

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GEORGE CHRISTOFORATOS</b>	:	DETERMINATION
		DTA NO. 815826
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period December 1, 1991 through February 28, 1993.	:	

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Petitioner, George Christoforatos, 11 Rutland Road, Mastic, New York 11950, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1991 through February 28, 1993.

On April 29, 1998, petitioner by his then representative, Alexander Triant, 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 on documents and briefs to be submitted by August 14, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, George Christoforatos, a Notice of Estimated Determination dated November 30, 1992 which was addressed to petitioner at “11 Rutland Rd, Mastic, NY 11950-2807.” The notice bears assessment identification number L-006756306-7 and certified mail control number P 911 206 290. The notice asserts a total amount due of \$7,993.63. The Division also issued to petitioner a Notice of Estimated Determination dated April 25, 1994 which was addressed to petitioner at “11 Rutland Rd, Mastic, NY 11950-2807.” The notice bears assessment identification number L-008707772-3 and certified mail control number P 911 208 024. The notice asserts a total amount due of \$8,029.18. The Division also issued to petitioner a Notice of Determination dated April 25, 1994 which was addressed to petitioner at “11 Rutland Rd, Mastic, NY 11950-2807.” The notice bears assessment identification number L-00807773-2 and certified control number P 911 208 025. The notice asserts a total amount due of \$3,798.37. The notice indicates that the basis of the assessment was the filing of a late, no-remit sales and use tax return for the quarter ending February 29, 1992.

2. Petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the November 30, 1992 Notice of Estimated Determination, the April 25, 1994 Notice of Estimated Determination and the April 25, 1994 Notice of Determination. The envelope in which the request was mailed bears a United States Postal Service postmark of December 4, 1996.

3. BCMS issued a Conciliation Order Dismissing Request to petitioner dated February 28, 1997. It states, in part, that “[t]he Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on November 30, 1992

and April 25, 1994, but the request was not mailed until December 4, 1996, or in excess of 90 days, the request is late filed.”

4. Notices of determination and notices of estimated determination, such as the ones at issue herein, are computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (“CMR”). The CMR lists those taxpayers to whom notices of estimated determination and notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of determination and notice of estimated determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading “Certified No.” The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the November 30, 1992 CMR lists an initial date of November 19, 1992, which has been manually changed to November 30, 1992. On page 1 of the April 25, 1994 CMR is listed an initial date of April 13, 1994, which has been manually changed to April 25, 1994.

6. After a notice of determination or notice of estimated determination is placed in the Division’s Mail Processing Center’s “Outgoing Certified Mail” basket, a staffer weighs and seals

each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service in the Albany, New York area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his or her signature or both to the CMR.

7. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

8. The November 30, 1992 CMR is a 15-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." This CMR lists consecutive certified control numbers P 911 206 161 through P 911 206 323, inclusive. Each such certified control number is assigned to an item of mail listed on the 15 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The last page of the CMR, page 15, contains a pre-printed entry of 163 next to the statement "Total Pieces and Amounts Listed."

9. Information regarding the subject Notice of Estimated Determination is contained on page 12 of the CMR. Specifically, corresponding to certified control number P 911 206 290 is notice number L-006756306, along with petitioner's name and address, which is identical to that listed on the subject Notice of Estimated Determination. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR in order to comply with statutory privacy requirements.

10. Only the first page of the CMR bears the postmark of the Roessleville Branch of the U.S. Postal Service, dated November 30, 1992.

11. As noted previously, on the last page of the CMR (page 15) a total pieces entry of 163 has been pre-printed. It is noted that this figure has not been manually circled nor does there appear in the vicinity of the figure the signature or initials of a Postal Service employee.

12. Appearing immediately beneath the “total pieces” listing on page 15 is the listing “Total Pieces Received at Post Office.” No information appears after this listing.

13. The Division generally does not request, demand or retain return receipts from certified or registered mail.

14. The April 25, 1994 CMR is a 22-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” This CMR lists consecutive certified control numbers P 911 207 856 through P 911 208 094, inclusive. Each such certified control number is assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The last page of the CMR, page 22, contains a pre-printed entry of 239 next to the statement “Total Pieces And Amounts Listed.”

15. Information regarding the subject Notice of Estimated Determination and Notice of Determination is contained on page 16 of the CMR. Specifically, corresponding to certified control numbers P 911 208 024 and P 911 208 025 are notice numbers L-008707772 and L-008707773, respectively, along with petitioner’s name and address, which is identical to that listed on the subject Notice of Estimated Determination and Notice of Determination. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the

CMR in order to comply with statutory privacy requirements.

16. All of the pages of the CMR bear the postmark of the Roessleville Branch of the U.S. Postal Service, dated April 25, 1994.

17. As noted previously, on the last page of the CMR (page 22) a total pieces entry of 239 has been pre-printed. This figure has been manually circled and there appears in the vicinity of the figure the signature of a Postal Service employee.

18. Appearing immediately beneath the “total pieces” listing on page 22 is the listing “Total Pieces Received at Post Office.” No information appears after this listing.

19. The affixation of the Postal Service postmark, the signature of the Postal Service employee, and the circling of the “total pieces listed” figure indicate that all 239 pieces listed on the CMR were received at the post office.

20. The facts set forth above in Findings of Fact “4” through “11”, “13” through “17” and “19” were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of determination and notices of estimated determination such as the ones at issue herein. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

21. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received (*see*, Finding of Fact “19”) was established through the affidavit of Mr. Baisley. Mr. Baisley’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center specifically requested that Postal

Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] 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.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (***Id.***)

C. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991; ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is

delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*). In this proceeding, petitioner does not contest the Division’s assertion that the Notice of Estimated Determination and the Notice of Determination claimed to have been mailed on April 25, 1994 were, in fact, properly mailed to petitioner on that date; nor does petitioner attempt to rebut the presumption that the notices in question were delivered or offered for delivery in the normal course of the mail. Moreover, the proof of mailing and delivery submitted by the Division proves these facts. Accordingly, petitioner was required to file his request for a conciliation conference with BCMS within 90 days of April 25, 1994, or no later than July 24, 1994.

D. As noted in Conclusion of Law “C”, the required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the notices of estimated determination and determination were issued to petitioner on April 25, 1994.

The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of estimated determinations and determinations (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified



control number assigned to the notice.

Second, the Division established that the general issuance procedure was followed on April 25, 1994 in the generation and mailing of petitioner's notices dated that day. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as April 25, 1994 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figure "239" on the last page of the April 25, 1994 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has signed in the vicinity of the figure. As in *Matter of Roland (supra)*, the Division's affiant (here Mr. Baisley) states that the circling of this figure indicates that this was the number of pieces of mail received by the USPS on April 25, 1994. In addition, and unlike the situation in *Roland*, the affiant here also states the basis of his knowledge for this proposition. That is, the Baisley affidavit states that the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case as to the April 25, 1994 Notice of Estimated Determination and Notice of Determination.

Petitioner does not challenge the date or method of mailing of the notices of estimated determination or determination dated April 25, 1994. Furthermore, review of the petition filed in this matter indicates that petitioner does not dispute that the notices dated April 25, 1994 were issued to him at his last known address. The Division has established that it mailed the notices to petitioner on April 25, 1994 at his last known address.

E. As noted in Conclusions of Law “A” and “B”, a Notice of Determination or Notice of Estimated Determination becomes an assessment unless the taxpayer requests a conciliation conference with BCMS or files a petition with the Division of Tax Appeals within 90 days after the notice is issued. The last day on which petitioner could have timely requested a conciliation conference with BCMS or filed a petition with the Division of Tax Appeals with reference to the notices dated April 25, 1994 was July 24, 1994. The request for a Bureau of Conciliation and Mediation conference was filed on December 4, 1996. Unfortunately, this date is well past the statutory 90-day period within which such a request may be made. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner’s case as to the Notice of Estimated Determination and Notice of Determination mailed on April 25, 1994.

F. In *Matter of Roland (supra)* the Tax Appeals Tribunal determined that the Division of Taxation failed to meet its burden of proof with respect to the mailing of a statutory notice. Because the proof of mailing presented by the Division in *Roland* is similar in many respects to the proof presented by the Division in this case with regard to the Notice of Estimated Determination dated November 30, 1992, an analysis of *Roland* is appropriate. Specifically, in *Roland* all pages of the CMR bore a Postal Service stamp and the last page was signed by a postal service representative. Additionally, the entry next to the heading “Total Pieces Received

at Post Office” was blank and the number indicating total number of pieces listed on the CMR was circled. The Tribunal determined that the CMR was flawed because it did not indicate how many of the pieces listed were actually received at the post office. The Tribunal rejected the Division’s contention that the circling of the total number of pieces figure indicated that all such pieces were actually received at the post office. The Division’s contention was based on an affidavit made by one Daniel G. LaFar which asserted that the circling indicated that this was the total number of pieces received. The Tribunal determined that the affidavit was speculative because it did not state the affiant's basis of knowledge for this assertion. The Tribunal concluded that “lacking this element,” i.e., the affiant’s basis of knowledge, the Division had not met its burden of proof on the mailing issue.

The proof presented by the Division relating to the November 30, 1992 Notice of Determination is less probative than that offered in ***Roland***. In the present matter, only the first page of the CMR bears a Postal Service stamp and the last page of the document has not been signed by a Postal Service employee. Further, the space next to the heading “Total Number of Pieces” indicates 163 as the total number of pieces and such figure has not been circled. In addition, the affidavit (here made by Mr. Baisley) does not indicate how many pieces were received by the United States Postal Service or on what information Mr. Baisley relies for his conclusion that one piece of mail was delivered to the post office addressed to petitioner. Therefore, as in ***Roland (supra)***, the Division has not met its burden of proof on the mailing issue relating to the Notice of Estimated Determination dated November 30, 1992 and petitioner is entitled to a BCMS conference on this statutory notice.

G. In his petition, petitioner requested a courtesy conference with the Division in the event that he did not prevail on the timeliness issue. Petitioner is advised that he should

contact the Division or the Division's representative regarding this request.

H. The petition of George Christoforatos is granted as indicated in Conclusion of Law "F". This matter will be returned to the Bureau of Conciliation and Mediation Services for the scheduling of a conference on the November 30, 1992 assessment only. In all other respects the petition of George Christoforatos is dismissed.

DATED: Troy, New York  
February 4, 1999

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE