

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
LINDA B. KAISER, OFFICER OF LBK FOOD :  
SERVICES LTD. :  
for Revision of Determinations or for Refund :  
of Sales and Use Taxes Under Articles 28 :  
and 29 of the Tax Law for the Periods :  
DETERMINATION :  
June 1, 1992 through August 31, 1992, : DTA  
NOS. 813962  
December 1, 1992 through May 31, 1993 and :  
813963, 813964  
September 1, 1993 through February 28, 1994. :  
813965, 813966  

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813967, 813968

In the Matter of the Petitions :  
of :  
LINDA B. KAISER, OFFICER OF LBK FOOD :  
SERVICES LTD. :  
for Redetermination of Deficiencies or for :  
Refund of Personal Income Tax Under Article 22 :  
of the Tax Law for the Periods October 1, 1992 :  
through December 31, 1992, March 30, 1992 :  
through March 30, 1993 and August 3, 1993 :  
through September 28, 1993. :  
813969

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The Division of Taxation ("Division") by its representative,  
Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of  
counsel), brought a motion dated September 1, 1995, returnable  
October 2, 1995, for an order directing the entry of summary  
determination in favor of the Division on the ground that  
petitioner failed to file a request for a conciliation

conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of determination and notices of deficiency. Petitioner, appearing pro se, filed a letter in opposition to the motion.

Upon review of all of the papers filed in connection with this motion, Arthur S. Bray, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioner did not file requests for conciliation conferences or petitions with the Division of Tax Appeals within the 90-day period prescribed by Tax Law § 170(3-a); § 689(b) and § 1138(a)(1), the late requests for conciliation conferences were properly denied and the petitions before the Division of Tax Appeals should be dismissed with prejudice, for lack of jurisdiction.

The Division included with its affidavit copies of petitioner's petitions, received by the Division of Tax Appeals on June 22, 1995, which separately challenged five notices of determination dated September 19, 1994, which assessed a deficiency of sales and use taxes and three notices of deficiency, dated September 19, 1994, which asserted a deficiency of personal income tax as follows:

NOTICES OF DETERMINATION

PERIOD ENDED	<u>TAX</u> DUE	<u>INTEREST</u>		<u>PAYMENT/</u> <u>PENALTY</u>	<u>BALANCE</u> <u>CREDITS</u>
8/31/92	\$10,472.18	\$2,835.67	\$3,141.61	\$ 0.00	\$16,449.46
2/28/93	6,341.55	1,251.69	1,712.12	0.00	9,305.36
5/31/93	7,789.28	1,259.61	1,869.38	0.00	10,918.27
11/30/93	14,969.82	1,396.27	2,689.25	525.00	18,530.34
2/28/94	4,767.09	208.93	635.05	2,000.00	3,611.07

NOTICES OF DEFICIENCY

PERIOD ENDED	BALANCE <u>TAX</u> DUE	<u>INTEREST</u>		<u>PAYMENTS/</u> <u>PENALTY</u>	<u>CREDITS</u>
12/31/92	\$ 0.00	\$ 0.00	\$ 617.16	\$ 0.00	\$ 617.16
3/30/93	0.00	0.00	218.61	0.00	218.61
8/03/93 <sup>1</sup>	0.00	0.00	789.01	0.00	789.01
8/31/93	0.00	0.00	725.66	0.00	725.66
9/28/93	0.00	0.00	562.34	0.00	562.34

The petitions which challenged the notices of deficiency included a copy of conciliation order, CMS No. 146081, dated March 24, 1995, which denied petitioner's request for a conciliation conference because "the notices were issued on September 19, 1994, but the request was not mailed until February 17, 1995, or in excess of 90 days, the request is late filed." The petitions which challenged the notices of determination included a copy of conciliation order, CMS No. 146082, dated March 24, 1995, which denied petitioner's request for a conciliation conference for the same reason that the request for a conciliation conference was denied on the notices of deficiency. In addition to the foregoing, the Division

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<sup>1</sup>One Notice of Deficiency was issued by the Division to assert a deficiency of personal income tax for the periods ending August 3, 1993, August 31, 1993 and September 28, 1993.

included a copy of the Division's answer to petitioner's petition, dated July 20, 1995 (Exhibit "1"), the affidavit of Geraldine Mahon with attached exhibits (Exhibit "2"), the affidavit of Daniel LaFar (Exhibit "3"), the affidavit of Monica Amell (Exhibit "4"), and copies of the respective requests for conciliation conference, dated January 31, 1995, signed by petitioner (Exhibit "5"). The last exhibit included a copy of an envelope addressed to the Department of Taxation and Finance, Bureau of Conciliation and Mediation

Services. The envelope was sent by certified mail, return receipt requested and bore a United States Postal Service Stamp of February 17, 1995.<sup>2</sup>

In support of the Division's motion for summary determination, three affidavits were submitted pertaining to the mailing of the notices. The first affidavit was that of Geraldine Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, attached to which, as Exhibit "A" was a copy of the certified mail record dated September 19, 1994 and as exhibit "B", the notices which were petitioned (Notice L009520083 was not petitioned).

In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She

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<sup>2</sup>The affidavit of Christina Seifert, Esq., states that attached to her affidavit, as Exhibit 6, are copies of two envelopes which contained petitioner's requests for a conciliation conference. In fact, the Division did not offer an Exhibit 6. However, a copy of one envelope was included with Exhibit 5. Therefore, it is assumed that one envelope was used to request the conciliation conferences.

receives a computer printout referred to as the "certified mail record". Each of the notices is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to this mailing consisted of 29 fan-folded (connected) pages and included the 6 notices of determination and 3 notices of deficiency issued to Linda B. Kaiser. She described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until ordered otherwise by a staff member of the Division. The document itself consists of 29 pages each

with 11 entries with the exception of page 29 which has 4 entries for a total of 312 entries . On the final page (page 29), the "total pieces and amounts listed" is stated to be 312. The Postal Service representative circled the "total pieces" to indicate that there were no deletions. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of the certified mail record issued by the Division on September 19, 1994, which includes the six notices of determination and the three notices of deficiency issued to Linda B. Kaiser. In the upper left hand corner of the certified mail record, the date "09/08/94" appears and was changed manually to "9-19-94". The original date, September 8, 1994, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing

of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's mail room who are responsible for altering the date so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a postal service representative who affixes his or her initials or signature and/or a U.S. postmark to a page or pages of the certified mail record. In this case the postal representative signed page 29 of the certified mail record.

As Ms. Mahon points out, pages 27 and 28 of the certified mail record indicate that nine notices numbered L 009520080 through L 009520088 were sent to Linda B. Kaiser, 43 Charleswood Dr., Pittsford, N.Y., 14534-2747 by certified mail using control numbers P 911 005 094 through P 911 005 102. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on September 19, 1994. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and

described are the normal and regular procedures of the CARTS control unit. This certified mail record consists of 29 consecutively numbered pages, wherein the certified control numbers run successively from P 911 004 804 on page 1 to P 911 005 115 on page 29.

The affidavit of Daniel B. LaFar, the Principal Mail and Supply Clerk in the Division's mail and supply room attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. LaFar states that after a notice is placed in the "outgoing certified mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. LaFar maintains that a member of the mail room staff delivers them to the Roessleville branch of the USPS in Albany. The postal employee affixes a postmark and/or his or her signature to the certified mail record as an indication of receipt by the USPS. He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In this case the postal employee signed the certified mail record, affixed the postmark of the Roessleville branch of the United States Postal Service in Albany, New York to each page of the certified mail record, and circled the "total number of pieces

listed", which indicates that this was the total number received at the post office. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. LaFar concluded that on September 19, 1994 an employee of the mail and supply room delivered nine pieces of certified mail addressed to Linda B. Kaiser, 43 Charleswood Dr., Pittsford, N.Y. 14534-2747, to the Roessleville Branch of the United States Postal Service in Albany, in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. LaFar determined that a member of his staff obtained a copy of the certified mail record, with the postmark delivered to and accepted by the Postal Service on September 19, 1994, for the records maintained by the CARTS control unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed in the mailing of the item of certified mail at issue herein.

The affidavit of Monica Amell, a senior mail and supply clerk employed in the registry unit of the New York State Department of Taxation and Finance, was also submitted by the Division describing her request on Form 3811-A for verification of delivery of the notices mailed to petitioner on September 19, 1994 by certified mail. Her affidavit indicated that as a part

of her duties as mail and supply clerk in the registry unit she prepares forms which are used by a mailer to request return receipts after mailing. In this particular case, Form 3811-A was prepared for each of the notices, and sent to the post office where the piece of mail in question was delivered. She further explains that the delivery post office fills in Form 3811-A based upon its delivery records with the name of the individual or organization that received the piece of mail and the date of delivery. Ms. Amell attached to her affidavit the Form 3811-A prepared for this taxpayer for each of the notices which were issued. On each form she provided the mailing date of September 19, 1994, the respective certified number and the name and address of the taxpayer and mailed the same to the post office on July 20, 1995. The form was thereafter returned to her with the name "L. Kaiser", written in a box designating to whom delivery was made, and the date September 21, 1994 handwritten in the box denoting the date of delivery.

In response to the foregoing, petitioner, Linda B. Kaiser, submitted a letter which stated that the difficulty began in 1987 when she and her husband were evicted from a very lucrative business. Petitioner and her husband were not given any formal notice until December 21, 1987 when they received an eviction notice. Further, they were not allowed to enter the building to obtain the records, supplies or equipment which belonged to them. During the following five-month period, petitioner and her husband, attempted, without success, to find work. While they were looking for work, petitioner and her

husband were approached by a Sam Loria to go into a new business on a "no money down" basis. Petitioner and her husband were required to refurbish the premises and their banker agreed with the arrangements. However petitioner and her husband were not aware of the extent of the repairs needed. Further, it took time to build up a clientele. In addition, it was difficult to make the bank payments. Eventually, petitioner's banker was dismissed from the lending institution and the bank required payment on petitioner's notes. This prompted petitioner and her husband to file a petition for bankruptcy.

While their bankruptcy petition was pending, petitioner and her husband's payment of taxes fell into arrears. Petitioner and her husband agreed to discontinue their bankruptcy proceeding with the understanding that they would try to make an offer in compromise by attempting to remortgage their house. Petitioner submits that unless they can obtain a settlement, no mortgage company will refinance because of existing State and Federal tax liens.

Petitioner states that she is 52 years old and her husband is 56. In the past year, petitioner's husband had skin cancer and was diagnosed with diabetes. Petitioner also states, among other things, that their son has been paying their living expenses which include a mortgage and insurance payments. In conclusion petitioner states that she and her husband want to pay what is possible with the money they can obtain or borrow from their family.

CONCLUSIONS OF

LAW

A. 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).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 489 NYS2d 970). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94). 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).

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

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the

person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. 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" (emphasis added).

Pursuant to Tax Law § 1138(a)(1), a Notice of

Determination:

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (emphasis added).

Pursuant to Tax Law § 681(a):

"[i]f upon examination of a taxpayer's return . . . the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state" (emphasis added).

Tax Law § 681(b) provides, in relevant part, that:

"[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . ." (emphasis added).

Upon receipt of the notice of determination or deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, 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 (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

C. Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (see, Matter of T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

This burden is imposed on the Division for different reasons, depending upon whether the notice sent was a Notice of Determination or Notice of Deficiency. For a Notice of Determination, Tax Law § 1147(a)(1) provides that the proper mailing of a Notice of Determination (i.e., the certified or registered mailing of the notice to the taxpayer at his last known address) is presumptive evidence of the receipt of the notice by the person to whom the notice is addressed. As explained by the Court of Appeals in Matter of Ruggerte, Inc. v. State Tax Commn. (64 NY2d 688, 485 NYS2d 517, 518), this language in Tax Law § 1147(a)(1) "makes 'receipt' a part of the

procedural equation and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption." Thus, it is crucial that the Division prove that the notices were properly issued, even in the face of possible rebuttal evidence introduced by the petitioner. Here, as noted, the Division has demonstrated that on September 19, 1994, six notices of determination were properly issued, and no rebuttal evidence whatsoever was introduced by petitioner.

For a Notice of Deficiency, the taxpayer does not have this same presumed right of rebuttal. Rather, as the Tribunal held in Matter of Malpica (Tax Appeals Tribunal, July 19, 1990), Tax Law § 681(a) "does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received" (see, Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; see also, Keado v. United States, 86-1 US Tax Cas ¶ 9321, affd 853 F2d 1209 [re: parallel Federal provision IRC § 6212(b)(1)]; cf., Matter of Ruggerte v. State Tax Commn., supra [dealing with sales tax assessment under Tax Law § 1147(a)(1)]). Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer (Matter of Malpica, supra), i.e., "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Dorff v. Commissioner, 55 TCM 412).

However, the presumption of delivery does not arise unless

or until sufficient evidence of mailing has been proffered (see, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112).

For both notices of determination and deficiency, the mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

D. Through the evidence it has submitted, the Division has established that the notices of determination and deficiency in question were, in fact, mailed to petitioner on September 19, 1994. First, the Division introduced adequate proof of its standard mailing procedures via affidavits of several Division employees involved in the notice generation and issuance process. In particular, the Mahon and LaFar affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the copies of the notices of determination sent to petitioner as certified numbers: P 911 005 094 through P 911 005 102 and assessment numbers L 009520080 through L 009520088.

Second, the Division established that the general issuance procedure was followed on September 19, 1994, in the generation and mailing of petitioner's notices. The certified mail record for this date is presented in its entirety and contains, on the

final page, a total for the number of items received at the post office. This number has been circled to indicate that there were no deletions from the list of certified numbers. The Mahon affidavit corroborates the fact that there are 312 certified control numbers in the mail record, noting that there are 11 such numbers per page on pages one through 28 and only 4 such numbers on page 29. Further, each of the 29 pages of the certified mail record submitted -- most notably, pages 27 and 28 on which petitioner's notices are listed -- is date stamped September 19, 1994 by the Roessleville branch of the United States Postal Service in Albany, New York.

In short, the affidavits submitted, which are consistent with the information listed on the face of the notices in question, along with the certified mail records and notices in evidence, provide direct documentary evidence confirming the September 19, 1994 date and mailing of the subject notices. Moreover, the presence of the Postal Service date stamp on pages 27 and 28 of the September 19, 1994 certified mail record -- the pages containing the information regarding the notices of determination and deficiency issued to petitioner -- directly supports the conclusion that the mailing of said notices occurred as claimed by the Division. (see, Matter of Katz, supra).

E. The Division has introduced evidence in support of its motion for summary determination -- namely that it properly mailed the notices in issue on September 19, 1994. In response, petitioner listed a series of unfortunate events which warrant

sympathy. However, petitioner's statements do not address the question of whether she filed a petition challenging any of the notices within the requisite 90-day period. Under these circumstances, the Division, as the proponent of this motion for summary determination, has succeeded in carrying its burden of showing that it is entitled to judgment as a matter of law because there is no material issue of fact in dispute in this case.

F. Because the effect of this determination is to deny the Division of Tax Appeals jurisdiction over the matter, the merits of petitioner's case may not be considered.

G. Accordingly, the Division's motion for summary determination is granted and the petitions of Linda B. Kaiser, Officer of LBK Food Services, Inc. are dismissed.

DATED: Troy, New York  
December 7, 1995

/s/ Arthur S. Bray

ADMINISTRATIVE LAW JUDGE