STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAWRENCE V. PARISI	:	DETERMINATION DTA NO. 815686
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 1991 through August 31, 1991, December 1, 1991 through February 29, 1992, September 1, 1992 through February 28, 1993 and June 1, 1993 through November 30, 1993.	:	

Petitioner, Lawrence V. Parisi, 144 Concord Street, Westbury, New York 11590-2923, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1991 through August 31, 1991, December 1, 1991 through February 29, 1992, September 1, 1992 through February 28, 1993 and June 1, 1993 through November 30, 1993.

On April 24, 1997, the Division of Taxation brought a Motion for Summary Determination seeking dismissal of the petition on the ground that petitioner failed to file a timely request for a conciliation conference or a petition contesting the statutory notice at issue. This motion was denied by an Order dated July 17, 1997, upon the basis that there existed unresolved material issues of fact concerning receipt of the statutory notice. Accordingly, the matter was to be scheduled for a hearing.

On November 15, 1997 and November 21, 1997, respectively, petitioner, by his duly appointed representative, Steven R. Haffner, Esq., and the Division of Taxation by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by April 20, 1998, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed either a request for a conciliation conference or a petition with the Division of Tax Appeals contesting a statutory Notice of Determination.

FINDINGS OF FACT

1. On June 3, 1996, the Division of Taxation ("Division") mailed a Notice of Determination to petitioner, Lawrence V. Parisi, assessing sales and use taxes due for the sales tax quarterly periods spanning March 1, 1991 through August 31, 1991, December 1, 1991 through February 29, 1992, September 1, 1992 through February 28, 1993 and June 1, 1993 through November 30, 1993. This notice assessed the aggregate amount of $389,751.37 for the noted periods, consisting of tax plus penalty and interest to the date of issuance of the notice. The notice was issued to petitioner under the assertion that he was an officer and person responsible to collect and remit sales and use taxes on behalf of Fleet Chevrolet Corp., pursuant to Tax Law § 1138(a); § 1131(1) and § 1133(a).

2. The notice described above was addressed to Lawrence V. Parisi, 144 Concord *Avenue*, Westbury, New York 11590. This same address is listed on the Division's mailing records as the address to which the notice was mailed. However, the balance of documents in the record show

petitioner's address as 144 Concord *Street*, Westbury, New York 11590. These documents include the documents exchanged between the parties after the June 3, 1996 issuance date of the Notice of Determination, and include a Notice and Demand for Payment, a Consolidated Statement of Tax Liabilities, the petition, the request for conciliation conference, the power of attorney, etc. Moreover, the 144 Concord Street address appears on petitioner's resident income tax returns (Forms IT-201) for 1994 and 1995, and on petitioner's 1995 Application for Automatic Extension of Time to File for Individuals (Form IT-370).

3. Petitioner protested the liability assessed under the notice of determination by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). This request was dated September 27, 1996 and the envelope in which it was mailed bore a machine metered (Pitney Bowes) postmark of September 27, 1996. However, there was no United States Postal Service ("USPS") postmark or other evidence of the date of actual mailing of the request, and thus BCMS treated the September 30, 1996 receipt date as the filing date for the request. Since the filing date was more than 90 days after the June 3, 1996 mailing date of the notice, the request for conference was denied as untimely.

4. Petitioner protested this denial by filing a petition with the Division of Tax Appeals alleging, *inter alia*, that the notice of determination was not issued to his last known address, that he never received the notice of determination, and that his first notification of the liability at issue was via a Notice and Demand dated September 26, 1996. The Division, in turn, answered the petition and filed the Motion for Summary Determination seeking dismissal of the petition.

5. The July 17, 1997 Order in this matter concluded that the Division had tendered sufficient evidence to establish that the notice of determination had in fact been mailed on June 3, 1996, as claimed. However, given the noted error in the mailing address it was concluded that

the Division had not established *proper* mailing of the notice to petitioner's last known address, as required, thus leaving in issue the fact of petitioner's actual receipt of the notice of determination. Accordingly, the Division's motion for summary determination seeking dismissal of the petition as untimely filed was denied.

6. The issue presented in this matter, at this point, and the basis for denial of the Division's motion, centers on the difference between petitioner's "last known address," i.e., 144 Concord *Street*, versus the 144 Concord *Avenue* address to which the notice of determination was mailed. Petitioner has claimed that he did not receive the notice of determination and attributes such nonreceipt to the fact that the notice was not mailed to his proper address, to wit, 144 Concord Street. In turn, petitioner maintains that since his first notification of the assessed liability at issue was the September 26, 1998 notice and demand, and that since his request for conference, received by BCMS on September 30, 1996, was filed within 90 days of such notice, the request was clearly timely and petitioner is entitled to be heard on the merits of his case.

7. In support of his claim of nonreceipt of the notice of determination, and of his assertion that the address error was not harmless or inconsequential error, petitioner points out that Nassau County road maps reveal that eight towns in the immediate vicinity of petitioner's address have a Concord Avenue.[1] Furthermore, on November 19, 1997 and November 29, 1997, respectively, petitioner's counsel mailed a certified letter to petitioner using the erroneous 144 Concord Avenue address. The first of such letters was received by petitioner, while the second of such letters was returned, unopened and marked in bold red ink "NO SUCH STREET--Returned To Sender."

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[1] The eight towns are East Meadow, Uniondale, West Hempstead, Garden City, Williston Park, Oceanside, Lake Success and Bethpage. In addition, East Meadow also has a Concord Drive, and Lynbrook has a Concord Court.

8. The Division argues, in response, that the notice was properly mailed to petitioner on June 3, 1996, and that petitioner had 90 days from such date to either request a conciliation conference or file a petition for a hearing. The Division notes that the 90th day after June 3, 1996 was a Sunday, and that the following day was Labor Day, thus allowing for a protest to be timely if filed by September 3, 1996. However, since petitioner's request was filed beyond such date, the Division takes the position that the request was properly denied as untimely.

9. The Division claims that the notice of determination was properly mailed, with the use of "Avenue" instead of "Street" constituting harmless or inconsequential error. The Division points out that none of the eight Concord Avenues which are in close geographic proximity to petitioner's Concord Street address are located in the same zip code where petitioner's address is located. In addition, and similar to the mailings by petitioner's counsel, on September 17, 1997 the Division sent a piece of certified mail to petitioner at the erroneous 144 Concord Avenue address. This piece of mail was delivered to petitioner's household on September 23, 1997, as established by the Division's submission of PS Form 3811 ("Domestic Return Receipt") confirming such delivery. Finally, the Division submitted an affidavit made by one Carol Ross, who is employed as the supervisor in the NIXIE mail unit of the Division's Registration and Data Services Bureau. Ms. Ross' affidavit states that:

> The Nixie Unit receives specific categories of returned mail from the Department's Mail Processing Center. The NIXIE Unit separates those categories and processes them according to established procedures. Notices of Determination generated by the Department's CARTS system, as well as other categories of documents, are forwarded to the DATA Entry Unit so that a "NIXIE Flag" is entered into the taxpayer's address record on the Department's Taxpayer Indicative Data system. The Nixie flag indicates to a person reviewing a taxpayer's address record that some document mailed by the Department to the taxpayer at that address was not delivered and was returned to the Department.

> I have reviewed the Department's address history record for Lawrence V. Parisi and there are no NIXIE flags. There is no indication that Notice of Determination L012146995 was returned to the Department.

10. In reply, petitioner points out that the Division admits it mailed the notice to petitioner at the wrong address, namely 144 Concord Avenue instead of 144 Concord Street. Furthermore, petitioner notes the Division does not dispute that there are eight Concord Avenues, as well as a Concord Drive and a Concord Court, in neighboring towns in the immediate vicinity of petitioner's Concord Street address. In response to the Division's assertion that the Street versus Avenue distinction is harmless or inconsequential error because there is no Concord Avenue located in the same zip code where petitioner is located, with the presumed conclusion that the notice must therefore have been delivered to Concord Street, petitioner argues that the Division provides no information as to USPS procedures when a named address does not exist in a given zip code. Petitioner also argues that the Division's evidence showing that a mailing addressed to 144 Concord Avenue was delivered to petitioner's household must be weighed against the fact that one of two such mailings made by petitioner's representative was not delivered but rather was returned by the USPS with the indication "No Such Street." Petitioner's point is that one verifiable nondelivery of mail out of only three attempts supports petitioner's claim of nondelivery, refutes the Division's assertion that the erroneous address was harmless or inconsequential error, and is an unacceptable result especially in light of the consequences sought to be imposed (i.e., a fixed and final tax assessment approaching $400,000.00, with no right to be heard in opposition). Finally, petitioner asserts that the NIXIE mail affidavit, which claims the Division has no record of a returned notice of determination against petitioner, is unpersuasive

because it is conclusory and lacking in specific details and, at best, only increases the possibility that the notice, though incorrectly addressed, was in fact delivered.

CONCLUSIONS OF LAW

A. As set forth fully in the July 17, 1997 Order issued in this matter, the Division submitted adequate proof that the notice of determination at issue was mailed on June 3, 1996. All things being equal, petitioner would then have been required to file either a request for a conciliation conference or a petition for a hearing within 90 days after the June 3, 1996 mailing of the notice of determination in order to secure his right to challenge the assessment made by the notice (Tax Law § 1138[a][1]). In this case, the 90th day after June 3, 1996 was a Sunday, and the following day was a legal holiday, thus leaving until Tuesday, September 3, 1996 for petitioner to file such a request or petition. Petitioner's request, however, was dated September 27, 1996 and was received September 30, 1996, and appeared to be untimely, thus leaving petitioner without recourse to challenge the assessment. However, petitioner has challenged this jurisdictional bar to review on the basis that he never received the notice, arguing in the process that the notice was not properly mailed to him at his last known address.

B. There appears to be no dispute between the parties that, as set forth on petitioner's tax returns and various other documents, petitioner's "last known address" was 144 Concord *Street* and not 144 Concord *Avenue*. It follows, and appears undisputed, that the notice was thus not properly addressed as required, and hence cannot be said to have been properly mailed. As noted in the July 17, 1997 Order, the Division established "actual" mailing of the notice on the date claimed, but did not establish "proper" mailing. Proper mailing gives rise to a rebuttable presumption that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail (***see,*** Tax Law § 1147[a][1]; ***Matter of Katz,*** Tax Appeals Tribunal, November

14, 1991). However, this presumption does not arise unless and until there is proof of proper mailing (***id.***). Here, because of the error in petitioner's address, proper mailing has not been established and thus the Division does not benefit from any presumption of delivery of the notice nor does petitioner face the burden of rebutting such a presumption. This point is significant, for when such presumption has arisen based on proper mailing, a taxpayer's general denial of personal receipt of such a notice is insufficient as a matter of law to overcome the presumption of receipt (***T. J. Gulf v. New York State Tax Commn,*** 124 AD2d 314, 508 NYS2d 97, 98-99; ***Matter of American Cars-R-Us, Inc. v. State Tax Commn.***, 147 AD2d 795, 537 NYS2d 672).

C. Petitioner has denied receiving the notice of determination, and in defense of his failure to file a request or petition within 90 days after June 3, 1996, argues that the address error on the notice of determination is not insignificant or inconsequential, noting that there are some eight Concord Avenue addresses, as well as a Concord Drive and a Concord Court in the immediate surrounding geographic vicinity of petitioner's address. Petitioner also notes that one of three certified mailings addressed to him at Concord Avenue instead of Concord Street was not delivered. Petitioner also claims that he first became aware of the assessment upon his receipt of a notice and demand for payment dated September 26, 1997. This notice and demand was addressed to petitioner at 144 Concord Street (i.e., his last known address), and petitioner points out that he responded by filing a request for a conciliation conference dated the very next day.

The Division, in contrast, argues that while the address used to mail the notice was not the same as petitioner's last known address, the distinction between "Avenue" and "Street" in the address amounts to a harmless or inconsequential error and thus should not invalidate the mailing or the notice. In support of its position, the Division points out that none of the eight Concord Avenue addresses are within the same zip code as petitioner's correct address and, further, that

the Division's NIXIE mail unit has no record that the notice of determination mailed to petitioner at Concord Avenue was returned to the Division.

D. Case law addressing the issue of misaddressed mail has focused on whether, notwithstanding an erroneous address, there was actual receipt of the notice. In ***Agosto v. Tax Commission of the State of New York*** (68 NY2d 891, 508 NYS2d 934), where the notice was addressed to 294 Wallen Street instead of the correct 294 Warren Street, and in ***Matter of Rosen*** (Tax Appeals Tribunal, July 19, 1990), where the notice was addressed to 6 Blue Water Hill South instead of the correct 9 Blue Water Hill South, there was evidence that the notices, albeit misaddressed, were in fact actually received by the intended taxpayer addressees. The Court and the Tribunal, respectively, held in these cases that actual receipt of the notices was sufficient to overcome the use of an erroneous address. In ***Agosto***, the Court held that where a "minor error" occurred in the address to which the notice of deficiency was sent and where the Division "determined that there was actual receipt in sufficient time to file a petition for redetermination of the deficiencies," the deficiencies would stand. Similarly, in ***Riehm v. Tax Appeals Tribunal*** (179 AD2d 970, 579 NYS2d 228, ***lv denied*** 79 NY2d 759, 584 NYS2d 447), the notice was mailed to the taxpayer's former address, but was nonetheless received by the taxpayer within time to file a protest. The Court held, consistent with ***Agosto,*** that under such circumstances the actual receipt of the notice in sufficient time to file a petition leaves the notice valid and overcomes the fact of an error in the address.

In ***Matter of Combemale*** (Tax Appeals Tribunal, March 31, 1994), the use of the name "Greene," instead of "c/o Arthur B. Greene," in the address portion of a notice mailed to taxpayers who had listed their representative's name (as well as their own names) in their address, was held to be a consequential as opposed to harmless error in address. In ***Combemale***,

the taxpayers spent time outside of the country and thus listed their address to include not only their own names, but also to include their representative's name, specifically within the address as "c/o Arthur B. Greene." However, the Division's notice of deficiency was simply addressed to petitioners with the additional word "Greene," as opposed to "c/o Arthur B. Greene," included thereon. The Tribunal pointed out that eliminating "Arthur B." (Greene) from the address eliminated an additional named addressee for the USPS to look for in attempting delivery and, futhermore, that eliminating "c/o" (in care of) from the address eliminated the direction to the USPS to look for such additional addressee. The Tribunal held that, taken together, these errors were consequential, and that since there was no admission or evidence of delivery of the notice to petitioners within time to protest (i.e., within the three-year period of limitations on assessment) the notice was invalid.

E. Based on the reasoning in the foregoing cases, the Division's claim that the address error in this case should be written off as harmless and inconsequential is rejected, and petitioners are entitled to be heard on the merits of their case. Specifically supporting this conclusion is that where, as here, there is an address error, the Division is not entitled to any presumption of delivery of the notice as is the case where a notice is properly mailed. In addition, and unlike ***Agosto*** and ***Rosen***, there is no evidence in this case that petitioner actually received the notice at issue within 90 days of its June 3, 1996 mailing date. Further, there are, as noted, numerous Concord Avenue listings in the near vicinity of petitioner's Concord Street address, and there is no information in the record concerning the USPS' procedures when the street address listed on a piece of mail does not exist within the specified zip code area. There is also the fact that one out of three later pieces of mail addressed to petitioner at Concord Avenue (instead of Concord Street) was not delivered, but rather was returned to the sender marked "No

Such Street." The Division points out, in comparison, that it has no record in its NIXIE mail section that the notice of determination in question, sent by certified mail to Concord Avenue (instead of Concord Street), was returned similarly marked. However, the fact of this one instance where an erroneously addressed mailing to petitioner was returned to the sender by the USPS, is not sufficient to support an affirmative conclusion that since the erroneously addressed notice of determination at issue was *not* returned to the Division it *must* therefore have been delivered to petitioner. Given the numerous Concord Avenue addresses in the vicinity of petitioner's address, and the absence of any information as to USPS procedures when a named street does not exist in the listed zip code, it is certainly possible that delivery was made to one of the Concord Avenue addresses. In fact, accepting the suggestion that a piece of mail addressed to Concord Avenue would simply be delivered to Concord Street, possibly because the latter is the closest named street address in the petitioner's zip code, not only overlooks the lack of information on USPS procedures where a street address does not exist in a zip code, but places emphasis on the zip code portion of an address when the same is not an essential element of an address. On this score, the Tribunal has held that errors in (and presumably the absence of) a zip code on a piece of mail does not render an otherwise correctly addressed notice invalid, since a zip code is not an essential element of an address for delivery purposes (***Matter of Karolight, Ltd.***, Tax Appeal Tribunal, July 30, 1992).[2]

F. The consistent thread in resolving each of the cases cited above has been to determine whether or not the taxpayer in fact received actual notice of the assessment in sufficient time to file a protest, rather than to focus on the simple fact of an error in the mailing address. That is, in

[2] In ***Karolight***, the Division conceded that the notice had not been received by the taxpayer within 90 days of its mailing, and that petitioner (who had challenged the underlying assessment upon receipt of actual notice thereof) was entitled to a hearing.

Agosto and ***Rosen***, requests for hearings were denied because the taxpayers had actually received the notices within the period of limitations on assessment, notwithstanding the address errors, but had not in turn filed protests within the required 90-day period after receipt of such notices. In ***Riehm***, a hearing was granted because the notice was actually received by the taxpayer within the period of limitations on assessment, notwithstanding the address error, and the taxpayer in turn filed a timely protest within 90 days of such actual receipt of notice. In ***Karolight***, although an erroneous zip code did not result in an erroneous address, it was conceded that the taxpayer had not in fact received the notice within 90 days after its mailing. In turn, since the taxpayer had filed a protest within 90 days of receipt of actual notice, it was entitled to a hearing. Finally, in ***Combemale***, the notice was canceled as invalid where there was error in the address, and no evidence or admission of receipt of actual notice of the assessment within the period of limitations on assessment. Consistent with these cases, where (as here) there is an error in address but the taxpayer has actually received notice of the assessment within time to protest, and where (as here) the taxpayer has protested within 90 days of such actual notice, the notice itself remains valid and the taxpayer is entitled to a hearing to contest the assessment.

G. In sum, the notice of determination was not properly addressed to petitioner at his last known address, and thus a presumption of delivery did not arise. In turn, there is no admission or evidence of actual receipt of such notice of determination, or of actual notice of the assessment against petitioner, prior to petitioner's admitted receipt of the September 26, 1996 notice and demand. Thereafter, petitioner promptly and timely challenged such actual notice by filing a request for a conciliation conference. Consistent with the cases cited above, it follows that petitioner, who protested within 90 days of receiving actual notice of the assessment, is entitled to a conciliation conference as requested on the merits of the assessment against him.

Accordingly, the matter is to be returned to the Division's Bureau of Conciliation and Mediation Services for a conciliation conference based on petitioner's timely request therefore.

H. The petition of Lawrence V. Parisi is hereby granted as indicated in Conclusion of Law "G", and a conciliation conference on the merits of petitioner's case shall be scheduled.

DATED: Troy, New York
October 1, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE