

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>JACK KLEIN</b>	:	<b>DETERMINATION</b>
	:	DTA NO. 815991
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 June 1, 1989 through August 31, 1994.	:	

---

Petitioner, Jack Klein, 19 Briarwood Lane, Suffern, New York 10901, 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 June 1, 1989 through August 31, 1994.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated November 20, 1997 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on December 20, 1997, the date petitioner's time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, 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, Jack Klein, a Notice of Determination dated December 6, 1996 which was addressed to petitioner at "19 Briarwood Ln Suffern, NY 10901-3601." The notice bears assessment identification number L-012953705-9 and certified mail control number P 911 005 373. The notice asserts a total amount due of \$17,832.33. The computation summary section of the notice indicates that this amount was comprised of \$11,864.49 in tax due, plus interest, for the period June 1, 1989 through August 31, 1994.

2. Petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the December 6, 1996 Notice of Determination. Petitioner's request is dated March 5, 1997 and was delivered to BCMS on March 7, 1997 by Federal Express.

3. BCMS issued a Conciliation Order Dismissing Request to petitioner dated April 25, 1997. It states, in part:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on December 6, 1996, but the request was not received until March 7, 1997, or 91 days, the request is late filed."

4. Notices of determination, such as the one 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 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 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 CMR lists an initial date of November 27, 1996, which has been manually changed to December 6, 1996. A similar change has been made to the last page (page 31) of the CMR.

6. After a notice of 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 the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his or her signature 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 CMR relevant to this case is a 31-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip + 4 Minimum Discount Mail". This CMR lists consecutive certified control numbers P 911 005 254 through P 911 005 584, inclusive, with one deletion as noted below. Each such certified control number is assigned to an item of mail listed on the 31 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.

9. The last page of the CMR, page 31, contains a pre-printed entry of 331 under the heading "total pieces listed". This entry has been manually changed to 330. This change reflects the fact that one piece of mail was "pulled" from the CMR. A piece of mail may be pulled from the CMR to correct a discrepancy in name or address. A piece of pulled mail will be segregated from its group of notices for correction and issuance at another time. On page 27 of the CMR, a piece of mail assigned certified control number P 911 005 548 contains a line through the entire entry for this piece of mail. This piece was pulled from the CMR and this deletion is reflected in the change in the "total pieces listed" entry on page 31. With this change, the CMR herein thus lists 330 certified control numbers corresponding to 330 items of mail listed thereon. There are no other deletions from the list.

10. Information regarding the subject Notice of Determination is contained on page 11 of the CMR. Specifically, corresponding to certified control number P 911 005 373 is notice number L 012953705, along with petitioner's name and address, which is identical to that listed

on the subject 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.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated December 6, 1996.

12. As noted previously, on the last page of the CMR (page 31) a total pieces entry of 331 has been manually changed to 330. In addition, this handwritten figure has been manually circled and beneath it is the signature or initials of a Postal Service employee.

13. Appearing immediately beneath the “total pieces” listing on page 31 is the listing “Total Pieces Received at Post Office”. No information appears after this listing.

14. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the “total pieces listed” figure indicate that all 330 pieces listed on the CMR were received at the post office.

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

16. The facts set forth above in Findings of Fact “4” through “12”, “14” and “15” 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 such as the one 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.

17. 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 “14”) 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.

18. The address on the subject Notice of Determination is the same as the address given in both an Application for Automatic Extension of Time to File for Individuals (Form IT-370), dated April 15, 1996, and an Application for Additional Extension of Time to File for Individuals (Form IT-372), dated August 12, 1996, both of which were filed by petitioner in connection with his 1995 New York personal income tax return.

19. The Division also submitted the affidavit of Deborah Baker, a Mail and Supply Clerk in the Division’s outgoing mail room. As part of her duties, Ms. Baker prepares U.S. Postal Service Forms 3811-A for mailing. According to Ms. Baker’s affidavit and the relevant portion of the Domestic Mail Manual, Issue 51, dated 1/1/97 (a copy of which was attached thereto), the Postal Form 3811-A is a form used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office where the piece of mail in question was delivered. The delivery post office then completes the form by providing the mailer the delivery date and the name of the individual or organization that postal delivery records show received the mail. Form 3811-A does not provide the mailer with the recipient’s signature.

20. Attached to Ms. Baker’s affidavit is a copy of the Form 3811-A which was requested for petitioner herein. This form indicates that an article of mail bearing article number

P 911 005 373 and addressed to petitioner at the address listed on the subject notice was delivered on December 12, 1996.

21. Also attached to Ms. Baker's affidavit is a copy of Postal Form 3849 which was returned to the Division along with the Form 3811-A. This form indicates that on December 11, 1996, the Postal Service attempted to deliver an article of certified mail bearing article number P 911 005 373 and addressed to petitioner at the address listed on the Notice of Determination. This form also indicates that the article could be picked up at the post office after December 12, 1996 at 9:00 AM. The form has a box for "Leave at my address" which is checked with instructions to leave the article in the mail box and the form appears to bear petitioner's signature. Also, the form has a signature in a box for "Delivered by" with a Postal Service postmark of December 19, 1996.

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

A. A motion for summary determination may be granted:

"if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon, Baisley and Baker affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and pursuant

to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. 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).

D. 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.*)

E. 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 Determination at issue was properly mailed to petitioner on December 6, 1996; nor does petitioner attempt to rebut the presumption that the notice in question was 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 December 6, 1996, or no later than March 6, 1997.

F. The regulations governing the filing of requests for conciliation conferences state that the date of the United States postmark will be deemed to be the date of filing of any mailed document required to be filed under Tax Law § 170(3-a), but where the delivery of such a document is made by courier, delivery messenger or similar services, the date of such delivery will be deemed the date of filing (20 NYCRR 4000.7[a][1][ii]). Therefore, the date of delivery of a document sent by Federal Express, such as petitioner’s request for a conciliation conference, must be deemed the date of filing (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). Petitioner’s request was filed on March 7, 1997, or one day beyond the 90-day period of limitations, and was therefore untimely.

G. It is noted that the Tax Law has been amended to extend the “timely mailing equals timely filing” rule previously limited to documents bearing U.S. Postal Service postmarks to certain private delivery services (*see, L 1997, ch 577*). This new provision became effective September 10, 1997, however, and therefore is not applicable in this case.

H. 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.

I. The petition of Jack Klein is dismissed.

DATED: Troy, New York  
February 5, 1998

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE