner knows nothing about a Notice Number L004673963. It was only upon reading the Conciliation Order that Petitioner first learned about a Notice Number L004673963

"2. The Conciliation Order states the Year/Period as 9/1/83 - 9/30/83 & 6/1/84 - 6/30/84. However, this is

the first time Petitioner has ever been notified of this tax period in connection with L-004673963-2. On the Taxpayer Collection Notice, Assessment No. L-004673963-2 is listed with a tax period ended 6/30/84.

"3. The Tax Department failed to properly serve Petitioner with Assessment Nos. L-004673963-2 and L004673963.

"4. Assessment Nos. L-004673963-2 and L004673963 were issued outside the period of limitations.

"5. Petitioner timely filed its request for a conciliation conference. There is no proof that Assessment Nos. L-004673963-2 and L004673963 were issued or served on or about November 14, 1990. Petitioner received the Taxpayer Collection Notice, Assessment No. L-004673963-2, in July 1993 and submitted its request for a conciliation conference within 90 days of such request, to wit, on or about September 2, 1993.

"6. Petitioner denies owing the taxes, penalties and interest listed as outstanding and subject to collection according to the Taxpayer Collection Notice, Assessment No. L-004673963-2.

"7. Petitioner denies owing any taxes, penalties and interest relating to Assessment No. L004673963.

"8. Petitioner's due process rights have been substantially contravened by the Tax Department's failure to provide adequate information to enable Petitioner to properly respond to Assessment Nos. L-004673963-2 and L004673963.

"9. Petitioner reserves the right to file additional objections upon receiving appropriate information from the Tax Department."

An answer, dated May 4, 1994, was served to petitioner by a transmittal letter also dated May 4, 1994. The Division, in its answer, denied the allegations contained in numbered paragraphs 1 through 9 in item (6) of the petition. It further stated that: (1) a Notice of Determination (Notice No. L004673963-2, dated November 14, 1990) was issued to petitioner, pursuant to Articles 28 and 29 of the Tax Law, asserting

additional tax due in the amount of \$610,629.87, plus penalty and interest; (2) petitioner failed to request a conciliation conference within 90 days from the issuance of the notice; (3) on February 25, 1994, BCMS issued a Conciliation Order (CMS No. 136141) to petitioner which denied petitioner's request as untimely made; (4) pursuant to Tax Law §§ 170(3-a)(a) and 1138(a)(1), a request for a conciliation conference must be filed within 90 days from the date of the statutory notice; and (5) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of the timeliness of petitioner's protest. The answer also states that petitioner has the burden to prove that "the assessments at issue are erroneous or otherwise improper", and to show that petitioner's protest was timely.

On May 16, 1994, the Division of Tax Appeals received petitioner's reply to the Division's answer to the petition. Petitioner's representative, in the reply, stated the following as affirmative defenses:

1. "The underlying, purported Notice of Determination, No. L004673963, is barred by the applicable statute of limitations."
2. "The underlying, purported Assessment, No. L-004673963-2, is barred by the applicable statute of limitations."
3. "The underlying claims of the Division are barred by the Division having entered into accord and satisfaction of the underlying claims, for good and valuable consideration."
4. "Petitioner was not afforded the notice of the underlying Notice of Determination and Assessment, required by the applicable statutes and regulations."

The Division submitted as its Exhibit "A" a letter dated

October 24, 1994 in which the Division of Tax Appeals notified petitioner of the following:

"The timeliness of the request for conference and/or petition filed in the above matter has been raised as an issue. Since this is a threshold jurisdictional issue which must be resolved before a hearing on the merits of your case can be allowed, the hearing which has been scheduled will confine itself strictly to this timeliness issue."

Copies of this letter were sent to petitioner, its representative and the Division's representative.

At the hearing, the Division submitted the affidavit of James Hika, with attachments, as its Exhibit "G". James Hika is an Excise Tax Auditor II in the Transaction and Transfer Tax Bureau ("Bureau") of the Metropolitan District Office ("D.O.") and has held this position since 1973. His affidavit sets forth the custom and practice in the preparation and mailing of notices of determination.

In his affidavit, Mr. Hika stated that he was familiar with the Bureau's procedures, as they existed in November 1990, for mailing sales tax notices of determination ("notices"). He indicated that the Notice of Determination issued to petitioner (Notice No. S901114819M [converted to Notice No. L004673963-2]), dated November 14, 1990, was prepared by the Bureau, proofread and then deposited in an envelope addressed to petitioner. He also indicated that the Bureau prepared and attached a return receipt request, or Postal Form 3811 ("green card"), to the envelope. According to Mr. Hika, "the address on each envelope and green card is taken from the enclosed Notice." The envelope containing the notice, with the attached green card, was then

brought to the mailroom.

Mr. Hika explained that it was and is the procedure of the mailroom to prepare a certified mail record for each day's set of notices sent by certified mail. He stated that:

"The taxpayer's name and zip code are written on the certified mail record. The certified mail number from each envelope's green card is entered on the certified mail record. The envelopes are compared with the certified mail record to verify that all Notices are accounted for.

"Mailroom personnel then deliver the envelopes containing the Notices to the United [sic] States Postal Service, which then stamps the certified mail record. A copy of the stamped certified mail record is returned to the Bureau.

"When 'green cards' are returned to the D.O. they are forwarded by the mailroom to the Bureau."

Attached to Mr. Hika's affidavit as Exhibit "A" is a copy of the Notice of Determination (S901114819M), which he asserts was mailed on November 20, 1990 and was delivered on November 21, 1990 to Jenny Oil Corporation. Attached to Mr. Hika's affidavit as Exhibit "B" is the certified mail record ("CMR"), consisting of PS Form 3877, which contains the list of the notices allegedly mailed on November 20, 1990.⁴ Attached to the affidavit as Exhibit "C" is a copy of the front and back of PS Form 3811, Domestic Return Receipt Card ("green card"), Article Number 752 363. The Hika affidavit affirms that the certified mailing of the Notice of Determination to petitioner was in compliance with Bureau mailing procedures. He further indicated that he was "unaware of any problems that arose with

⁴Portions of Exhibit "B" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

respect to executing the required Bureau procedures for mailing the Notice" to petitioner.

The mailing record submitted consists of a copy of Postal Service Form 3877 which contains the following: the name and address of the sender is listed as "DEPARTMENT OF TAXATION & FINANCE"; the box is checked next to "Certified" in the column marked "Indicate type of mailing". PS Form 3877 lists in table form for each item sent the article number, the name and address of the addressee, the postage, fees, charges and remarks. There are entries on all 15 lines of the form. Lines 4, 5 and 6 contain the entries which appear to pertain to petitioner. The information listed on lines 4, 5 and 6 of the CMR is as follows:

Line 4 - " 361 Jenny Oil Co_p " 10536⁵
Line 5 - " 362 " " " " 10530
Line 6 - " 363 " " " " 10536.

Across the bottom of the page are spaces for total number of pieces listed by sender, the number of pieces received by the post office and the name of the post office's receiving employee. Review of the bottom of the PS Form 3877 indicates that there is a circled "15" in the space for total number of pieces listed by sender and a circled "15" in the space for total number of pieces received by the post office. There is an illegible signature in the space for the name of the post office's receiving employee. This CMR is date stamped

⁵The ditto marks in the article number column refer to the first three numbers listed on line 1 - "752". In the name and address column, the third letter of the word "Co_p" is impossible to decipher; there is also no explanation of the ditto marks before "10536".

November 20, 1990 by the United States Postal Service, although the postmark is extremely faint and illegible.⁶

Included as part of the Hika affidavit is a copy of the front and back of PS Form 3811 ("green card"). On the back of the green card, item 3, "Article Addressed to:", contains the typed entry "Jenny Oil Corporation, P.O. Box A, Katonah, New York 10536." Item 4, "Article Number", has handwritten "752 363". "Type of Service" checked is "certified". Item 5, "Signature - Address", contains an illegible signature.⁷ Item 6, "Signature - Agent", and item 7, "Date of Delivery", are both blank. This green card is date stamped November 21, 1990 by the Katonah, New York branch

of the United States Postal Service, although the postmark is somewhat faint and slightly illegible.⁸

The upper middle of the front of the green card has been stamped "RECEIVED, NOV 29, 1990, TTTB UNIT, DEPARTMENT OF TAXATION AND FINANCE, METROPOLITAN DIST. OFFICE." The following was printed in the sender's name, address and zip code space:
"NEW YORK STATE, DEPARTMENT OF TAXATION AND FINANCE,

⁶The date of November 20, 1990 is clear; the remainder is illegible.

⁷The signature appears to be that of Richard Kennon. The first name is readable; however, the last name is somewhat illegible and difficult to read.

⁸The November 21 portion of the date is clear; however, the last two numbers in the year are not too clear, although it appears to be 1990. "Katonah, NY" and a portion of the zip code, "1053_ _998", are clear; the remainder of the postmark is illegible.

METROPOLITAN DISTRICT OFFICE, 55 HANSON PLACE, BROOKLYN, NEW YORK 11217-1579." The lower left hand corner of the green card contains the following: "ATTENTION:, MICHAEL D'ESPOSITO, TTTB UNIT, ROOM 1114, (ELEVENTH FLOOR)."

The Division submitted as its Exhibit "H" a copy of the front and back of PS Form 3811, Return Receipt ("green card") for article number 752 361.⁹ As its Exhibit "I", the Division submitted the face side

of an envelope. In the upper left hand corner of the envelope is the return address of the Division's Metropolitan District Office.¹⁰ Typed in the upper middle of the envelope is "CERTIFIED MAIL, RETURN RECEIPT REQUESTED." It is addressed to "Robert H. Kennon, Jenny Oil Corporation, 22 Topland Road,

⁹On the back of PS Form 3811, the box for item 3, "Article Addressed to:", contains the typewritten entry "Richard V. Kennon, Jenny Oil Corporation, Three Westview Lane, Katonah, New York 10536." Item 4, "Article Number", has handwritten "752 361". "Type of Service" checked is "certified". Item 5, "Signature - Address", contains the signature "Richard J. Kennon". Item 6, "Signature - Agent", and item 7, "Date of Delivery", are both blank. There is a date stamped by the United States Postal Service on the back of the green card. The November 21 portion of the date is clear, but only the "1" in the year is legible. "Katonah, NY" is somewhat clear; a portion of the zip code, "10536-399_", is less clear; and the remainder of the postmark is illegible.

The front of the green card has the following listed in the space provided for the sender's name, address and zip code "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, METROPOLITAN DISTRICT OFFICE, 55 HANSON PLACE, BROOKLYN, NEW YORK 11217-1579."

¹⁰The return address listed is: "New York State, Department of Taxation and Finance, Metropolitan District Office, 55 Hanson Place, Brooklyn, NY 11217-1579." Typed next to the return address is "TTTB UNIT, ROOM 1114, (ELEVENTH FLOOR)."

Hartsdale, New York 10530."¹¹ Stamped on the envelope is a box which contains "CERTIFIED MAIL, NO. 752362, RETURN RECEIPT REQUESTED, FEE PAID."¹² The U.S. Postal Service postage paid stamp is in the upper right hand corner of the envelope and bears the date November 20, 1990. Directly beneath the postmark is stamped "1st Notice 11/21; 2nd Notice 12-4-90; Return 12-9-90." In the lower left hand corner was a stamped hand with "RETURNED TO SENDER" in it and directly beneath it were various reasons why the envelope was being returned to the sender. However, none of the reasons was checked.

During the hearing, the Division's representative, Ms. Seifert, offered the following explanation as to why she placed Exhibits "H" and "I" into evidence:

"I placed them into evidence to clarify postal form 3877 which is Exhibit B of the Hika affidavit. On the postal form 3787 [sic], Jenny Oil is listed -- Jenny Oil Corporation is listed on Line 4 and notations are made on Lines 5 and 6 indicating that things were also sent to -- or appears to be Jenny Oil Corp.

"Exhibits H and I show that article number 752361 was sent to Richard V. Kennon, Jenny Oil Corporation. That -- Exhibit I shows that certified mail number 752362 was sent to Robert H. Kennon, Jenny Oil Corporation. And Exhibit C attached to the Hika affidavit shows that article number 752363 was sent to Jenny Oil Corporation. I wanted to clarify how the specific documents were sent out" (tr., pp. 53-54).

Petitioner's representative objected to the introduction of Division's Exhibit "G", the Hika affidavit, into evidence

¹¹This address was crossed out and the following address was handwritten "FWD, 1737 Palmland Drive, Boynton, Beach, Fla. 33436."

¹²The number 752362 is handwritten.

because Mr. Hika was not available for cross-examination. Mr. Levine stated that petitioner was being "deprived of a fundamental right to explore the knowledge of a person who submits an affidavit and inquire what the basis of his knowledge is, if any" (tr., p. 16). In response to Mr. Levine's objection, the Division's representative, Ms. Seifert, stated that:

"It is the procedure of the Department that we do not present witnesses in mailing cases" (tr., pp. 18-19).

The affidavit was allowed into evidence as the Division's Exhibit "G" (tr., pp. 20-21).

At the hearing, petitioner submitted as its Exhibit "1" a letter dated December 3, 1984 sent by Kenneth L. Robinson, Esq., to William J. Greeney of the Division regarding Jenny Oil Corp.

- Motor Fuel Taxes.¹³ Mr. Robinson wrote, in pertinent part:

"As we discussed by telephone last week, enclosed please find a Power of Attorney executed by an officer of Jenny Oil Corp. Hereafter, please submit all letters and direct all telephone calls concerning the Motor Fuels Tax Audit of Jenny Oil Corp. to our attention."

A copy of the Power of Attorney referenced in the letter was not submitted into evidence. Petitioner's representative explained that his office could not find the actual copy of the Power of Attorney (tr., p. 32).

As its Exhibit "2", petitioner submitted a copy of a letter dated January 28, 1985 sent by Barry Holmes to Carl

¹³At that time, Mr. Robinson was an associate in the law firm of Carl Levine, P.C. The letter was addressed to: "William J. Greeney, Tax Auditor II, New York State Department of Taxation and Finance, White Plains District Office, 99 Church Street, White Plains, New York 10033."

Levine, P.C.¹⁴ in response to Mr. Robinson's December 3, 1984 letter to Mr. Greeney. In this letter, Mr. Holmes acknowledged the filing of a power of attorney and sent a photostat of Motor Fuel Tax Assessment No. 2442 issued to Jenny Oil Corporation on December 10, 1984.

Included as part of petitioner's Exhibit "2" was a copy of the Notice of Determination of Tax Due under Motor Fuel Tax Law, Notice No. 2442, dated December 10, 1984 which asserted additional motor fuel tax due pursuant to Article 12-A of the Tax Law for the audit period May 1981 through April 1984 in the total amount of \$1,325,108.64.¹⁵

As noted in Findings of Fact "1" and "2", the Division issued notices of determination dated November 14, 1990 to Jenny Oil Corporation, Richard V. Kennon, as president of Jenny Oil Corporation, and Robert H. Kennon, as vice-president of Jenny Oil Corporation. Each Notice of Determination asserted additional sales and use taxes due in the amount of

\$610,629.87, plus penalties of \$305,314.94 and interest of \$671,639.09, for a total amount due of \$1,587,583.90.

Petitioner submitted as its Exhibit "3" a December 14,

¹⁴Mr. Holmes was an Excise Tax Auditor II with the Division's District Office Audit Bureau in Albany, New York.

¹⁵The total amount due was broken down as follows:

13,145,919 gals. @ \$.08	\$1,051,673.52
Penalty	<u>273,435.12</u>
TOTAL	\$1,325,108.64

1990 letter from Richard H. Champion, Esq., to Supervising Administrative Law Judge Andrew Marchese concerning Richard V. Kennon and Robert H. Kennon's application "for a prompt hearing in respect of a pre-decision warrant, issued November 14, 1990 and in the amount of \$1,587,583.90." This letter contained the following information:

"The names, addresses and telephone numbers of the applicants are:

Richard V. Kennon	Robert H. Kennon
180 Succabone Road	28 Swamp Fox Circle
Bedford Hills, New York	Little River, South Carolina
914-666-7689	803-249-8826

"The name, address and business identification number of the business involved is:

Jenny Oil
Identification No.: 13-2833403
PO Box A
Katonah, New York 10536

"The name, address and telephone number of the taxpayer's representative is:

Richard H. Champion
1233 20th Street, N.W.
Suite 800
Washington, DC 20036
202-457-0919."

This letter also asked that the Division be required to furnish to the applicant's representative a written statement which contained information used as the basis for the determination of the amount of the warrant in accordance with 20 NYCRR 604.8(b) (renum 20 NYCRR 2394.8 eff July 10, 1991). The letter also stated that Mr. Champion was contacted by Ms. Patricia Brumbaugh of the Division's Law Bureau on December 14, 1990 about the Messrs. Kennon's request to BCMS for

a prompt hearing with respect to the pre-decision warrant and their request for information about the propriety of the amounts reflected in the pre-decision warrant.

At the hearing, petitioner submitted a letter from Patricia L. Brumbaugh to Mr. Champion dated December 18, 1990 as its Exhibit "4". Ms. Brumbaugh wrote, in pertinent part:

"Following up on our telephone conversation of December 14, 1990 enclosed is a workpaper showing the breakdown of the sales taxes asserted in this matter. The quantity of motor fuel is based on eleven invoices for barge loads of gasoline as set forth at page 12 of the indictment against Richard V. Kennon and Robert H. Kennon which was the subject of a recent conviction. A copy of that page of the indictment is also enclosed.

"Tomorrow, December 19, 1990, I will be meeting with the Transactions and Transfer Tax Bureau (TTTB) auditor whose audit work resulted in issuance of the Notice of Determination. By the end of this week I will forward to you his affidavit setting forth the facts underlying these Notices.

"It should be noted that the enclosed workpaper also show [sic] computation of motor fuel taxes on the same gallonage. The computation itself is a mechanical matter of applying a known tax rate to the identified gallonage. These amounts relate to a portion of the periods covered by a notice of determination, which was issued to the corporation and is presently pending hearing in the Division of Tax Appeals. The attorneys of record for that matter are Levine, Robinson & Algios. Unless I have a power of attorney from you from the corporation, or a delegation of authority from the attorneys of record, I will not be permitted to discuss any aspect of that matter with you."

Attached to this letter was a computation sheet entitled "JENNY OIL COMPUTATION OF TAX DUE SALES AND MOTOR FUEL" which contained computations of motor fuel tax, penalties and interest due for the period ending May 31, 1984 and August 31, 1984, as well as sales tax, plus penalties and interest, for the same period.

The sales tax computation was as follows:

<u>Period Ending</u>	<u>Gallons</u>	<u>Rate</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
5/31/84	1,259,804	.099	\$124,720.59		\$ 62,360.30	
	\$143,540.54		\$ 330,621.43			
8/31/84	<u>5,061,555</u>	.076	<u>485,909.28</u>		<u>242,754.64</u>	
	<u>528,098.55</u>		<u>1,256,962.47</u>			
	6,321,359		\$610,629.87		\$305,314.94	
	\$671,639.09		\$1,587,583.90			

Also attached to Exhibit "4" was page 12 of an indictment which referenced 11 invoices for bargeloads of gasoline.

Richard V. Kennon and Robert H. Kennon each filed a Request for Conciliation Conference dated February 5, 1991 by their authorized representative, Carl Levine.¹⁶ As part of its Exhibit "6", petitioner included both Richard and Robert Kennon's requests for conciliation conference; the individual powers of attorney each had executed appointing Carl S. Levine, Esq., and Kenneth L. Robinson, Esq., as their respective representatives; as well as Notice of Determination (Notice No. S901114820M) issued to Richard V. Kennon, as president of Jenny Oil Corporation.

Richard V. Kennon's conciliation conference request references notice/ assessment identification number S901114820M, and Robert H. Kennon's conciliation conference request references notice/assessment identification number S901114821M. Review of both requests reveals that the same bases were used in both requests. The bases stated are as follows:

- "1. Notice of Determination was issued outside period of limitations.

¹⁶Each request contained a box labeled "Name on notice/assessment" and a blank space. That blank space on Richard Kennon's request contained "Richard V. Kennon"; while on Robert Kennon's request, the space contained "Robert H. Kennon".

- "2. Sales taxes were or may have been paid to New York State by others in chain of title or were required to have been paid by others in chain of title.
- "3. Taxpayer is not obligated to pay the relevant taxes to the Department due to application of applicable law and regulations.
- "4. Such other and further arguments as shall be raised at the Conference or upon filing of the Petition."

A petition dated August 9, 1993 was filed on behalf of Richard V. Kennon and Robert H. Kennon, officers of Jenny Oil Corporation, by their representative, Carl S. Levine (Petitioner's Exhibit "7"). This petition referenced a prior petition submitted on July 14, 1993, which had been assigned DTA No. 812100 by the Division of Tax Appeals, and two conciliation orders (CMS Nos. 111138 and 113653). The petitioners were contesting tax in the amount of \$1,587,583.90. The petition stated, in pertinent part, in item 6 that:

- "1. On July 14, 1993 a Petition was submitted under the same CMS Nos. 111138 and 113653, solely on procedural grounds to protest the failure to grant Petitioners a Conciliation Conference.
- "2. It is possible that the procedural matter will not be resolved within the 90 day period provided for Petitioners to protest the Conciliation Orders. Therefore, in the interest of protecting Petitioners' rights to protest the assessments on the merits, this Petition is filed within such 90 day period and without waiver of the prior Petition for procedural relief.
- "3. Petitioners deny owing the taxes, penalties and interest assessed in the Notice of Determination, dated November 14, 1990
- "4. The Notice of Determination does not provide sufficient information to explain the basis for the alleged tax deficiency.
- "5. The Petitioners' due process rights have been substantially contravened by failing to provide sufficient information to enable Petitioners to fully

repond [sic] to the Notices of Determination. Thus, the Notices of Determination should be dismissed.

"6. Petitioners reserve the right to file additional objections upon receiving appropriate information from the Tax Department."

The Division of Tax Appeals assigned DTA No. 812161 to this petition.

As its Exhibit "11", petitioner submitted a single-page handwritten memorandum from the audit workpapers. The memorandum was addressed "To Mike" and bore the date 11/20. It stated, in pertinent part, the following:

"Call from Bill Frank: Richard Kennon has moved to the two addresses below. Please send additional certified notices there. -- Also, see if there is any lawyer who has their Power of Attorney and send copies to him."

Petitioner's representative offered the following information about this memorandum:

"This is a one-page handwritten memo from the work papers. References a call from Bill Frank. He was a supervisor in the TTB Unit with responsibility over petroleum companies, among other things.

"It's dated November 20th which, I would note, I believe is the same date as the assessments or very close in date to the notices.

"The point that I am making with this exhibit is that it says, 'Also see if there is any lawyer who has their Power of Attorney and send copies to him.' My point is, that clearly wasn't done" (tr., pp. 49-50).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that the Division of Tax Appeals should first determine the validity of the sales tax notice issued to petitioner, and thus whether it has jurisdiction before considering whether the protest was timely filed. It argues that the Division of Tax Appeals does not have

jurisdiction since the Notice of Determination is invalid. Petitioner asserts that the Notice of Determination is barred by the statute of limitations and was not properly served on petitioner and its representative.

It asserts that the Division has not met its burden of showing that the Notice of Determination was mailed to petitioner on or about November 20, 1990. As proof of mailing, the Division submitted into evidence Mr. Hika's affidavit (Division's Exhibit "G"). At the hearing, petitioner's representative objected to the introduction of this affidavit into evidence on the grounds that: it was hearsay; and the affiant was unavailable for cross-examination (see, Finding of Fact "17"). In his brief, petitioner's representative renews his objections and argues that petitioner's due process rights were violated because Mr. Hika was unavailable for cross-examination.

Citing relevant case law, petitioner maintains that the Division has failed to prove that it mailed the notice to petitioner and, therefore, the petition should be deemed timely.

Petitioner also contends that it timely protested the notice. It maintains that the Division "was placed on notice of Jenny's protest by, at minimum, the Kennon's timely protests of their individual sales tax assessments, which were identical to the sales tax assessment issued to Jenny" (Petitioner's brief, p. 26).

In addition, petitioner argues that the Division failed to serve the notice on petitioner's representatives and, therefore,

the 90-day period for filing a protest should have been tolled.

Lastly, petitioner asserts that the principles of waiver, payment, collateral estoppel and accord and satisfaction are each applicable in the instant case and bar the Division from holding petitioner liable.

Petitioner requests that the Notice of Determination be dismissed in its entirety.

The Division contends that petitioner had 90 days from the date of issuance of the Notice of Determination in which to request a conciliation conference in accordance with Tax Law §§ 170(3-a)(a) and 1138(a)(1). It argues that it has established November 20, 1990 as the date of mailing of the Notice of Determination, through the introduction into evidence of the affidavit of James Hika, the certified mail record, as well as PS Form 3811 ("green card"). The Division maintains that petitioner did not mail a "request for conciliation conference" until September 2, 1993, 1,017 days after the Notice of Determination was issued to it. Citing relevant case law, the Division argues that since the request was not filed within 90 days, the original determination finally and irrevocably fixed the tax.

The Division argues that even if it is held that the certified mail record in the instant matter is in some way deficient, the green card clearly indicates that the Notice of Determination (Notice No. S901114819M) was delivered on November 21, 1990 to petitioner and was signed for by Richard Kennon, an officer of the corporation. Citing relevant case

law, the Division asserts that even if the date of delivery was used as the starting date in calculating the 90 days, petitioner would still be 1,015 days late in requesting a conciliation conference.

Contending that petitioner's argument that the notice at issue is invalid because it was issued after the three-year statute of limitations had expired, the Division explained that the notice included an assessment of fraud penalty and fraud may be assessed at any time. The Division maintains that the assessment of fraud penalty in the Notice of Determination at issue, pursuant to Tax Law § 1145(a)(2), "is evidenced by the fact that the penalty assessed is equal to exactly one half of the tax assessed."

The Division asserts that petitioner's argument that a copy of the notice at issue was not sent to the corporation's representative is meritless. Another meritless argument raised by petitioner, according to the Division, concerns the fact that petitioner's due process rights were violated by the absence of the auditor as a witness at the hearing.

The Division also argues that there must be something more than petitioner's mere claim at hearing that because the corporate officers timely requested conciliation conferences, it was put on notice that the corporation was also requesting a conference. It maintains that the "officers' Requests for Conciliation Conference did not in anyway mention the name of the corporation, the corporation's address, the corporation's Notice of Determination, or the corporation's identification

number" (Division's letter, p. 3). Lastly, it asserts that petitioner's arguments concerning the applicability of the principles of waiver, payment, collateral estoppel and accord and satisfaction to this matter are misplaced.

The Division requests that the petition in this matter be denied and the Notice of Determination be sustained.

In its reply brief, petitioner argues that this matter is not the typical case of whether or not petitioner filed a timely protest. Rather, it asserts that the gravamen of this matter is whether the Division may argue, without submitting any proof, that petitioner is guilty of fraud, when the principals/100% stockholders of petitioner had been found by the Division to be not guilty of fraud. Petitioner avers that it is illogical for the Division to claim that petitioner is guilty of fraud when its principals have been found to be innocent of fraud by the Division. It maintains that in order to resolve this controversy justly and fairly, the Division of Tax Appeals should view this matter in light of the resolution of its companion matters, the Kennons' individual petitions (see, Finding of Fact "25").

Petitioner also avers that it never received the Notice of Determination (Notice No. S901114819M). It also asserts that the Consolidated Statement of Tax Liabilities, dated July 15, 1993, was never served directly on either it or its attorney, Carl S. Levine, Esq. (see, Finding of Fact "3"). However, once petitioner and its representative learned of the Consolidated Statement of Tax Liabilities, it states that it filed a timely

protest. It again contends that the Division's failure to produce any witnesses violated its due process rights because petitioner was precluded from cross-examining anyone with first-hand knowledge of the audit and the basis for the assessment.

Lastly, petitioner states that even if the timeliness of its protest is at issue, its protest should be deemed timely. It argues that the Kennons' requests for conciliation conference did mention petitioner, Jenny Oil Corporation.

Petitioner requests that its petition be granted in full and the Notice of Determination be dismissed in its entirety.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in pertinent part, that:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing"

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

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

C. A taxpayer has the option of requesting a conciliation conference with BCMS upon receipt of the Notice of

Determination, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (20 NYCRR 4000.3[c]).

Tax Law § 170(3-a)(a) provides, in part, that BCMS shall provide a conference at the request of a taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed."

D. Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish both the fact and date of mailing of the notice of determination (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The proof required consists of evidence of a standard procedure for the issuance of such notices offered by one with personal knowledge of such procedures and evidence that establishes that the procedure was followed in the particular case under consideration (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533).

E. As noted in Conclusion of Law "D", the required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavit of Mr. Hika in support of its position that the Notice of Determination was issued to petitioner on November 20, 1994.

During the hearing and in the brief, petitioner's representative asserted that petitioner's due process rights were violated because Mr. Hika was unavailable for cross-examination. Petitioner maintains that the Hika affidavit is conclusory and replete with hearsay. It also asserts that the Division "offered no explanation as to why Mr. Hika was not present in person to testify" (Petitioner's brief, p. 24). Petitioner contends that the affidavit does not speak for itself and petitioner cannot cross-examine it or any other jurisdictional document. Petitioner argues that it was not afforded the opportunity to cross-examine anyone with first-hand knowledge of the mailing of the Notice of Determination or the basis for the audit and the assessment because the Division failed to produce anyone at the hearing to testify regarding the actual mailing of the notice to petitioner. Petitioner maintains that the Division has failed to prove that it mailed the notice to petitioner and, therefore, the petition should be deemed timely.

Petitioner's argument that its due process rights were

violated is without merit. Although the Division did not produce Mr. Hika or any other witness for petitioner to cross-examine, the record indicates that petitioner did not make a request of this Administrative Law Judge to subpoena either Mr. Hika or any other witness, an action authorized by the State Administrative Procedure Act § 304(2) and the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.6[c]).

As the Tribunal noted in Matter of Matson (Tax Appeals Tribunal, March 10, 1988, citing Eagle v. Patterson, 57 NY2d 831, 455 NYS2d 759):

"petitioners must request a witness pursuant to this section of the State Administrative Procedure Act in order for failure to produce such witness to offend petitioner's due process rights."

The Division has established through the affidavit of Mr. Hika that the Notice of Determination was issued and sent by certified mail on November 20, 1990 to petitioner. In addition, the Division has submitted a copy of the CMR Postal Form 3877 for November 20, 1990, the returned postal receipts PS 3811 (green cards) showing receipt by addressees on November 21, 1990 and a copy of a returned envelope addressed to "Robert H. Kennon, Jenny Oil Corporation" as proof of mailing (see, Findings of Fact "13", "14", "15").

The CMR which allegedly proves that the notice was mailed to petitioner is inadequate. I find that the PS Form 3877 is not properly completed. While this one-page CMR does contain the certified number, name of petitioner, the date, postmark and signature of a postal employee acknowledging receipt, it does not contain petitioner's address. Also, based on a review of

the CMR, it appears that petitioner was the intended recipient of three notices sent by certified mail (see, Finding of Fact "13"). As the Tribunal noted in Matter of Montesanto (supra):

"As we discussed in Katz and Clark, a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the taxpayer's representative, the date, postmark and the signature of a Postal Service employee acknowledging receipt."

I find that the evidence submitted fails to satisfy the Division's burden that the notice was properly mailed to petitioner on November 20, 1990. As the Tribunal noted in Matter of Katz (supra):

"proof of mailing requires evidence of the ordinary issuance procedure as well as evidence of the fact that the procedure was actually followed in a particular case."

F. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). In further support of its proof of mailing, the Division submitted the returned postal receipts PS forms 3811 (green cards) addressed to "Jenny Oil Corporation" (Article No. 752363) and "Richard V. Kennon, Jenny Oil Corporation" (Article No. 752361), respectively, as well as the returned envelope addressed to "Robert H. Kennon, Jenny Oil Corporation" (Article No. 752362) (see, Findings of Fact "13", "14", "15"). Based on this evidence, the statutory 90-day period may be measured from the date of the United States Postal Service postmark on the PS Form

3811, to wit, November 21, 1990. The Division has established that petitioner received the Notice of Determination on November 21, 1990.

G. As noted in Conclusions of Law "A" and "C", a Notice of Determination becomes final and irrevocable unless the taxpayer files either a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS within 90 days after the notice is issued. The last day on which petitioner could have timely filed either a request for a conciliation conference or a petition was February 19, 1991 unless there was a tolling of the 90-day period.

Petitioner argues that, in accordance with Matter of Bianca v. Frank (43 NY2d 168, 401 NYS2d 29), the 90-day period for the filing of petitions should be tolled in this case because its representative was not served with the Notice of Determination. Petitioner asserts that the Division was aware of its responsibility to serve the Notice of Determination on petitioner's representative as evidenced by the handwritten memorandum submitted as petitioner's Exhibit "11". Petitioner maintains that:

"Within at most two and a half months after the issuance of the sales tax assessment to Jenny, the Tax Department was on notice of the identity of Jenny's representatives. Specifically, the Tax Department knew that Richard Champion and Carl S. Levine represented the Kennons in their individual matters for the same sales tax at issue here, and that Carl S. Levine represented Jenny on the motor fuel tax assessment" (Petitioner's brief, p. 17).

It contends that, in this case, sales and motor fuel taxes were integrated because the sales taxes due were computed on the

identical number of gallons used to determine motor fuel taxes due. It further asserts that the Division should have logically determined that the same attorney who was representing petitioner on the motor fuel tax matter was also representing it on the companion sales tax matters.

The Division maintains that petitioner's argument is meritless "because a copy of the purported power of attorney running from the petitioner to a representative for the tax and periods at issue was not entered into evidence" (Division's letter, p. 2).

The Division is correct. Petitioner has not submitted any evidence to show that, prior to issuance of the Notice of Determination, Mr. Levine and/or members of his law firm were petitioner's representatives for sales taxes during the relevant period. In fact, although it appears that Mr. Levine and/or a member of his law firm were petitioner's representatives with regard to the motor fuel tax audit, a copy of that power of attorney was not submitted into evidence either (see, Findings of Fact "17", "18", "19"). Petitioner's argument that since the motor fuel tax and sales tax are integrated in this case, the power of attorney appointing Mr. Levine and/or members of his law firm should encompass the sales tax as well as the motor fuel tax during the relevant period is without merit. 20 NYCRR 2390.5 states, in pertinent part, that a power of attorney:

"should clearly describe the proceeding in which the attorney or agent is authorized to represent the taxpayer and the taxable year or period involved therein."

Motor fuel taxes and sales taxes are separate and distinct

taxes. It was petitioner's burden to introduce evidence that Mr. Levine or a member of his law firm had filed a power of attorney, and the party upon whom the burden or proof rests loses if no evidence is offered on the fact at issue (see, Matter of Grace & Co., Tax Appeals Tribunal, September 13, 1990). No such evidence was produced here (see, Matter of Sliford Restaurant, Tax Appeals Tribunal, October 10, 1991).

Since the 90-day period was not tolled in this case, the last day on which petitioner could have timely filed either a request for a conciliation conference or a petition was February 19, 1991. Petitioner's request was dated September 2, 1993 and was received by BCMS on September 7, 1993 (see, Finding of Fact "4"). Unfortunately, this date is well past the 90-day period within which a request may be filed. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

H. As an alternative argument, petitioner contends that it timely protested the Notice of Determination. It maintains that the Division "was placed on notice of Jenny's protest by, at minimum, the Kennons' timely protests of their individual sales tax assessments, which were identical to the sales tax assessment issued to Jenny" (Petitioner's brief, p. 26). Petitioner argues that the notices of determination were addressed, respectively, to "Richard V. Kennon, As President of Jenny Oil Corporation" and "Robert H. Kennon, as Vice President of Jenny Oil Corporation". It also asserts that "in the center

of each Notice of Determination it states: '[y]ou are liable individually and as [president or vice president] of Jenny Oil Corporation" (Petitioner's reply brief, p. 10; emphasis supplied in original). Petitioner contends that since the Kennons' requests for a conciliation conference did mention Jenny Oil Corporation, its request for a conciliation conference should be deemed timely. I find petitioner's argument to be meritless.

Tax Law § 170(3-a)(a) provides that "[a] request for conciliation conference shall be applied for in the manner as set forth by regulation of the commissioner" The regulations provide that the request for a conciliation conference should contain:

"(i) the name and address of the requester;

"(ii) the name and address of the requester's representative, if any;

"(iii) if applicable, the taxable years or periods involved and the amount of tax in controversy;

"(iv) the action or actions of the operating division or bureau which are being protested;

"(v) the facts and law which the requester asserts are relevant to the controversy;

"(vi) the signature of the requester or the requester's representative beneath a statement that the request is made with knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law;

"(vii) a legible copy of the statutory notice being protested; and

"(viii) the original or a legible copy of the power of attorney" (20 NYCRR 4000.3[b][1]).

In Matter of Crispo (Tax Appeals Tribunal, April 13, 1995),

the Tribunal found the situation where the taxpayer claimed a timely, yet informal request for refund had been made to be analogous to the situation where the taxpayer claims a timely, yet informal request for a conciliation conference has been made. The Tribunal found the analysis employed in the refund situation to be applicable in the determination of whether there has been a timely request for a conciliation conference. The Tribunal stated:

"In analyzing whether a taxpayer has made an informal claim for refund, the Supreme Court has stated:

'a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period' (United States v. Kales, 314 US 186, 194).

"Lower courts applying this standard have held that:

'[i]t is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer' (American Radiator & Standard Sanitary Corp. v. United States, 318 F2d 915, 63-2 USTC ¶ 9525, at 89,179; see also, Rosengarten v. United States, 181 F Supp 275, 60-1 USTC ¶ 9303, cert denied 364 US 822)" (Matter of Crispo, supra).

The information contained in the Kennons' requests, inasmuch as it relates to petitioner, does not satisfy any of the requirements specified in the Division's regulations, nor can it be said that it fairly advised the Commissioner of petitioner's claim so as to constitute an informal request. The only

references to Jenny Oil Corporation in either of the Kennons' requests is on their respective notices of determination which were referenced by notice/assessment number and annexed to their respective requests. I do not find the words "Jenny Oil Corporation" to be sufficient to put the Division on notice that a request for a conciliation conference was being made by petitioner, Richard Kennon or Robert Kennon with regard to the Notice of Determination (Notice No. S901114819M) issued to petitioner.

Petitioner did not make a timely request for a conciliation conference.

I. Petitioner asserts that the Division of Tax Appeals should first determine the validity of the Notice of Determination issued to petitioner and thus whether it has jurisdiction before considering whether the protest was timely. In support of its position, petitioner cites Shelton v. Commissioner (63 TC 193) and the Tribunal decision in Matter of Cheakdkaipejchara (Tax Appeals Tribunal, April 23, 1992).

Petitioner argues that the Notice of Determination is barred by the statute of limitations. It asserts that the notice is invalid because it was issued outside the three-year statute of limitations. Petitioner maintains that the Notice of Determination was issued more than six years after the audit period. It contends that there is no indication on the face of the Notice of Determination that the Division alleged fraud. In its brief, petitioner asserts that:

"no specific allegations of fraud against Jenny have ever been made in this matter. The first time the Law

Bureau advised Petitioner it was purportedly alleging fraud was in its Answer filed May 4, 1994" (Petitioner's brief, p. 15).

Petitioner avers that there can be no finding of fraud against it when the Division settled the sales tax assessments, which mirrored the assessment issued to petitioner, against the Kennons who owned 100% of the stock of petitioner and were the president and vice president of petitioner, for \$7,500.00 in tax and interest and \$0.00 in penalties. Petitioner argues that it does not make sense that the principals are innocent of fraud but their corporation is guilty of fraud. It maintains that the notice issued to petitioner is barred by the statute of limitations.

The Division contends that petitioner's argument is incorrect because the Notice of Determination included an assessment of fraud penalty and, pursuant to Tax Law § 1147(b), fraud may be assessed at any time. It further asserts that the assessment of fraud penalty in the notice at issue, pursuant to Tax Law § 1145(a)(2), "is evidenced by the fact that the penalty assessed is equal to exactly one half of the tax assessed" (Division's letter, p. 2).

The sole issue at the hearing was the timeliness of petitioner's request for a conciliation conference. The issue of fraud goes to the merits of the case. Since I have found that petitioner's request for a conciliation conference was not timely filed and that the Division of Tax Appeals is without jurisdiction, there is no need to address this issue (see, Conclusion of Law "G").

J. Petitioner also argued that the principles of waiver, payment, collateral estoppel and accord and satisfaction are each applicable in the instant case and bar the Division from holding petitioner liable. Since all of these issues go to the merits of the case and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case, I need not address them.

K. The petition of Jenny Oil Corporation is hereby dismissed.

DATED: Troy, New York
September 28, 1995

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE