

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
OLIVIA, INC. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 814036
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 1988 through :
May 31, 1994.¹ :
:

Petitioner, Olivia, Inc., 54A Broadway, Greenlawn, New York 11740, 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 September 1, 1988 through May 31, 1994.

Petitioner appeared by Kelly, Sackman, Spollen & Upton (William R. Kelly, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel).

Petitioner and the Division of Taxation executed a consent waiving a hearing in this matter and agreeing to have the controversy determined on submission. Petitioner's reply brief was due on October 6, 1997, which date began the six-month period for the issuance of this determination.

After review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

¹See Finding of Fact "6" for a more detailed explanation of the period at issue.

ISSUES

I. Whether the Division of Taxation properly mailed a notice of claim to petitioner within the time limits prescribed by 20 NYCRR 537.6(a).

II. Whether petitioner timely filed its request for a conciliation conference.

FINDINGS OF FACT

1. On April 30, 1994, Mr. Thomas A. Healy² entered into an agreement with Chauncey, Inc. to purchase the restaurant, bar and grill business known as Meehan's and located at 54A Broadway, Greenlawn, New York. The agreement provided that the sale included:

“the lease of such premises, the keys and all other indicia of possession, the goodwill of the business as a going concern, tradename, telephone number, stock-in-trade, furniture, fixtures and equipment, equipment leases, all contracts which have been entered into by Seller in connection with the business, and all other property (except cash) used by Seller in such business” (Division's Exhibit D, Attachment).

2. Since this transaction involved the sale of all of the assets of Meehan's, and was not in the normal course of business of Meehan's or Chauncey, Inc., the sale was a bulk sale of business assets. Accordingly, petitioner filed with the Division of Taxation (hereinafter “Division”) its form number AU-196.10, Notification of Sale, Transfer or Assignment in Bulk (hereinafter “Notification of Sale”). The one-page notification of sale was dated June 22, 1994 and included a cover letter from petitioner's representative dated June 23, 1994. It was received by the Division on June 27, 1994. The Notification of Sale was contained in an envelope with a United States Postal Service (hereinafter “USPS”) postmark of June 23, 1994 and a registered mail sticker, and was stamped Return Receipt Requested (hereinafter “RRR”).

²Mr. Healy is listed on documents subsequently submitted to the Division as president of Olivia, Inc.

3. Petitioner sent another notification of sale to the Division, this time with supporting documents, including the purchase agreement. This one-page notification of sale was dated June 22, 1994 and included a cover letter from petitioner's representative dated June 27, 1994. It was received by the Division on June 29, 1994. The Notification of Sale was contained in an envelope with a USPS postmark of June 27, 1994 and a registered mail sticker, and was stamped RRR. The two notifications of sale appear to be identical originals. The cover letters appear to be identical with the exception of the two different dates.³

4. Under the section heading "mailing address," the Notification of Sale lists the purchaser or representative as Olivia, Inc., 37 Smith Street, Greenlawn, New York 11740, and the seller or representative as Chauncey, Inc., 4 Shawnee Street, Centerport, New York 11721. The escrow agent for the transaction is listed as Curto, Barton & Alesi, P.C., One Huntington Quadrangle 1N5, Melville, New York 11747. Under the section heading "vendor identification," the purchaser's name is listed as Olivia, Inc, the business name is listed as Healy's Inn, and the address is listed as 54 A Broadway, Greenlawn, New York 11740. Under the same heading the seller's name is listed as Chauncey, Inc, the business name is listed as Meehan's, and the address is listed as 54 A Broadway, Greenlawn, New York 11740. "Unknown" was listed as the last day of the seller's business. Under the section heading "details of sale" the type of business is listed as a bar and restaurant, and the date of sale is set forth as "5 days after approval of liquor

³The Division in its brief indicates that the date of receipt is not clear because of an unclear date stamp and the fact that there is more than one received date. I disagree and find that the dates and word "RECEIVED" are legible on both envelopes, both cover letters and both notifications of sale. Furthermore, there were clearly two submissions: one mailed on June 23, 1994 and received on June 27, 1994, and one mailed on June 27, 1994 and received on June 29, 1994.

license.” Zero is shown as the amount of escrow and “N/A” is shown as the bank where the escrow funds are deposited. The sales price of the assets sold was set forth as follows:

1. Tangible personal property (furniture, fixtures, etc.).....	\$23,000.00
2. Motor Vehicles.....	0.00
3. Merchandise inventory for resale	\$17,000.00
4. Manufacturing equipment, tools and supplies.....	0.00
5. Real estate.....	0.00
6. Intangible property (goodwill, etc.)	\$20,000.00
7. Other.....	\$100,000.00 ⁴
8. Total sales price.....	\$160,000.00

The Notification of Sale stated that the total sales price consisted of \$40,000.00 in cash and \$120,000.00 in promissory notes payable in equal monthly installments over 10 years. The Notification of Sale also stated that the sale was conditioned on the purchaser’s liquor license application being approved, and was signed by Thomas A. Healy, as president of Olivia, Inc.

Petitioner, in the petition filed in this matter, states that the business was transferred on September 16, 1994.

5. The Division issued a Notice of Claim (bulk sale number 1994002980) dated July 11, 1994 to Olivia, Inc. at 37 Smith Street, Greenlawn, New York 11740. The Notice of Claim indicated that the purchaser was Olivia, Inc., t/a Healy’s Inn, and that the seller was Chauncey, Inc., t/a Meehan’s and provided:

⁴Pursuant to the purchase agreement, this would be \$70,000.00 for the lease and leasehold improvements and \$30,000.00 for a restrictive covenant.

“You are hereby notified that, in spite of any provisions contained in the sales contract, except as indicated in condition number two listed below, no distribution of funds or property, to the extent of the amount of the State’s claim, may be made before the following conditions have been met:

“1. The Department of Taxation and Finance has determined the seller’s liability, if any.

“2. Payment of such liability has been made to the Department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law).

“3. This office has authorized you to release the funds or property.

* * *

“Please note that failure to comply with this notice subjects you to personal liability for any sales tax deficiency determined to be due from the seller. The Tax Department has 90 days from the date of receipt of the bulk sale notification to determine the seller’s sales tax liability, if any. Every timely notice received more than 10 days prior to the date of taking possession of or payment for the business assets, shall be considered to have been received not more than 10 days prior to the date of taking possession of, or payment for, the business assets, whichever comes first, regardless of the date when the notice is actually received.” (Division’s Exhibit E.)

Petitioner, in the petition filed in this matter, denies having received any notice of claim.

6. The Division issued a Notice of Determination (audit case ID number X-475035104) dated September 19, 1994 to Olivia, Inc. at 54A Broadway, Greenlawn, New York 11740 for sales and use taxes. The Notice of Determination included purchaser assessment ID numbers L-009518945 for the period September 1, 1992 through May 31, 1994 and L-009518946 for the period September 1, 1988 through August 31, 1992. The computation of the current balance due for purchaser assessment ID number L-009518945 showed a total amount assessed of \$33,197.67 consisting entirely of tax with no amounts due for interest or penalty. The computation of the current balance due for purchaser assessment ID number L-009518946 showed a total amount assessed of \$98,151.61 consisting entirely of tax with no amounts due for interest or penalty, and

a payment or credit of \$36,478.00, leaving a balance of \$61,673.61 due. In this computation payments were credited resulting in no balance due for the quarters ending November 30, 1988, February 28, 1989, May 31, 1989, August 31, 1989, and November 30, 1989. There was also a payment credited to the quarter ending February 28, 1990 in the amount of \$4,450.70, leaving a balance due for that period of \$1,703.92. The petition in this matter lists only the periods February 28, 1990 through May 31, 1994 as the periods at issue, presumably relying on this computation. The documents submitted by the Division also indicate that this is the period at issue. However, at the time the petition was filed it appears from the computation that the quarter ending February 28, 1990, while not referenced in the petition, remained at issue. The petition does indicate that both purchaser assessment ID numbers L-009518945 and L-009518946 were at issue. Since these assessment numbers were listed on the petition, it is found that this matter includes the period September 1, 1988 through May 31, 1994. It is noted that the periods September 1, 1988 through November 30, 1989 have been paid and that only \$1,703.92 remains due for the quarter ending February 28, 1990. It is also noted that the Division in its brief asserts that further payments have been made as follows:

“Since the issuance of the Notice of Determination, the seller has made a substantial payment that reduces but does not eliminate the tax due that underlies Assessment #L-009518496. The petitioner’s liability for this Assessment will be correspondingly reduced for the reduction in the Seller’s tax liability.” (Division’s Brief, p. 3.)

It cannot be determined from this statement precisely what periods contained in purchaser assessment number L-009518946 have been completely or partially paid.

Under the heading explanation and instructions the notice provides:

“This notice is issued because you are liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141(c) and 1138(a)(3) of the New York State Tax Law.

“THE TAX ASSESSED HAS BEEN ESTIMATED IN ACCORDANCE WITH PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH A HEARING PROCESS BY FILING A REQUEST FOR A CONCILIATION CONFERENCE OR A PETITION FOR A TAX APPEALS HEARING BY 12/18/94.

* * *

“NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 12/18/94.

* * *

“If we do not receive a response to this notice by 12/18/94:

“This notice will become finally and irrevocably fixed and subject to collection action.”⁵

7. Petitioner, in the petition filed in this matter, states that it received the Notice of Determination five days after the sale of the business. Since the business was sold on September 16, 1994, the Notice of Determination was received on September 21, 1994.

8. Petitioner’s request for a conciliation conference, in the form of a letter from petitioner’s representative dated February 1, 1995 listing assessment numbers L-009518946 and L-009518945, states:

“Enclosed please find Power of Attorney in connection with the above assessments. I would appreciate someone contacting me as soon as possible with regard to arranging a conciliation conference.” (Division’s Exhibit C.)

The power of attorney was attached. Below petitioner’s representative’s signature appears the notation “VIA UPS NEXT DAY AIR”, indicating the method of delivery chosen. There is no

⁵December 18, 1994 is the due date for a request for conciliation conference or petition as listed on the notice of determination. However, since December 18, 1994 was a Sunday, the petition or request for a conciliation conference was required to be filed by Monday, December 20, 1994 (see, Tax Law § 1147[a][3]; General Construction Law §§ 20, 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).

envelope for this request in evidence. This correspondence shows in-date stamps of February 2, 1995 for the Division's Tax Compliance Division (hereinafter "TCD"), February 6, 1995 for Tax Compliance C.O. (presumably Central Office) Processing and February 24, 1995 for the Division's Bureau of Conciliation and Mediation Services (hereinafter "BCMS").

There is a second letter from petitioner's representative dated February 16, 1995. This letter attaches copies of the previous correspondence and explains that no response to that correspondence had been received. It further explains that it is petitioner's position that the Division did not send petitioner a notice of claim within five days of receipt of petitioner's notification of sale and, therefore, that the Notice of Determination was improper. The letter states that petitioner had not received any response to its notification of sale until it received the Notice of Determination dated September 19, 1994. A copy of petitioner's notification of sale was also attached to this correspondence. This correspondence shows in-date stamps of February 17, 1995 for TCD and February 24, 1995 for BCMS.

Both of petitioner's representative's letters were addressed to TCD, Building 8, Room 401, New York State Campus, Albany, New York 12227.

9. A Conciliation Order Dismissing Request dated April 7, 1995 was issued by BCMS.

The reason for dismissing petitioner's request was:

"The Tax Law requires that a request be issued within 90 days from the date of the statutory notice. Since the notices were issued on September 19, 1994, but the request was not received until February 24, 1995, or in excess of 90 days, the request is late filed."

A petition protesting this order was filed by petitioner on June 29, 1995. On May 2, 1997 the Division of Tax Appeals received a consent executed by the parties waiving a hearing and agreeing to have this matter determined on submission. Pursuant to such agreement the Division

submitted both documents and a brief in support of its position, while petitioner submitted neither.

10. The Division submitted affidavits concerning the issuance of the Notice of Claim with attachments from the following personnel: Joseph DeVito, a Clerk 1, employed in the Central Office Audit Bureau - Sales Tax (hereinafter COAB - Sales Tax”) of the Division for six years, whose duties include delivering notices of claim to the Mail Processing Center of the Division; Thomas R. Driver, a Sales Tax Technician II - Desk Audit Specialist, employed in the Bulk Sale Unit, COAB - Sales Tax, of the Division for six years, and who prior to that was a Senior Audit Clerk in the Bulk Sale Unit for five years, and who is knowledgeable regarding the operating procedures of the unit; and Charles Brennan, a Mail Clerk in the Mail Processing Center of the Division since 1964, whose duties include delivery of outgoing mail to the post office. These affidavits describe the general procedures for the mailing of notices of claim. The affidavits also describe how these procedures were followed in this case.

11. The general process for mailing notices of claim begins with an employee of COAB - Sales Tax delivering the notices of claim to be mailed to the Mail Processing Center. That same staff person witnesses the sealing and stamping of the envelopes to insure that the address on each envelope corresponds with the address on the notice of claim being mailed. Upon completing this duty the staff person from COAB signs a mailing statement⁶ to the effect that he or she witnessed the sealing and stamping of the envelopes and had his or her signature

⁶The Division in the affidavits and in its brief refers to this statement as a mailing affidavit. The statement is not an affidavit. First, the statement is not sworn to by the signatory. Second, there is nothing in the record indicating that the person signing as a witness to the signature has any authority to administer oaths or take affirmations (*see*, 1 NY Jur 35, 41.) Therefore, in this determination this statement is referred to as a mailing statement, not a mailing affidavit.

witnessed by someone in the Mail Processing Center. The statement is also dated. The standard practice of the Mail Processing Center is to then “have the envelopes delivered by a mail clerk of that unit to a branch of the United States Post Office of Albany, New York on that same day.” (Division’s Exhibit G, p. 1.) After depositing the notices of claim with the post office, it is required that the mail clerk sign a mailing statement⁷ to the effect that the notices of claim were deposited with the post office. That signature is witnessed by someone in the Mail Processing Center and the statement is dated. At some point in this process a computer listing is prepared entitled “Mailing Record” which shows the date that the notices of claim to purchasers on the listing are being sent and lists the bulk sale numbers and purchasers’ names and addresses. The statements signed by the Division employees appear on this mailing record.

12. In support of its position that the procedures outlined in Finding of Fact “11”, were followed in this case, the Division submitted a copy of the mailing record listing bulk sale number 1994002980. The Division also submitted a copy of the Notice of Claim. The mailing record apparently consists of two pages.⁸ On the first page appears “DATE SENT IS: 07-11-1994”. Petitioner’s name appears on the first page next to the bulk sale number 1994002980. Petitioner’s address is listed as 37 Smith Street, Greenlawn, New York 11740. In the column for the “State” there appear eight listings, indicating that eight notices of claim were mailed on

⁷The findings in footnote six regarding the mailing statements of COAB - Sales Tax staff also apply to this mailing statement completed by the Mail Processing Center staff.

⁸The Division submitted three copies of the mailing record. “PAGE: 1” appears on each copy at the top of the first page. The top of all three of the second pages appears to have been blocked out during copying, leaving no indication that it is page two of the same document. However, the dates appearing on both pages are the same, and the mailing statements appearing on the “second” page refer to the eight notices identified in this listing, which is consistent with the information on page one.

July 11, 1994.⁹ The bulk sale number listed on the mailing record for the Notice of Claim matches the bulk sale number listed on the Notice of Claim. The name and address of petitioner as listed on the mailing record also correspond to the information set forth on the Notice of Claim as petitioner's mailing address.

The second page of the mailing record is entitled Affidavit of Mailing and states:

“ON JULY 11, 1994, I DELIVERED 8 NOTICES IDENTIFIED IN THIS LISTING TO THE MAIL AND SUPPLY SECTION OF THE DEPARTMENT OF TAXATION AND FINANCE, ALBANY, N.Y., AND THERE WITNESSED THE SEALING AND STAMPING OF THE ENVELOPES IN WHICH THEY WERE ENCLOSED. EACH SUCH NOTICE WAS ENCLOSED IN AN ENVELOPE ADDRESSED TO THE TAXPAYER NAMED THEREIN, AT THE ADDRESS SHOWN ON THE NOTICE.” (Division's Exhibit F, Exhibit B.)

The signature of Joseph DeVito appears under this statement, followed by the signature of a witness who was a member of the Mail Processing Center staff, and the date July 11, 1994.

Following this date appears:

“ON JULY 11, 1994, I DEPOSITED IN A BRANCH OF THE UNITED STATES POST OFFICE OF ALBANY, NEW YORK, ALL NOTICES DESCRIBED ABOVE, ALL ENCLOSED IN SEALED POSTPAID ENVELOPES.” (Division's Exhibit F, Exhibit B.)

The signature of Daniel Paris appears under this statement, followed by the signature of Charles Brennan as a witness, and the date July 11, 1994. Mr. Paris was a Mail Clerk in the Mail Processing Center at that time, but has since transferred to another State agency.

13. The Division submitted affidavits concerning the issuance of the Notice of Determination with attachments from the following personnel: Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter “CARTS”) Control Unit of the Division

⁹The remainder of the information (bulk sale numbers, names and addresses) for the other seven notices had been redacted to protect the privacy of the other taxpayers.

since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices. The affidavits also describe how these procedures were followed in this case.

14. The general process for issuing and mailing notices of determination begins with the CARTS Control Unit receiving a computer printout entitled "Assessments Receivable, Certified Record for Non-Presort Mail", referred to as a certified mail record (hereinafter "CMR") and the corresponding notices of determination. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices of determination are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NUMBER".

15. A Division employee places each notice in an envelope. Once the notices are "placed in the 'Outgoing Certified Mail' basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places 'postage' and 'fee' amounts to the letters." (Baisley Affidavit, p. 1.) Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in the process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Roessleville Branch of the United States Postal

Service in Albany, New York. A postal employee signs or affixes a postmark, or both, to the CMR.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. The CMR is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the originating unit.

16. In support of its position that the procedures outlined in Findings of Fact "14" and "15", were followed in this case, the Division submitted, together with the affidavits, a copy of the CMR listing petitioner's name and a copy of the notice of determination at issue in the present matter. The CMR consists of one page with three entries. It shows a printed date of "09/07/94", and this printed date has a line through it and above it is the handwritten date of "9-19-94". There is a consecutive listing of three certified control numbers beginning with P 911 206 021 and ending with P 911 206 023. There is a United States Postal Service postmark of September 19, 1994 on the CMR. Handwritten initials appear above the postmark. Next to the phrase "TOTAL PIECES AND AMOUNTS LISTED" appears the typewritten number "3". Nothing appears next to the phrase "TOTAL PIECES RECEIVED AT POST OFFICE". It is asserted in Mr. Baisley's affidavit that the handwritten initials and United States Postal Service Postmark on the CMR indicate that the post office received all three pieces of mail listed on the CMR.

Notice number X 475035104, as listed on the CMR, matches the audit case ID number set forth on the Notice of Determination. The certified number listed on the CMR for the notice sent to petitioner (P 911 206 023) matches the certified number shown at the top of the first page of the notice. The name and address of petitioner as listed on the CMR also correspond to the

information set forth on petitioner's notice. The United States Postal Service postmark of September 19, 1994 on the CMR matches the handwritten date on the CMR and the date appearing on the Notice of Determination.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner asserts that it properly notified the Division of its impending bulk purchase by mailing its notification of sale on June 23, 1994 and that it never received the required notice of claim from the Division. Petitioner argues that even if the Division mailed a notice of claim it was not timely because it was not mailed within five days of the Division's receiving petitioner's notification of sale as required by the regulations. It is petitioner's position that the Notice of Determination issued is therefore invalid or, in the alternative, that the date of mailing of such notice cannot be used as the date initiating the 90-day time period available to petitioner to file a petition.

18. The Division asserts that the affidavits it submitted prove that the Notice of Claim was properly mailed to petitioner on July 11, 1994. It is the Division's position that pursuant to 20 NYCRR 537.2(c)(6) a notification of sale received more than 10 days prior to either the scheduled or actual date of sale is deemed received 10 days prior to either the scheduled date of sale or the actual sale of the business, whichever was later. Since there was no scheduled date of sale listed in the Notification of Sale, and according to the petition the business was actually sold on September 16, 1994, the Notification of Sale should be deemed to be received on September 6, 1994. Since the Division had five days from September 6, 1994 to issue its notice of claim, and had actually issued the Notice of Claim on July 11, 1994, it was timely.

The Division further argues that since the Notification of Sale filed by petitioner did not set forth a date certain for the anticipated sale of the business, it was not proper as to content and

therefore did not commence the five-day period available to the Division to issue the notice of claim pursuant to 20 NYCRR 537.6(b).

The Division asserts that the proper and timely mailing of the Notice of Determination is not at issue in these proceedings as the petition states that petitioner received the notice dated September 19, 1994 on September 21, 1994, and in any event the affidavits submitted prove that the notice was properly mailed.

In conclusion the Division asserts that since the Notice of Claim and Notice of Determination issued were both properly and timely issued and mailed, petitioner's request for conciliation conference, filed some four months later, was not filed within the 90-day period mandated by the Tax Law.

CONCLUSIONS OF LAW

A. This matter involves the sale of all of the assets of Meehan's, a bar and restaurant business owned by Chauncey, Inc., to petitioner. This sale of all assets was not in the normal course of business of Meehan's or Chauncey, Inc., and, therefore, the sale was a bulk sale of business assets.

A purchaser in a bulk sale transaction must notify the Division of the impending transaction by registered mail at least 10 days prior to taking possession of or paying for the business and also inform the Division of:

“the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferor or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing” (Tax Law § 1141[c]).

Any notice received earlier than 10 days prior to the scheduled or actual sale of the business will be deemed to have been received 10 days prior to the later of either the scheduled date of sale or

the actual date of sale (20 NYCRR 537.2[c][6]). If any information required to be reported on the notification of sale changes, proves to have been incorrect or was not available when the notice was originally filed, the purchaser must file a revised notice with the Division (20 NYCRR 537.2[e]). Pursuant to Tax Law § 1141(c), whenever a purchaser fails to notify the Division of an impending bulk sale, or, after such notification, is informed by the Division that a possible claim for sales and use taxes against the seller exists, the Division establishes a first priority right and lien against the proceeds of the sale to the extent of the taxes determined to be due from the seller, and the purchaser is forbidden from transferring any of those proceeds to the seller. Furthermore, any purchaser not complying with the requirements of Tax Law § 1141(c) will be held personally responsible for the taxes determined to be due from the seller.

The Division has five business days from receipt of a notification of sale to respond by mailing an acknowledgment of receipt of the notice, an explanation that the notification is incomplete or incorrect, a notice of possible claim for sales and use taxes due to the purchaser and seller, or any combination of these documents (20 NYCRR 537.6[a]). If the Division fails to mail within five business days a notice of possible taxes due, the purchaser is relieved of any liability for the taxes determined to be due from the seller and any obligation to withhold the proceeds of the sale from the seller (20 NYCRR 537.6[b]).

The Division has 90 days from receipt of notification from the purchaser of the impending sale to inform both the seller and the purchaser of the sales and use taxes determined to be due from the seller (Tax Law § 1141[c]; 20 NYCRR 537.6[c]). Also pursuant to this section, and 20 NYCRR 537.6(d), if the Division fails to notify the purchaser and seller within the 90-day

period, the purchaser is no longer required to withhold any proceeds due the seller. For the 90-day period to commence, any notification of sale submitted by a purchaser “must be in substantial compliance with section 1141(c) of the Tax Law” (20 NYCRR 537.2[a]).

The Division when issuing a notice of claim or notice of determination may provide such notice 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” (Tax Law § 1147 [a][1]).

When issuing a notice of determination the Division must mail the document by registered or certified mail (Tax Law § 1147[a][1]). If the Division is able to show that a notice was properly mailed, the Division is entitled to the presumption that the notice was received by the person to whom it was addressed (Tax Law § 1147[a][1].)

B. As a bulk sale purchaser, petitioner was required to file a notification of sale with the Division at least 10 days before the sale. Petitioner filed several similar notifications of sale received by the Division on June 27, 1994 and June 29, 1994. The Division had five business days from receipt of the Notification of Sale to issue a notice of claim to petitioner and the seller informing them that there was a possible claim for sales and use taxes. In support of its position that it complied with this requirement, the Division submitted a notice of claim dated July 11, 1994 and addressed to petitioner at the mailing address petitioner provided in the Notification of Sale. As proof that the notice was properly issued, the Division introduced affidavits explaining the standard procedure followed in issuing notices of claim, and that these procedures were followed in this case.

C. The DeVito, Driver, and Brennan affidavits establish the general procedure for issuing

notices of claim. The procedure begins with an employee of COAB - Sales Tax delivering the notices of claim to be mailed to the Mail Processing Center. That same staff person witnesses the sealing and stamping of the envelopes to insure that the address on each envelope corresponds with the address on the notice of claim being mailed. Upon completing this duty the staff person from COAB signs a mailing statement to the effect that he or she witnessed the sealing and stamping of the envelopes and had his or her signature witnessed by someone in the Mail Processing Center. The statement is also dated. The envelopes are delivered the same day by a mail clerk of the Mail Processing Center to a branch of the Albany post office. After depositing the notices of claim with the post office, the mail clerk signs a mailing statement to the effect that the notices of claim were deposited with the post office. That signature is witnessed by someone in the Mail Processing Center and the statement is dated. At some point in this process a mailing record is prepared which is a computer printout listing the date that the notices of claim to purchasers on the listing are being sent; the bulk sale numbers; and the purchasers' names and addresses. The mailing statements signed by the Division employees also appear on this mailing record.

D. In support of its position that such procedures were followed in this case, the Division presented the following evidence. Mr. DeVito of COAB - Sales Tax attests that he delivered the notice to the mail room and watched the envelopes being sealed and stamped. Mr. Brennan of the Mail room attests that Mr. Paris, a Division employee at the time, delivered the envelopes to the post office. Mr. DeVito and Mr. Paris each signed a statement on the mail record stating what each had done and each of these statements was witnessed. In *Matter of Peconic Bay Motors* (Tax Appeals Tribunal, September 26, 1991) the Tax Appeals Tribunal held that this is

sufficient to prove that the Division properly mailed the Notice of Claim (*see also, Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97).

E. There remains the question of whether the Division timely issued the Notice of Claim within five business days of receipt of the Notification of Sale as required by 20 NYCRR 537.6(a), (b). The initial notification of sale in this matter was received on June 27, 1994. The notice did not set forth the required proposed date of sale, but merely stated that the sale would occur five days after the purchaser received approval of its liquor license. This information was never corrected by the filing of an amended notification of sale as required. The actual transfer of the business occurred on September 16, 1994. The June 27, 1994 date when the Notification of Sale was received is more than 10 days prior to the September 16, 1994 date of sale.

Therefore, the Notification of Sale is deemed received ten days prior to the actual September 16, 1994 date of sale, or September 6, 1994. Since the Division issued the Notice of Claim on July 11, 1994, or prior to the date the Notification of Sale was deemed received, the Notice of Claim was timely issued within the required five days after receipt of the Notification of Sale.¹⁰

F. Petitioner asserts that it never received the Notice of Claim. Having determined that the Division submitted sufficient evidence to raise the presumption under Tax Law § 1147(a)(1) that the Notice of Claim was received, petitioner cannot merely assert that it did not receive the notice but must rebut the presumption with evidence that it did not receive the Notice of Claim.

Petitioner did not submit any evidence in support of its position that it did not receive the Notice

¹⁰Having determined that the Notice of Claim was timely, it is not necessary to address the Division's argument that petitioner's notification of sale was improper as to content and therefore could not be used to initiate the five-day period.

of Claim (*see, Matter of T.J. Gulf v. New York State Tax Commn., supra; 3410 Pons Food Corp., Tax Appeals Tribunal, September 7, 1995*).

G. Pursuant to Tax Law former § 1138(a)(1)¹¹, petitioner had 90 days from the mailing of the Notice of Determination to file a petition with the Division of Tax Appeals. Petitioner also had the option, pursuant to Tax Law § 170(3-a), to file a request for a conciliation conference with BCMS.

Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue was properly mailed and when it was mailed. (*Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991.*) This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of proper mailing arises (*see, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112*). If the Division is unable to meet this burden the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Katz, supra; Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Fuchs, Tax Appeals Tribunal, April 20, 1995*).

H. The Mahon and Baisley affidavits describe the general mailing procedures for mailing the type of notices at issue in the present matter. The process begins in the CARTS Control Unit.

¹¹Tax Law §1138(a)(1) has been amended since 1994, the year in issue. Such amendments did not affect the 90-day time requirement.

Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. The notices are placed in envelopes. In the Mail Processing Center, employees weigh and seal the envelopes containing the notices, ensure the proper postage and fees are affixed to the envelopes, compare the information on the envelopes with that on the CMR, count the envelopes and change the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and notices are then delivered to the post office. A postal employee signs or affixes a postmark to the CMR. The postal employee is requested to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number received. Usually on the next day an employee of the Mail Processing Center returns to the post office to pick up the completed CMR. Completed CMRs are then returned to the CARTS Control Unit.

I. The CMR submitted attempts to illustrate that the Division's mailing procedures were followed in this case. The name and address of petitioner and the certified control number listed on the CMR correspond to the information set forth on petitioner's notice. The notice number listed on the CMR next to petitioner's name matches the audit case ID number on the notice. The date of the United States Postal Service postmark on the CMR indicates that the notice was mailed on September 19, 1994.

J. The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*see, Matter of Katz, supra*). There are several problems with the Division's proof of mailing in this case. First, the CMR as submitted indicates that three pieces of mail were listed on the CMR. However, in the space

provided to fill in the number of pieces received at the post office, nothing has been written in. This is an improperly completed CMR. There is nothing in the mailing procedures that attempts to explain this discrepancy. In several similar cases the Tax Appeals Tribunal has held this type of improperly completed CMR to be insufficient to prove mailing of a notice of deficiency (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The CMRs submitted in *Brager* and *Roland* also had a blank space in the space provided to write in the number of pieces of mail received at the post office. In those cases the number of pieces listed had been circled and the Division attempted by affidavit of one of its employees to state that the post office personnel had circled the number listed to indicate that it was also the number received. The Tribunal held that the Division's employee had not indicated the basis of this knowledge and therefore that the Division had not proven mailing. In the present matter there is no circle or any other indication of the number of pieces of mail received at the post office. Mr. Baisley, in his affidavit, states that the United States Postal Service postmark on the CMR indicates that all three pieces of mail were received at the post office. This statement is not useful in that it does not indicate the basis of Mr. Baisley's knowledge of that fact (*Matter of Brager, supra*; *Matter of Roland, supra*). On this basis alone the Division has not proven proper mailing of the Notice of Determination in this matter.

The second problem with the Division's proof of mailing centers on the question of whether the Division mailed the Notice of Determination to petitioner's last known address in accordance with Tax Law § 1147(a)(1). The notice of claim in this case was addressed and mailed to the mailing address that appeared on the Notification of Sale submitted by petitioner. The Notification of Sale was submitted on a form provided by the Division. The Division's form

has spaces for both mailing address information and business address information. It can be assumed that this is to avoid any confusion in a case where businesses are being bought and sold and business addresses may change. The mailing address listed on a notification of sale has been held to be the last known address of a taxpayer in a bulk sale situation (*see, Matter of Charbru Restaurant*, Tax Appeals Tribunal, June 3, 1993). The Notice of Determination was addressed and mailed to the business address listed on the Notification of Sale submitted by petitioner. The Division makes no attempt to explain why a different address was used. There is nothing in the description of the Division's mailing procedures contained in the affidavits that explains what address is chosen. In that the Division's form specifically asks for a mailing address and a business address, and the notice of claim was sent to the mailing address, it is determined that petitioner's last known address was the mailing address set forth on its notice of claim. Since the Division addressed and mailed the Notice of Determination to the business address listed on the Notification of Sale, the Division did not mail the notice to petitioner's last known address in accordance with Tax Law § 1147(a)(1).

K. Petitioner in this matter admits receiving the Notice of Determination on September 21, 1994. Absent a showing of prejudice by petitioner, the addressing and mailing of the notice by the Division to the incorrect address does not void the notice (*see, Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447; *Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *revd on other grounds* 204 AD2d 916, 612 NYS 2d 503, *affd as mod on other grounds* 86 NY2d 165, 630 NYS 2d 680, *cert denied Matter of Vermont Information Processing v. Commissioner*, ___ US ___, 133 L Ed 2d 426).

Where the Division cannot prove proper mailing of a notice, but receipt of the notice by the petitioner can be demonstrated, the Tax Appeals Tribunal has held that:

“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 Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992, citing *Matter of Bryant Tool and Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992.)

The statutory time frame allowed petitioner in this matter to file its request for conciliation conference must be measured from September 21, 1994, the admitted date of receipt.

L. Petitioner chose to file a request for conciliation conference with BCMS. The final question is whether petitioner timely filed its request. Pursuant to Tax Law §§ 2, 170(3-a) and former § 1138(a)(1), petitioner had 90 days from the mailing of the Notice of Determination to file a request for conciliation conference with BCMS. Counting 90 days from September 21, 1994 results in a December 20, 1994 due date for the request. The request was received on February 2, 1995 by TCD, the office it was addressed to by petitioner’s representative. There is no envelope in evidence, making the date of receipt the date of filing (*see*, Tax Law § 1147[a][2]). It is not necessary to address the issue of whether petitioner was required to file its request with BCMS and not TCD. Assuming the filing of the request with TCD was sufficient, the earliest possible date petitioner’s request for a conciliation conference was filed was February 2, 1995, considerably beyond the statutory deadline for filing the request of December 20, 1994.

There being no timely request for a conciliation conference, the petition of Olivia, Inc. must be dismissed (*see, Matter of 3410 Pons Food Corp., supra; Matter of Greene Valley Liquors, supra*).

M. The petition of Olivia, Inc. is dismissed, and the Notice of Determination dated September 19, 1994, with credit given for the payments made by the seller as noted in Finding of Fact "6", is sustained.

DATED: Troy, New York
March 19, 1998

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE