STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
JOHN McNAMARA	:DETERMINATION DTA NO. 813361
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 December 1, 1989 through February 28, 1991.	:

Petitioner, John McNamara, 108 Van Brunt Manor Road, East Setauket, New York 11733, 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 December 1, 1989 through February 28, 1991.

The Division, by its representative, William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated February 24, 1995 and returnable on March 27, 1995,[1] for an order of summary determination on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination.[2] The

[1]Petitioner's representative requested and received a 10-day extension of time within which to file a response to the Division of Taxation's motion for summary determination. The return date of the motion was changed to April 6, 1995 and the answering papers were due on or before March 27, 1995.

[2]The Division of Taxation's representative, in paragraph 2 of her affidavit in support of her motion for summary determination, incorrectly stated the second ground upon which she based her motion. The correct second ground is that a petition for a hearing before the Division of Tax Appeals was not filed within 90 days of the issuance of the Notice of Determination.

Division of Taxation's motion is supported by

the affidavit of Christina L. Seifert, Esq., sworn to the 23rd day of February 1995, with attachments thereto; the affidavit of Geraldine Mahon, sworn to the 2nd day of February 1995, with attachments thereto; and the affidavit of Daniel B. LaFar, sworn to the 31st day of January 1995. Petitioner filed the affidavit of his representative, Eugene B. Fischer, Esq., sworn to the 23rd day of March 1995, with attachments thereto and his affidavit, sworn to the 22nd day of March 1995, in opposition to the Division of Taxation's motion for summary determination. Now, upon the motion papers, affidavits, and all pleadings and documents submitted, Winifred M. Maloney, Administrative Law Judge, issues the following determination.

ISSUE

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

FINDINGS OF FACT

The Division of Taxation ("Division") mailed to petitioner, John McNamara, a Notice of Determination (Notice No. L-008523436-4) dated March 11, 1994 for sales and use taxes in the amount of $523,832.00, plus penalties of $171,624.40 and interest of $261,934.35, for a total amount due of $957,390.75 for the period December 1, 1989 through February 28, 1991. [3]

[3]The Notice of Determination was addressed to "McNamara - John, 108 Van Brunt Manor Rd, East Setauket, New York 11733-3901."

The explanation and instruction section contained the following:

> "This notice is issued because you are liable as an Officer/ Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.
>
> "Our records indicate that you are/were an Officer/Responsible Person of: McNamara Buick-Pontiac, Inc."

The computation summary section of the Notice of Determination contained the following:

"Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
02-28-90	48,801.00	29,903.44	14,640.30		0.00
					93,344.74
05-31-90	91,697.00	51,783.17	27,509.10		0.00
					170,989.27
08-31-90	111,886.00	57,969.16	33,565.80		0.00
					203,420.96
11-30-90	126,700.00	59,976.06	38,010.00		0.00
					224,686.06
02-28-91	144,748.00	62,302.52	57,899.20		0.00
					264,949.72
TOTALS	523,832.00	261,934.35	171,624.00		0.00
					957,390.75"

Petitioner sent a Request for Conciliation Conference ("request"), dated July 14, 1994, which referenced Assessment ID L-008523436-4 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 July 16, 1994. BCMS received the request on July 20, 1994.

By Conciliation Order (CMS No. 140745) dated September 23, 1994, the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on March 11, 1994 and the request was not mailed until July 16, 1994, or more than 90 days from the date of the notice, the request was untimely filed.

A Tax Compliance Levy ("levy") issued by the Division was received by Fleet Bank of Connecticut on November 22, 1994. This levy references Warrant ID No. E-008523436-W001-5 docketed in Suffolk County on November 16, 1994 in the original warranted amount of $1,529,426.78. The judgment debtor's name and address were:

"John McNamara
Individually and as a Responsible Person of
McNamara Buick-Pontiac INC.
Winer
400 Garden City Plaza
Garden City, NY 11530-3336."

Petitioner filed a petition with the Division of Tax Appeals dated November 22, 1994 by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated November 23, 1994. The petition was received by the Division of Tax Appeals on November 28, 1994.

Petitioner is seeking a reversal of the order dismissing the conciliation conference request pertaining to the Notice of Determination which assessed sales and use taxes for the period December 1, 1989 through February 28, 1991. The petition challenges the assessment of $523,832.00 in tax, plus penalty and interest. The petition states:

"1. On or about May 20, 1994 Petitioner received three

(3) notices of determination and four (4) notices of estimated determinations for sales tax arising from the operations of Angst Inc.

"2. Included in the aforementioned notices was a page entitled 'consolidated statement of tax liabilities' which listed an eighth (8th) assessment (the subject assessment #L 008523436-4) in the amount of $523,832 plus interest and penalties.

"3. This was the very first notice petitioner had of such assessment.

"4. On June 8, 1994, Petitioner's attorney, J. Timothy Shea, filed requests for conciliation conferences on the notices of assessment referred to in paragraph 1.

"5. On July 6, 1994, my attorney, J. Timothy Shea, was informed by the New York State Department of Taxation and Finance, Hauppauge, New York, that the eighth (8th) assessment was a sales assessment arising from another corporation, McNamara Buick Pontiac, Inc., notice of which was mailed on June 20, 1994 to the Petitioner.

"6. On July 6 and July 22, 1994 respectively, the Department canceled four (4) of the assessments referred to in paragraph 1.

"7. On July 15, 1994 my attorney filed a request for a conciliation conference with the New York State Department of Taxation and Finance for the subject assessment, #L008-523436-4.

"8. My attorney was notified by order dated September 23, 1994 that notice of the subject assessment #L008523436-4 was issued to the Petitioner on March 11, 1994 and the request for a conciliation conference was denied as untimely.

"9. On November 7, 1994, the Department canceled the remaining three (3) assessments referred to in paragraph 1.

"10. Petitioner [sic] never received any notice of determination or estimated determination of the subject assessment #L008523436-4 from the New York State Department of Taxation and Finance on or after March 11, 1994."

On December 6, 1994, petitioner's former representative, J. Timothy Shea, sent a letter to E. Carlsson of Collections which referenced Assessment Number(s): L-008523436-4 and L-

008802052-8.[4] Mr. Shea wrote, in pertinent part:

> "As you have been made aware, the undersigned represents John McNamara in connection with certain assessments for sales and use taxes that have been imposed upon Mr. McNamara as a result of the operations of McNamara Buick Pontiac, Inc. Warrants have apparently been issued for tax assessments that Mr. McNamara never received notice of. The issue of receipt of notice is on appeal with the Tax Appeals Bureau in Albany.
>
> "Initially, I direct your attention to tax compliance levy dated November 22, 1994 addressed to John McNamara, individually and as a responsible person of McNamara Buick Pontiac, Inc., Winer, 400 Garden City Plaza, Garden City, New York 11530-3336. (Copy enclosed) The address is apparently for an accounting firm which does not represent Mr. McNamara in this matter.
>
> "Also enclosed is a copy of a collection notice dated December 1, 1994 addressed to McNamara [sic] Buick Pontiac, Inc., at PO Box 208, Port Jefferson, New York 11777-0204 for an assessment reflected on the attached consolidated statement of tax liabilities. Please be advised that McNamara Buick Pontiac, Inc. was one of many corporations forfeited to the Federal Government on May 18, 1992 by virtue by [sic] a Federal order of forfeiture which appointed Dominic DiNapoli of Price Waterhouse as Trustee of McNamara Buick Pontiac, Inc. All notices regarding McNamara Buick Pontiac, Inc. or other forfeited corporations should be directed to Dominic DiNapoli, Special Trustee, at Price Waterhouse, 1177 Avenue of the Americas, New York, New York 10036.
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> "Your department has commenced collection activities against Mr. McNamara for tax assessments for which he has had no notice. The tax assessment number L-008523436-4 in the amount of $523,832.00 plus interest and penalties and assessment number L-0088020502-8 in the total amount of $1,462,508.60 are being appealed to the New York State Division of Tax Appeals for the purpose of setting aside the assessments on the basis that Mr. McNamara did not receive the appropriate statutory notice.

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[4]The letter was addressed to: "E. Carlsson, Collections, New York State Department of Taxation and Finance, Suffolk District Office, New York State Office Building, Veteran's Memorial Highway, Hauppauge, New York 11788."

> "Mr. McNamara insists that no taxes are due to the State of New York for the periods covered in the notices.
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> "I am led to believe that the Federal Government will cooperate in connection with providing access to the books and records of McNamara Buick Pontiac, Inc. for the contested periods at some time in the future when the Federal Government no longer needs them."

An answer, dated January 24, 1995, was served on petitioner by a transmittal letter also dated January 24, 1995. The Division, in its answer, stated that it lacked "knowledge of information sufficient to form a belief as to the allegations contained in item (6) of the petition." It further stated that: (1) a Notice of Determination (Notice No. L008523436, dated March 11, 1994) was issued to petitioner, pursuant to Articles 28 and 29 of the Tax Law, asserting tax due in the amount of $523,832.00, plus penalty and interest; (2) that Notice of Determination "bearing certified control number P 911 174 283 addressed to John McNamara, 108 Van Brunt Manor Rd., East Setauket, NY 11733-3901 was stamped 'REFUSED' and returned" to the Division; (3) petitioner failed to request a conciliation conference within 90 days from the issuance of the notice; (4) on September 23, 1994, BCMS issued a Conciliation Order (CMS No. 140745) to petitioner which denied petitioner's request as untimely made; (5) 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 (6) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of timeliness of petitioner's protest. The answer also states that

petitioner has the burden to prove that "the assessment at issue is erroneous or otherwise improper", and to show that petitioner's protest was timely.

On February 27, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1).[5]

In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Geraldine Mahon and Daniel B. LaFar, employees of the Division; a copy of the New York

State Department of Taxation and Finance Assessments Receivable certified mail record dated March 11, 1994; a copy of the Notice of Determination dated March 11, 1994; a copy of the envelope used to mail the Notice of Determination; a copy of the envelope which contained petitioner's Request for Conciliation Conference; and a copy of the Request for Conciliation Conference.

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[5]The Division's representative, in paragraph 2 of her affidavit, incorrectly stated her second ground as "a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Conciliation Order." However, paragraph 7 of her affidavit correctly stated that:

> "[s]ince the Petitioner did not file a Request for Conciliation Conference or a Petition with the Division of Tax Appeals within the time period prescribed by Tax Law sections 170(3-a)(a) and 1138(a)(1), the late Request for Conciliation Conference was properly denied and the Petition before the Division of Tax Appeals should be dismissed, with prejudice for lack of jurisdiction."

Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, which relates to the Division's computer system for generating notices of deficiency and notices of determination to taxpayers under Articles 28 and 29 of the Tax Law.

In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency/determination prior to their shipment to the Division's mechanical section for mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record", and the corresponding notices of determination generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the certified mail record. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her initials/ signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the certified mail record containing a list of the notices allegedly issued by the Division on March 11, 1994, which she asserts bears the information relating to petitioner's

notice and is a true and accurate copy of such record.[6] Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Determination, addressed to petitioner, which bears assessment identification number L-008523436 and certified control number P 911 174 283.[7] Page 20 of the certified mail record contains certified control number P 911 174 283, Notice of Determination number L008523436, addressed to petitioner, McNamara - John, 108 Van Brunt Manor Road, East Setauket, New York 11733-3901. The certification and notice numbers listed match those on the notice issued to petitioner.

On this copy of the certified mail record, the certified control numbers run consecutively from P 911 174 073 on page 1 to P 911 174 327 on page 24, with 11 entries per page, except page 24 which contains two entries, as well as the total figures for the certified mail record. All 24 pages of the certified mail record bear the print date of March 2, 1994, changed manually on the first page and last page only to March 11, 1994 and the record print time of 42:29:28. Each of the 24 pages submitted is date stamped March 11, 1994 by the Albany, New York Roessleville Branch of the United States Postal Service.

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[6]Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding. The Notice of Determination was sent to "McNamara - John".

[7]The Division's address listed on this Notice of Determination was:

"New York State Department of
Taxation and Finance
Audit Division - Suffolk D.O. - Sales Tax
Veterans Memorial Highway
Hauppauge, NY 11788-5599."

Ms. Mahon explained in her affidavit that the

print date for certified mail records is approximately 10 days prior to the mail date in order to give sufficient time to review the notices by hand and to process the postage. She notes that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service. She also identified that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the United States Postal Service after mailing.[8]

It is noted that while the certified mail record submitted contains, on page 24, the total number of pieces listed, 255, it does not contain a total for the number of pieces received at the post office. On page 24, the number 255 is circled on the line entitled "TOTAL PIECES AND AMOUNTS LISTED", and directly beneath the circled number 255 is the illegible initials/signature of the postal representative.

Daniel B. LaFar is employed as a principal mail and supply clerk in the Division's mail and supply room. Mr. LaFar's duties include the supervision of mail and supply room staff in

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[8]In paragraph 3 of her affidavit, Ms. Mahon described the certified mail record as follows: "The certified mail record for the block of Notices issued on March 11, 1991 including the Notice of Determination issued to John McNamara, consists of 24 fan folded (connected) pages" (emphasis added). There is a typographical error. The correct date is March 11, 1994. All remaining paragraphs of her affidavit recite the March 11, 1994 date.

delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed

by the mailroom in the regular course of business, and which allegedly were followed, in particular, on March 11, 1994.

Mr. LaFar stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail and supply room, a member of the staff weighs and seals each envelope, postage and fees are affixed and the postage and fee amounts are recorded on the certified mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. The postal employee also circles the total number of pieces listed to indicate that this was the total number of pieces received at the post office. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here, CARTS Control Unit).

Attached to Ms. Seifert's affidavit as Exhibit "3" is a photocopy of the face side of what appears to be a window envelope, containing three window boxes. The window box in the

upper left-hand side of the envelope contained the following return address:

"New York State Department of
Taxation and Finance
Audit Division - Suffolk D.O. - Sales T
Veterans Memorial Highway
Hauppauge, NY 11788-5599."[9]

Directly beneath the return address window box is a window box which contained petitioner's address as follows:

"L-008523436-C001-2
MCNAMARA - JOHN
108 VAN BRUNT MANOR RD
EAST SETAUKET NY 11733__901."[10]

To the right of the return address window box is a window box which has the word "CERTIFIED" directly above the window box and the word "MAIL" directly beneath the window box. The following numbers appeared in the window box: "P 911 174 28."[11]

The post-paid meter stamp bears "Albany, NY", the date "Mar 11 '94" and U.S. postage of $1.29. There is a stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contained "RETURNED TO SENDER" and the sleeve contained "REFUSED". There is some extraneous handwriting on the envelope apparently made by a U.S. Postal Service representative. The envelope also contained a "received" date stamp of March 16, 1994 by the Division's Suffolk District

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[9]A portion of the return address is not visible in the window box.

[10]There is a thick black scribble line through a portion of the address. It has obscured part of the zip code.

[11]A portion of the certified control number is not visible in the window box.

Office Sales Tax Section.

Attached to Ms. Seifert's affidavit as Exhibit "4" is a copy of petitioner's Request for Conciliation Conference and a copy of the envelope

which contained petitioner's Request for Conciliation Conference. His request was received by the Division on July 20, 1994. It had been mailed by certified mail and the envelope containing the request bore a postal meter date of July 15, 1994 and was postmarked July 16, 1994.

In opposition to the Division's motion for summary determination, petitioner submitted the affidavit of his representative, Eugene B. Fischer, Esq. Mr. Fischer, in his affidavit, stated that the Division had failed: (1) to prove that it mailed the Notice of Determination on or about March 11, 1994 to petitioner, and (2) to provide any evidence of the Notice of Determination's receipt by petitioner. In his affidavit, he alleged that there were numerous deficiencies in the Division's proffered proof of mailing.

First, he pointed out the inconsistency between the date on the Notice of Determination allegedly issued to petitioner and the postmark date on the copy of the envelope which allegedly was used to mail the Notice of Determination. Mr. Fischer averred that the former had a date of March 11, 1994, while the latter had a metered mail postmark date of March 11, 1991 which was consistent with the date referenced in paragraph 3 of Ms. Mahon's affidavit. He further stated that:

> "There are no documents or affirmations included in the Division of Taxation's motion in support of a mailing of a Notice of Deficiency [sic] to the Petitioner on March 11, 1991, nor was there a copy of any mailing envelope or Post Office documents submitted in support of a mailing of a Notice of Deficiency [sic] on March 11, 1994. Therefore, the Division has failed to prove that there was any mailing of the Notice of Deficiency [sic] dated March 11, 1994 to John McNamara" (emphasis in original).

Second, he stated that the certified control number on the envelope in which the Notice of Determination was allegedly mailed differed from the certified control number included in the affidavits of Christina L. Seifert and Geraldine Mahon and page 20 of the certified mail record.[12]

Third, he averred that the certified mail record contained material flaws, as follows:

(A) there were two summaries listed on page 24 of the certified mail record: (1) "Total Pieces and Amounts Listed" and (2) "Total Pieces Received at Post Office". The former contained a number while the latter was blank. Mr. Fischer averred that "the failure to include any amounts on that line leads to the logical conclusion that no pieces were received at the Post Office and there was no mailing of any of the pieces listed" in the certified mail record (emphasis in original).

Mr. Fischer further stated that:

> "The affidavit of Daniel Lafar [sic] (Division's Exh. 2) in paragraph 6 states unequivocally, apparently but not specifically referring to page 24 of the certified mail record, that the postal employee signed (not initialed) the certified mail record and circled the number of pieces listed to indicate that this was

[12]Mr. Fischer referenced paragraphs 3 and 5 of Ms. Seifert's affidavit and paragraphs 8 and 11 of Ms. Mahon's affidavit.

> the number of pieces received at the Post Office. There is no indication in either the affidavits of Ms. Mahon or Mr. Lafar [sic] that it is standard Post Office procedure to 'circle' the number of pieces of mail received, and no explanation at all of why the line 'Total pieces received at Post Office' is left blank. Further, Mr. Lafar [sic] does not indicate how he has come to his conclusion that it was a Post Office employee who affixed his signature to the certified mail record. He does not identify the employee, nor indicate that he recognized the signature. Far better evidence in this regard would have been an affidavit from the employee delivering the certified mail record to the Post Office. In the absence of a foundation having been laid for Mr. Lafar's [sic] conclusions concerning the signing and circling on page 24 of the certified mail record, his affidavit must be disregarded in those respects.
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> * * *
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> "Ms. Mahon indicates in paragraph 7 of her affidavit that 'the Postal Service representative placed his/her initials on page 24 of the certified mail record'. However, while there are certain markings on page 24 of the certified mail record, it is impossible to determine if they are initials of any person, and there is no substantiation of the identity of any Postal Service employee who initialed page 24. This is further indication that either this mailing was not handled 'in the regular course of business' and as a common office practice, or that the mailing procedures used in the regular course of business by the Department are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are insufficient to support the proof of mailing of the subject Notice."

(B) Only the first and last page of the certified mail record have a manual date change from the record print date of 03/02/94 to the date on which the notices were allegedly delivered to the post office, 03/11/94. Mr. Fischer noted that there was no change of date on page 20 of the certified mail record, which contained the information related to the alleged mailing of the notice to petitioner:

"and no reason is given for the failure to change the dates manually on all of the intervening pages and whether only the first and last pages were stamped in the ordinary course of business. In addition, there are no initials or other identification of the person making such changes."

Fourth, Mr. Fischer notes that the return address on the envelope in which the Notice of Determination was allegedly mailed was the Division's office in Hauppauge, New York. He further notes that there was a stamp on the envelope which indicated that the envelope was received by the Division's Hauppauge, New York office on March 16, 1994. He averred that:

"There is no explanation of how or why a Division envelope with an address of a Division office in Hauppauge, New York, was processed in the Division's Albany, New York office and mailed in a U.S Post Office in Albany, New York, in the affidavits of Geraldine Mahon or Daniel Lafar [sic]. Further, if the 'Refused' stamp was affixed by the U.S. Post Office . . . the Post Office returned the envelope to the 'sender', the Division's Hauppauge office, and not to the Division's Albany office. The words 'returned to sender' are apparently part of the subject stamp. Therefore, clearly, there is an inconsistency between the affidavits of Geraldine Mahon and Daniel Lafar [sic], and the return address on the mailing envelope concerning the place of mailing that has not been explained by the Division, and such inconsistency reflects upon the veracity of the affiants and/or the record-keeping procedures of the Division in this instance, and as to whether this purported assessment was handled in the regular course of business and pursuant to the practices and procedures of the Mail and Supply Room (Aff., Daniel F. Lafar [sic], ¶¶ 8; 10), or there were unique circumstances in this matter which caused the alleged assessment <u>not</u> to be handled in the regular course of business.

"There also has been no evidence introduced of any mailing of the assessment from the Division's Hauppauge, New York office" (emphasis supplied in original).

Fifth, Mr. Fischer asserted that the Division did not lay a foundation for the conclusion that the stamped words "returned

to sender" and "refused" inside of a hand and sleeve was a "U S Postal stamp". He further asserts that "any conclusions concerning those stamped words must await the introduction of evidence concerning their origin."

Sixth, Mr. Fischer asserted that:

> "Petitioner should have the opportunity to cross-examine Ms. Mahon concerning the ability of the Division to produce return receipts in certain instances, the regularity with which such receipts are maintained or produced for evidence in cases, whether a log book is maintained for the receipt of such documents, and her own involvement in the production of receipts in those cases in which the Division introduces same into evidence."

Seventh, he contended that the best evidence of mailing and the receipt or reason for nonreceipt of a document was the maintenance of a log, or other documentary evidence of the return of certified mail documents. He argued that the Division failed to produce the best evidence of the mailing, the refusal and its return, the delivery receipt "which presumably contained a signature or notation as to who refused same." Lastly, he asserted that petitioner denied "ever receiving, refusing to receive, or having any knowledge of any envelope containing the subject assessment."

Attached to Mr. Fischer's Affidavit in Opposition as Exhibit "B" was petitioner's affidavit in which he stated, in pertinent part, that:

> "2. Prior to the filing of a Request for Conciliation Conference by my attorney, J. Timothy Shea, on July 15, 1994, in connection with the above-indicated matter, I did not receive, nor did I refuse to receive, nor did I have any knowledge of, any Notice of Determination, or Notice of Deficiency, concerning Sales and Use Tax assessments issued to me personally as a responsible Officer of McNamara Buick-Pontiac, Inc. for the periods

12/01/89-2/28/91, and in particular, I did not receive, or refuse to take delivery of, or have any knowledge of, Assessment Number L-008523436 prior to July 15, 1994."

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. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

C. A petitioner has the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services ("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 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. Petitioner contends that he did not receive, refuse to receive, or have any knowledge of any Notice of Determination. His representative asserted that there were material flaws in the certified mailing record, as well as inconsistencies between the general mailing procedures followed by the Division as outlined by the Mahon and the LaFar affidavits and the mailing procedures employed in the issuance of the subject Notice of

Determination (see, Findings of Fact "16" and "17").

F. 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 affidavits of Ms. Mahon and Mr. LaFar in support of its position that the Notice of Determination was issued to petitioner on March 11, 1994.

The affidavit of Ms. Mahon identifies the general office practice and procedures followed by the CARTS Control Unit in the preparation and mailing of the Notice of Determination on March 11, 1994. The only shortcoming I find in Ms. Mahon's affidavit with regard to the general office practice is that she did not identify the specific type of envelope used by the Division personnel, i.e., window envelope or regular envelopes. I do not find that to be a material flaw. In addition, Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business. The Division submitted a copy of the 24-page Assessments Receivable certified mail record for March 11, 1994 as proof of mailing.

I find the certified mail record in this case to be adequate. The certified mail record submitted contains all 24 pages of the original 24-page fan-folded certified mail record. All 24 pages of the certified mail record are date stamped

March 11, 1994 by the Roessleville branch of the United States Postal Service. The postal representative's illegible signature appears directly below the circled number 255 on page 24 of the certified mail record. This supports the conclusion that all 255 pieces were in fact received at the post office (see, Matter of Katz, supra).

The Division has established March 11, 1994 as the date of mailing of the Notice of Determination.

G. Upon proper mailing, notice of the assessment is presumed to be received and the 90-day period is deemed to begin on the date the notice is mailed (see, Conclusion of Law "B"). Petitioner does not contend that the address on the Notice of Determination was not his last known address. However, he does contend that he did not receive, refuse to receive or have any knowledge of any Notice of Determination. Petitioner's assertions alone would not be enough to overcome the presumption of receipt.

The Division has submitted a copy of the envelope with "RETURN TO SENDER REFUSED" on it in support of its position that the Notice of Determination was properly mailed to petitioner but was refused (see, Finding of Fact "14"). Petitioner's representative argues that it is impossible to determine the origin of the stamped hand and sleeve which contain the words "returned to sender" and "refused" on the returned envelope. He asserts that the Division has not established that this is a U.S. Postal Service stamp. He also contends that there is no explanation in either the Mahon affidavit or the LaFar affidavit

as to why the envelope was returned to the Division's Hauppauge, New York office. Furthermore, he argues that the Division has failed to produce the best evidence of the mailing, the refusal and its return, the delivery receipt "which presumably contained a signature or notation as to who refused same" (see, Finding of Fact "16"). The Division has established that the Notice of Determination was properly mailed to petitioner but was refused.

The U.S. Postal Service has standard procedures which it must follow in the delivery of mail. These standard procedures are set forth in the Domestic Mail Manual. Amongst the procedures are those concerning conditions of delivery, refusal and return which included:

> "Mail Refused When Offered for Delivery. The addressee may refuse to accept a piece of mail at the time it is offered for delivery" (DMM 153.11[b]).
>
> * * *
>
> "Refused Mail as Undeliverable. Matter refused by the addressee in accordance with 153.11b and 153.11c is treated as undeliverable (see 159)" (DMM 153.11[f]).

The procedure for the handling of mail which is refused by the addressee follows:

> "Return without delay if refused by addressee" (DMM 159.326[a]).

I find that the U.S. Postal Service followed standard procedure in its attempt to deliver the Notice of Determination to petitioner.

The Division has established through the affidavits of Ms. Mahon and Mr. LaFar that the Notice of Determination, addressed to petitioner, was placed in an envelope by Division personnel who then delivered it, on March 11, 1994, into the

possession of a U.S. Postal Service representative at the Roessleville branch of the U.S. Postal Service (see, Conclusion of Law "F"). The U.S. Postal Service attempted to deliver the envelope to petitioner; however, it was refused when it was offered for delivery. The U.S. Postal Service immediately returned it to sender at the return address contained in the upper left hand corner of the envelope, in this case the Division's Suffolk District Office located in Hauppauge, NY. The Suffolk District office received and date stamped the returned envelope on March 16, 1994 (see, Finding of Fact "14"). It is clear that the U.S. Postal Service followed standard procedure in this matter.

Petitioner has asserted that the Division has not proven that the "Return to Sender - Refused" stamp was a U.S. Postal Service stamp. The Division has the burden to prove mailing of the notice, it has done so. The burden is on the petitioner to prove that he did not receive the notice. Mere assertions of nonreceipt are not enough, there must be substantive evidence. Petitioner has failed to carry his burden of proving nonreceipt of the Notice of Determination. As for petitioner's contention that there is an inconsistency between the Mahon and LaFar affidavits and the return address on the mailing envelope concerning the place of mailing that has not been explained, this contention is meritless. I have already found that Ms. Mahon's failure to identify that a window envelope was used for the mailing of the Notice of Determination is not a material flaw in the Division's proof of mailing (see, Conclusion of Law

"F").

Petitioner has also argued that the best evidence would be the delivery receipt which "would contain a signature or notation as to who refused" the mailing. This argument is without merit. In her affidavit, Ms. Mahon has stated that in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail (see, Finding of Fact "12"). Also, there is no evidence in the record that it is standard U.S. Postal Service procedure to make notations on return receipt cards attached to refused mail. In this case, the best evidence was submitted, the returned envelope marked "refused".

The evidence submitted by the Division demonstrates that its attempt to give petitioner notice by certified mail was proper in all respects. Petitioner failed to rebut the Division's proof with any probative evidence substantiating his allegations of error (see, American Cars 'R' Us v. Chu, 147 AD2d 795, 537 NYS2d 672).

The Division has established that on March 11, 1994, the Notice of Determination was properly mailed to petitioner at his last known address.

H. 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 June 9, 1994. Petitioner mailed on July 16, 1994, a request for a conciliation conference dated July 14, 1994, which was received by BCMS on July 20, 1994 (see, Finding of Fact "2"). 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.

I. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

> "Such motion shall be supported by an affidavit, by a copy of the pleadings, and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact" (emphasis added).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.5[c][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a

full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

The Division has established its entitlement to summary determination in its favor. It has proven that the Notice of Determination on March 11, 1994, was properly mailed to petitioner's last known address. The Division has also shown that the envelope containing the Notice of Determination issued to petitioner, stamped "Refused - Return to Sender", was returned to its Suffolk District Office located in Hauppauge, New York on March 16, 1994 by the U.S. Postal Service. Petitioner's request for a conciliation conference was mailed on July 16, 1994, well after the 90-day statutory period had expired.

Since petitioner's request was untimely, the Division of Tax Appeals does not have jurisdiction to entertain the merits of petitioner's case. Accordingly, the Division's motion for summary determination is granted.

J. The Division's motion for summary determination is granted. The petition of John McNamara is hereby dismissed.

DATED: Troy, New York
September 7, 1995

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE