STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM T. JACKLING	:	DETERMINATION DTA NO. 816517
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1991 through: February 29, 1996 and for Redetermination of Deficiencies or for Refunds of Personal Income Tax under Article 22 of the Tax Law for the Years 1993 and 1995.	:	

Petitioner, William T. Jackling, 11 Old Brook Trail, Honeoye Falls, New York 14472, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1991 through February 29, 1996 and for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the years 1993 and 1995.

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 24, 1999 at 1:15 P.M. and continued to completion on March 30, 1999 at 10:00 A.M., with all briefs to be submitted by July 26, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (James Della Porta, Esq. and Andrew S. Haber , Esq., of counsel).

ISSUES

I. Whether notices of determination which erroneously identified petitioner as a person responsible for sales taxes due from General Nutrition Corporation, rather than Brother and Sisters of Mendon New York doing business as General Nutrition Corporation, are fatally defective.

II. Whether petitioner established that notices of determination dated June 3, 1994 were issued after the expiration of the period of limitation for assessment of sales and use taxes.

III. Whether petitioner was a person under a duty to act for Brother and Sisters of Mendon New York Two, Inc. in complying with Articles 28 and 29 of the Tax Law and, therefore, personally liable for sales taxes due from that corporation.

IV. Whether petitioner was a person under a duty to act for Brother and Sisters of Mendon New York doing business as General Nutrition Corporation in complying with Articles 28 and 29 of the Tax Law and, therefore, personally liable for sales taxes due from that corporation.

V. Whether the Division of Taxation has established the fact and date of mailing of notices of determination dated August 8, 1994 and September 25, 1995.

VI. Whether petitioner was a person under a duty to act for Rytown Millwork, Inc. in complying with Articles 28 and 29 of the Tax Law and, therefore, personally liable for sales taxes due from that corporation.

VII. Whether petitioner has shown that the amount of tax assessed on any of the notices of determination issued to him is incorrect or that the tax has been paid or that the tax liability is subject to the jurisdiction of a bankruptcy court.

FINDINGS OF FACT

1. Petitioner, William T. Jackling, filed a petition with the Division of Tax Appeals on May 7, 1998 challenging a series of notices of determination and notices of deficiency issued to him by the Division of Taxation ("Division"). The petition does not list the assessment or notice identification numbers of the notices being protested, but two documents were attached to the petition which identify a series of assessments issued to petitioner by the Division:

(a) A Conciliation Order (CMS No. 165540), dated February 6, 1998, references the following notices: L008890841, L008890842, L008890843, L008890844, L008890845, L008890846, L008890847, L008890848, L008890849, L008890850, and L010391223. The Division denied petitioner's request for a conciliation conference to protest these notices on the ground that the request for a conference was not made within 90 days of the mailing of the notices.

(b) A Consolidated Statement of Tax Liabilities, dated April 21, 1998, identifies the following outstanding assessments in addition to those referenced in the Conciliation Order of February 6, 1998: L-009322891, L-012240834, L-012240835, L-012240836, L-012240837, L-12240838, L-12240839, L-012591443-9, L-011107833, L-011107834 and L-011107835.[1]

2. On October 1, 1998, the Division brought a motion for an order of summary determination dismissing the petition on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the issuance of the notices of determination and notices of deficiency.

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[1] The Conciliation Order references notice number L008890850, but the Consolidated Statement of Tax Liabilities does not. All other notices referenced in the Conciliation Order are also listed in the Consolidated Statement of Tax Liabilities. Thus, 22 notices were petitioned in all.

3. On January 14, 1999, Administrative Law Judge Arthur S. Bray issued an order granting a motion made by the Division to dismiss the following notices on the ground that the Division of Tax Appeals lacks jurisdiction over them:

Notice number	Date of Notice
L-010391223	May 26, 1995
L-012240834	June 17, 1995
L-012240835	June 17, 1995
L-012240836	June 17, 1995
L-012240837	June 17, 1995
L-012240838	June 17, 1995
L-012240839	June 17, 1995

4. Judge Bray denied the Division's motion for summary determination with respect to notice numbers L008890841 through L008890850 and found that petitioner was entitled to a hearing on the merits to challenge these notices.

5. The Division's motion for summary determination did not address notice numbers L012591443, L009322891 and L011107833 through L011107835. Therefore, Judge Bray made no determination with respect to those notices.

Notice numbers L-008890841 through L-008890850

6. The following notices of determination, all dated June 3, 1994, were issued to petitioner as a person responsible for sales and use taxes due from Brother and Sisters of Mendon New York Two, Inc. ("Mendon Two"):

Assessment number	Period ended	Tax	Interest	Penalty	Payments	Balance due
L 008890841	11-30-93	4,714.31	262.75	707.13	0.00	5,684.19
L 008890842	8-31-93	5,491.53	482.12	988.43	0.00	6,962.08
L 008890843	5-31-93	5,864.08	710.68	1,231.44	0.00	7,806.20
L 008890844	2-28-93	8,952.41	1,393.14	2,148.52	0.00	12,494.07

7. The Division placed in evidence the original sales tax returns filed by Mendon Two for the periods shown above. In each case, the return was filed without remittance of the tax shown as due on the return. The returns were signed by Steve Danner, Accountant. All of the returns were filed within the period of limitation for filing such a return except assessment number L008890842 which was filed late on November 29, 1993. In each case, the Division assessed sales tax against petitioner in the amount shown as due on the return.

8. The Division's records establish that Mendon Two never applied for a certificate of authority. Upon receipt of sales tax returns filed by Mendon Two, the Division established a forced registration file for Mendon Two. Pursuant to this forced registration, Mendon Two was assigned vendor identification number 161431123C and registered as a sales tax vendor on June 30, 1993.

9. In a letter to the Division's Tax Compliance Section in Rochester, New York, dated April 17, 1995, petitioner made the following statements:

> This letter is to reply to the warrant issued regarding Christopher Jackling (attached). Christopher Jackling was not a responsible person for Brother and Sisters of Mendon New York Two, Inc. FEI # 16-1431123. He was an employee of the corporation. Chris Jackling did not have any knowledge of the books and records of Brother and Sisters of Mendon New York Two, Inc. and did not take part in any discussion which determined the payment of the obligations of the Corporation. A stamp bearing his signature was normally used to stamp checks. *The stamp was under my control and used as a matter of convenience.*

> Please vacate the tax warrant against Christopher Jackling due to the fact that he did not determine or participate in the daily administrative functions. (Emphasis added.)

This letter was written under the letterhead of Brother and Sisters of Mendon New York Two, Inc. d/b/a Imposters' Copy Jewelry, and it was signed by William T. Jackling as Director.

10. Petitioner incorporated Mendon Two. He described himself as the general manager of the corporation and the businesses operated by the corporation, but denied being a corporate officer after formation of the corporation.

11. The following notices of determination of sales and use taxes due, all dated June 3, 1994, were issued to petitioner as a person responsible for sales and use taxes due from General Nutrition Corporation ("GNC").

Assessment number	Period ended	Tax	Interest	Penalty	Payments	Balance due
L 008890845	11-30-93	1,122.43	62.56	168.34	0.00	1,353.33
L 008890846	8-31-93	1,257.80	110.43	226.34	0.00	1,594.57
L 008890847	5-31-93	1,538.08	186.40	322.98	0.00	2,047.46
L 008890848	2-28-93	2,172.15	165.65	255.40	1,107.66	1,485.54
L008890849	8-22-91	1,750.00	677.07	525.00	0.00	2,952.07
L008890850	11-30-92	6,002.97	171.71	720.33	6,002.97	892.04

12. The Division's computer record keeping system, known as the Case and Resource Tracking system, or "CARTS," shows the basis for the issuance of each of the notices of determination issued to petitioner. The following sales and use tax returns were filed within the statutory period of limitation for the filing of such a return without remittance of tax shown as due on the returns: L008890845, L008890847 and L008890848. Tax was assessed in the amount shown as due on the returns filed. CARTS shows two sales and use tax returns filed

after the due date for the return without remittance of the tax shown as due on the return: L008890846 and L008890850. Tax was assessed in the amount shown as due on the returns filed. Assessment numbers L0088890848 through L008890850 were paid in full after the issuance of the notices of determination but before the hearing in this matter. The Division canceled these notices.

13. On August 23, 1991, the Division received a Certificate of Registration from Brother and Sisters of Mendon N.Y. as G.N.C. ("Mendon as GNC"). The principal place of business was identified as 166 Irondequoit Mall Drive, Rochester, New York. Mendon as GNC was registered as a New York State sales tax vendor on September 3, 1991 and assigned the vendor identification number "161399609." The Certificate of Registration was signed by Martha Jackling as president. Other owners of the business were listed as follows: Christopher M. Jackling, secretary; Deborah E. Jackling, treasurer; Susan L. Slocum, vice-president. The former owner of the business is shown as General Nutrition Corporaton.

14. Mendon Two and Mendon as GNC (which will be referred to collectively as the "Mendon Corporations") received financing from a company named ARC which was identified by petitioner as the factor for both corporations. Petitioner negotiated and signed the agreements between the factor and the Mendon Corporations.

15. All of the receipts of the Mendon Corporations were turned over to an attorney representing the factor, and the attorney deposited the receipts into the factor's bank account on a daily basis. This included amounts collected by the Mendon Corporations as sales tax. The factor then returned 92 percent of the receipts to the Mendon Corporations and kept the remainder. Petitioner stated that it was his understanding that ARC was to pay over all sales tax

collected to the Division. He based this assumption on experience he had with another factor in another business and his knowledge that the Mendon Corporations were turning over the sales tax to ARC along with other receipts.

16. Petitioner entered into evidence three pages of a longer document identified as a Factoring and Security Agreement. He represented these pages to be identical to pages of the contracts executed by Mendon Two and Mendon as GNC with ARC. There is no provision in the portion of the document entered into evidence requiring ARC to pay sales taxes from the receipts turned over to it. The only paragraph relating to sales taxes states:

> *Indemnification for taxes*. In the event any sales or excise taxes are imposed by any state, federal, or local authorities with respect to any of the Bills sold and assigned hereunder; where such taxes are required to be withheld or paid by Factor, Seller shall also indemnify Factor and hold it harmless with respect to all such taxes and hereby authorizes Factor to charge the Seller's reserves, and bill Seller, any such tax that is paid or withheld by Factor.

17. ARC never stated that it would pay the sales tax on behalf of Mendon Two or Mendon as GNC. Petitioner never inquired about payment of sales tax by ARC. Petitioner at first testified that he first became aware that ARC was not paying the sales tax in 1994, but he later stated that he discovered that ARC was not paying the sales tax in 1991. He was asked when he first entered into a factor agreement with ARC regarding the Mendon Corporations, but he never answered that question.

18. Apparently, ARC was not paying over the sales tax collected in 1991 and then began doing so when petitioner complained to ARC's owner. It was petitioner's practice to bring his books and records to ARC's office to update accounts and prepare financial records. The accountant for the Mendon Corporations prepared sales tax returns and provided the signed originals to ARC. Petitioner stated that he expected ARC to pay the taxes shown as due on the

returns. But he also testified that the Mendon Corporations always mailed the sales tax returns to the Division and that he sometimes noticed that there were no checks enclosed with the returns. Nonetheless, the Mendon Corporations mailed the sales tax returns to the Division because petitioner understood that the corporations had a legal obligation to do so. Petitioner was aware at the time a return was filed whether it was accompanied by payment or not.

19. Petitioner was in charge of the finances of Mendon Two and Mendon as GNC; decided which creditors were to be paid; negotiated with the factors; negotiated with tax authorities regarding payment of taxes and generally managed the financial affairs of both corporations.

20. Petitioner and his wife, Martha Jackling, had a franchise agreement with General Nutrition Corporation. The franchisees, petitioner and his wife, allowed Mendon as GNC to operate the franchise at the Irondequoit Mall in Rochester. As the franchisor, General Nutrition Corporation had the right to enforce certain agreements with the franchisee. For this purpose, inspectors were sent to the store to ascertain whether the franchise agreement was being lived up to. When problems arose or changes needed to be made, General Nutrition Corporation communicated with petitioner. General Nutrition Corporation held the lease for space at the Irondequoit Mall and subleased to its franchisee. Petitioner negotiated the lease on behalf of General Nutrition Corporation.

21. Mendon Two operated three stores, one in the Irondequoit Mall, one in the Greece Mall and one in the East View Mall, all near Rochester. Petitioner negotiated the lease at the Eastview Mall on behalf of Mendon Two.

22. On the second day of hearing, petitioner claimed that he never received any of the notices issued on June 3, 1994. Moreover, he argued that since more than three years had passed since the filing of the tax returns, the Division was barred from issuing new notices or collecting the tax shown as due on the filed returns. The Administrative Law Judge stated that petitioner would be allowed to amend his petition to include this newly raised issue; however, since the statute of limitations argument is both a factual and legal issue, both the Division and petitioner would be allowed to submit further evidence, both evidence of mailing of the notices and any evidence relating to receipt of the notices by petitioner. Petitioner later stated that he wanted to allow Judge Bray's decision to stand and wanted this Administrative Law Judge to rule based on the evidence already in the record. As a consequence, the statute of limitations defense was deemed by this Administrative Law Judge to have been abandoned.

Notice number L-009322891

23. The Division issued to petitioner a Notice of Determination, dated August 8, 1994, assessing sales and use taxes due for the quarter ended February 28, 1994 in the amount of $7,837.69 plus interest and penalty (assessment number L-009322891). The notice was issued to petitioner as a person responsible for sales and use taxes due from Mendon Two. At hearing, the Division alleged that the Division of Tax Appeals lacks jurisdiction over this notice because petitioner did not file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of this notice.

24. In support of its position that notice number L-009322891 was not protested within the period of limitation for doing so, the Division offered the affidavits of Geraldine Mahon and James Baisley to explain the Division's standard procedure for mailing notices of determination

and notices of deficiency. Both Ms. Mahon and Mr. Baisley are familiar with and have personal knowledge of the procedures employed by the Division for mailing notices of determination and notices of deficiency.

25. Geraldine Mahon is a Principal Clerk in the CARTS Control Unit of the Department of Taxation and Finance. Among other things, CARTS produces the statutory notices which are mailed to taxpayers.

26. Ms. Mahon's regular duties include supervision of the processing of notices of deficiency and notices of determination prior to their shipment to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Certified Record for Non-Presort Mail (the "CMR") and the corresponding notices which are generated by CARTS and listed on the CMR. When it is received by Ms. Mahon, the CMR is a continuous, fan-folded document of connected pages. All pages are connected when Ms. Mahon initially receives the CMR, and they remain connected when the document is returned to her office after mailing of the notices. The page numbers of the CMR are shown in the upper right hand corner of each page.

27. Each CMR bears the date on which it was printed on the top left hand corner of each page. Each CMR is printed approximately 10 days in advance of the anticipated date of mailing of the statutory notices listed therein in order to ensure that there is sufficient lead time for the statutory notices to be prepared for mailing. The date on the first page of the CMR is then changed to conform to the date of actual mailing. According to Ms. Mahon, this change is made by a member of the Division's Mail Processing Center and not by any employee of her unit.

28. The notices to be mailed are assigned a certified mail control number which appears in a column of the CMR headed "CERTIFIED NO." The identification number of the notices are listed in a second column under the heading "NOTICE NUMBER." The notice numbers listed on the CMR correspond to the assessment identification numbers shown on each notice. Each notice number is followed by the name of the addressee and the address to which the notice is being mailed.

29. In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

30. In his affidavit, James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center, described the Division's standard procedure for delivering outgoing mail to the United States Postal Service ("USPS").

31. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail." A CMR for each batch of notices is also received. A member of Mr. Baisley's staff operates a machine that puts each statutory notice into an envelope, weighs and seals the envelope and places the "postage and fee" amounts on each envelope. A clerk then checks the first and last piece of certified mail listed on the certified mail record against the information shown on the CMR to verify that they match. The clerk then performs a random review of 30 or fewer pieces of mail by checking the information on those envelopes against the corresponding information shown on the CMR.

32. Mr. Baisley states that a member of his staff delivers the CMR and the envelopes to one of the various branches of the USPS located in the Albany, New York area. After receipt, a

postal employee affixes a postmark or his or her signature or both to the certified mail record indicating receipt by the Postal Service.

33. The CMR is left in the custody of the United States Postal Service when the notices are delivered to its possession. It is normally picked up by a member of the Mail Processing Center staff on the day following delivery and returned to the originating office. The certified mail record is the Division's record of receipt by the USPS of pieces of certified mail.

34. The Division entered into evidence a copy of a 53-page CMR which lists notice number L-009322891 on page 39. Ms. Mahon attests that this CMR is a true and accurate copy of the CMR prepared by the Division and maintained in the records of her unit except that portions of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers.

35. The CMR bears a USPS date stamp of August 8, 1994 on each page. On the first page of the CMR, the pre-printed date “07/29/94” has been crossed out and the date “8-8-94” has been handwritten above it. A signature appears at the bottom of the last page. The last line of the certified mail record states: "TOTAL PIECES RECEIVED AT POST OFFICE." No information has been entered on the document next to this line. The line above it states: "TOTAL PIECES AND AMOUNTS LISTED 577." The number "577" has been circled. In his affidavit, Mr. Baisley states: “A review of this [CMR] confirms that a USPS employee signed page 53 of the certified mail record and affixed a postmark to each page of the certified mail record. With respect to the total number of pieces of certified mail received, the last page of this certified mail record indicates that 577 pieces of mail were delivered to the USPS.”

36. Petitioner's name and address are listed on page 39 of the August 8 CMR. The notice number issued to him is shown as L 009322891 and the certified mail control number on the envelope is shown as P 911 005 117. The certified mail control number and assessment identification numbers on the Notice of Determination issued to petitioner correspond to the numbers on the CMR.

37. The Division put in no evidence to explain the basis for notice number L-009322891.

Notice numbers L-011107833 through L-011107835

38. Three notices of determination of sales and use tax due, each dated September 25, 1995, were issued to petitioner as a person responsible for sales and use taxes due from Rytown Millwork, Inc. assessing tax, interest and penalty as follows:

Notice No.	Period ended	Tax	Interest	Penalty	Payments	Balance due
L011107833	2/28/93	17,417.37	79.28	1,741.73	18,043.90	1,194.48
L011107834	11/30/92	93,149.23	37,758.26	28,746.46	0.00	159,653.95
L011107835	8/31/92	35,385.84	2,983.21	12,031.14	35,385.84	15,014.35

39. At hearing, the Division alleged that the Division of Tax Appeals lacks jurisdiction over these notices because petitioner did not file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of this notice. In support of this contention, the Division offered the affidavits of Geraldine Mahon and James Baisley. The portions of these affidavits which describe the Division's standard procecdure for mailing notices of determination and notices of deficiency are substantially identical to the affidavits described above in connection with notice number L-009322891.

40. The Division also submitted a second CMR which lists three notice numbers issued to petitioner: L-011107833 through L-011107835. This CMR is 16 pages long and bears a USPS date stamp of September 25, 1995 on each page. On the first page of the CMR, the date "09/16/95" has been crossed out and the date "9-25-95" has been handwritten above it. A signature appears at the bottom of the last page. Above the signature is a preprinted line which states, in part: "TOTAL PIECES AND AMOUNTS LISTED 168." The number 168 has been crossed out and the number 167 has been written in across from the last line of the certified mail record which states: "TOTAL PIECES RECEIVED AT POST OFFICE." The number 167 has been circled. In his affidavit, Mr. Baisley explains that the change reflects the fact that one piece of certified mail had been pulled from that group of mailings. According to Mr. Baisley, mail may be pulled for a number of reasons including an error in the mailing address.

41. A review of the September 25 CMR shows that one piece of mail, assigned certified control number P 911 205 765, was pulled from that day's mailing. A line was drawn through the entry for this taxpayer. Mr. Baisley states: "This deletion is reflected in the change of the total number of pieces listed on page 16 of the certified mail record."

42. Petitioner's name and address are listed three times on page 14 of the September 25 CMR. Notice number L 011107833 is listed with the certified mail control number P 911 205 907; notice number L 011107834 is listed with the certified mail control number P 911 205 908 and notice number L 011107835 is listed with the certified mail control number P 911 205 909. The certified mail control number and assessment identification numbers on the notices of determination issued to petitioner correspond to the numbers on the CMR.

43. The Division did not explain the basis for these three notices. Rytown Millworks was in the business of selling doors and windows. Petitioner was associated with Rytown Millworks and did not disclaim responsibility for taxes due from that company. He stated that Rytown Millworks was one of the many corporations formed to operate franchises owned by himself and his wife. Petitioner alleged that these sales taxes were previously assessed as the taxes of Tom's Doors and Windows and were paid.

Notice number L-012591443

44. Assessment number L-012591443 was listed as a fixed liability subject to collection action in the Consolidated Statement of Tax Liabilities, dated April 21, 1998, which was attached to the petition. At hearing, the Division acknowledged that this tax assessment was paid and the notice canceled.

CONCLUSIONS OF LAW

Notice numbers L-008890841 through L-008890850

A. Notice numbers L00890845 through L00890847[2] were issued to petitioner as a person responsible for sales taxes due from General Nutrition Corporation. As a threshold issue I will address petitioner's claim that he was never an officer of General Nutrition Corporation. While this is obviously true, it does not relieve petitioner of liability for these taxes. Brother and Sisters of Mendon New York filed a certificate of registration stating that it was doing business as GNC. There is no question that the taxes assessed against petitioner were based on sales made and reported by Mendon as GNC. The notices erroneously stated that petitioner was an officer or responsible person of General Nutrition Corp, rather than Mendon as GNC. This error is not

[2] Notice numbers L00890848, L00890849 and L00890850 were paid and have been canceled by the Division; therefore, they are no longer in issue.

sufficient to invalidate the notices. The law in New York is clear; defects on the face of the notice will not invalidate the notice, absent evidence of harm or prejudice to the petitioner (***Matter of Agosto v. Tax Commn.***, 68 NY2d 891, 508 NYS2d 934; ***Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892; ***Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin***., Sup Ct, Albany County, March 16, 1988, ***affd on other grounds*** 151 AD2d 822, 542 NYS2d 61; ***Matter of A & J Parking Corp.***, Tax Appeals Tribunal, April 9, 1992). Here, there is no evidence that petitioner was prejudiced by receiving notices issued to him as a person responsible for the taxes of General Nutrition Corporation. Petitioner is well aware that these assessments relate to the sales receipts of GNC franchises and of Mendon as GNC. He was neither confused nor prejudiced by the error on the notices.

B. Petitioner argues in a post-hearing submission that the notices of determination dated June 3, 1994 are invalid because they were not mailed within the three-year period of limitation for assessment of sales and use taxes (Tax Law § 1147[b]).[3] He originally raised this issue for the first time on the second day of hearing and later in the hearing appeared to have abandoned the issue. The statute of limitations for assessment of taxes is an affirmative defense which is waived unless affirmatively raised by the taxpayer (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, 828, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of Servomation Corp. v. State Tax Commn.***, 60 AD2d 374, 400 NYS2d 887; ***Matter of Pittman***, Tax Appeals Tribunal, February 20, 1992). To establish this defense, the taxpayer must prove the date on which the limitations period begins, the expiration date of the statutory period and receipt of the notice after

[3] In ***Matter of Mast*** (Tax Appeals Tribunal, July 29, 1993), the Tribunal ruled that the three-year period of limitation on assessment of tax applies to notices of determination issued to corporate officers for the tax reported, but not paid, by the corporation.

the running of the period (***Matter of Pittman***, ***supra***). The four sales tax returns submitted by the Division and the CARTS assessment documents provide proof of the date of filing of the notices and, therefore, proof of the assessment expiration date for each of them. However, petitioner has not established that any one of the notices of determination dated June 3, 1994 were mailed after the expiration of the statute of limitations for assessment of tax.

In his order dated January 14, 1999, Judge Bray ruled that the Division of Taxation had not submitted sufficient evidence to show that the notices of determination were actually mailed on June 3, 1994, and he ruled that, in those circumstances, petitioner was entitled to a hearing on the merits. Mr. Jackling did not deny receipt of the notices in response to the Division's motion for summary determination, but at hearing he claimed never to have received the notices. In addition, he argued that the Division's failure to show the exact date of mailing of the notices, coupled with his claim that he never received them, proved that the notices were not mailed within three years of the statute of limitations on assessments.

Petitioner was informed by this Administrative Law Judge that his denial of receipt of the notices and his assertion of the statute of limitations defense would necessitate a continuation so that both parties would have the opportunity to submit evidence on the question of whether the notices dated June 3, 1994 were mailed to petitioner within the three-year period of limitation. Petitioner balked at having the record remain open to additional evidence. Therefore, this Administrative Law Judge ruled that the timeliness of the June 3rd notices would not be in issue, in essence, that petitioner had waived the statute of limitations defense.

In a letter written in lieu of a brief, petitioner again raises the statute of limitations defense. Citing to ***Matter of Mast*** (***supra***), he states that the three-year period of limitation for

assessment of sales tax applies to a notice of determination issued to a responsible officer for taxes not remitted by the corporation with its returns. This is a correct statement of the law. However, the burden of proof to show that the notices were not issued within the period of limitation rests with petitioner (***see***, ***Matter of Pittman***, ***supra***, and cases cited therein). Petitioner is wrong in his contention that the mailing proof submitted by the Division to support its motion for summary determination establishes that the notices dated June 3, 1994 were not mailed. That proof was insufficient to prove that the notices were mailed on June 3, 1994. The mailing evidence did not prove the opposite contention, i.e., that the notices were never mailed at all. The denial of the Division's motion effectively resulted in a holding that issues of fact are unresolved with respect to the mailing of the notices. Petitioner declined the opportunity to resolve these issues of fact by allowing both parties to submit further evidence. Inasmuch as the evidence in the record is not sufficient to prove that the notices were not mailed within the three-year period of limitation, petitioner has not carried his burden of proof to show that the issuance of the notices was barred by the statute of limitations.

C. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as:

> any officer, director, or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] (Tax Law § 113l[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not

collected or paid depends on the particular facts of the case (***Matter of Cohen v. State Tax Commn***., l28 AD2d l022, 5l3 NYS2d 564).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (***Matter of Martin v. Commr. of Taxation & Fin***., 162 AD2d 890, 558 NYS2d 239; ***Matter of Cohen v. State Tax Commn***., ***supra***, 5l3 NYS2d at 565; ***Matter of Blodnick v. State Tax Commn***., l24 AD2d 437, 507 NYS2d 536; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Baumvoll***, Tax Appeals Tribunal, November 22, l989; ***Matter of D & W Auto Serv. Center***, Tax Appeals Tribunal, April 20, l989).

Petitioner was a person under a duty to act for Mendon Two and Mendon as GNC in complying with the requirements of Articles 28 and 29 of the Tax Law. He formed both corporations and installed the officers of those corporations. He was generally responsible for the financial affairs of the Mendon Corporations. He entered into financing agreements with the factors of those corporations. He negotiated with tax authorities on behalf of the corporations. He decided which creditors were to be paid and which were not. He maintained the books and records of both corporations. Identifying himself as the general manager of the

corporations, rather than a corporate officer, does not relieve him of the duty to collect and pay sales taxes on behalf of the corporations.

Petitioner's primary argument is that he should not be held liable for sales taxes which the Mendon Corporations' factor failed to pay over to the State. There is no merit to this argument. In several cases the Tax Appeals Tribunal concluded that an officer who had apparent authority within a corporation was not a responsible officer because an examination of the circumstances within the corporation revealed that the officer was actually precluded from exercising his authority (***see***, ***Matter of DeFeo***, Tax Appeals Tribunal, March 9, 1995; ***Matter of Taylor***, Tax Appeals Tribunal, October 24, 1991; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990). However, a person responsible for collection of sales tax is not relieved of personal liability for those taxes simply because he or she chose not to pay attention to whether the sales tax obligations of the corporation were being met or delegated the obligation to pay the sales tax to another (***see***, ***e.g. Matter of Martin v. Commissioner of Taxation & Fin.***, ***supra***; ***Matter of Cohen v. State Tax Commn.***, ***supra***; ***Matter of Blodnick v. State Tax Commn., supra***).

Here, petitioner was well aware that the Mendon corporations were filing sales tax returns without remitting the tax shown as due on those returns. He was not prevented from paying the tax by his factor. He simply chose to direct monies collected as sales tax to other creditors. It is no answer to say, as petitioner does, that there was not sufficient money available to pay the sales taxes. The sales taxes were collected by the Mendon corporations on behalf of the State. The tax monies should never have been placed into a general fund to pay other liabilities of the corporations.

Notice number L-009322891

D. I next will address whether the Division of Tax Appeals has jurisdiction over notice number L-009322891. This notice assessed sales and use taxes under articles 28 and 29 of the Tax Law. At the time the notices of determination were issued, section 1138(a)(1) of the Tax Law provided, as pertinent:

> If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. . . . Notice of such determination shall be given to the person liable for the collection or payment of the tax.

Tax Law § 1147(a)(1) provides:

> Any notice authorized or required under the provisions of [Article 28] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

A petition contesting a notice of determination of sales and use taxes must be filed within 90 days of the mailing of the notice by certified or registered mail (Tax Law § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). The filing of a request for a conference or a petition within the 90-day time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996). Where the Division claims that the request for a conciliation conference or petition for a hearing was not filed within the 90-day period, it has the burden of proving proper mailing of the notice of

determination to the taxpayer's last known address (***see***, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the case at hand (***see***, ***Matter of Katz***, ***supra***; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, ***supra***).

The Division is not required to produce employees who personally recall the mailing of each individual statutory notice. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (***e.g., Matter of Roland***, ***supra***; ***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, ***supra***). A properly completed Postal Service form 3877, reflecting Postal Service receipt of the item listed on the form, represents direct documentary evidence of the date and fact of mailing (***Matter of Air Flex Custom Furniture***, ***supra***; ***see also, Coleman v. Commr.***, 94 TC 82, ***Wheat v. Commr.***, 63 TCM [CCH] 2955). The United States Tax Court has held that "precise compliance with the postal service Form 3877 mailing procedures serves two purposes. A properly completed postal service form 3877 . . . *reflects compliance with IRS established procedures* for mailing deficiency notices [and] the properly completed form *raises a presumption of official regularity*" (***Wheat v. Commr., supra*** at 2958; emphasis added).

The Tax Appeals Tribunal has held that if the Division elects not to use a Form 3877 or its exact equivalent (a document complete on one page bearing a postmark and the signature of

a postal service employee) as its direct evidence of mailing, then it is required to provide evidence otherwise sufficient to prove both the fact and date of mailing of the statutory notice (***Matter of Green Valley Liquors***, Tax Appeals Tribunal, November 25, 1992).

Here, the Division relies on the affidavits of Geraldine Mahon and James Baisley to establish that the Division has an articulable mailing procedure. It has also offered a copy of the Notice of Determination dated August 8, 1994 (L009322891), the CMR's listing that notice, and the Mahon and Baisley affidavits to (1) show compliance with the articulated procedure and (2) to raise a presumption of official regularity.

The affidavits of James Baisley and Geraldine Mahon provide sufficient detail of the standard procedure of the Division for issuing notices of determination and notices of deficiency. The affidavits establish that a certified control number is assigned to each notice when the notices are generated. A certified mail record is created which lists all notices to be mailed, identifying each notice by identification number, certified mail number, and the name and address of the person to whom the notice is sent. The certified mail record is generated by the CARTS system at the time the notices are generated. The CMR and the notices listed on it are forwarded by Ms. Mahon's unit to the Division's mail processing center for mailing. The mailroom staff prepares the notices for mailing by placing them in envelopes, affixing postage and randomly checking the envelopes against the CMR. It then delivers the envelopes and the CMR to the USPS.

The pre-printed CMR contains an entry for the total number of pieces listed on it and a second entry for the total number of pieces received at the post office. Thus, the form itself would indicate an intention that a postal employee complete the CMR by entering the number

of items received. This second entry on the CMR listing notice number L-009322891 has not been completed. The omission of this information was not explained by the Division. Without this information, the number of pieces of mail received by the USPS cannot be determined (***Matter of Cal-Al Burrito Company, Inc.***, Tax Appeals Bureau, July 30, 1998; ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996). Accordingly, the Division has not met its burden of proof to show both the fact and date of mailing of the Notice of Determination, dated August 8, 1994.

The Tax Appeals Tribunal has held that where petitioner has received notice of the tax liability, but the exact date of mailing of the notice of determination cannot be established, the petitioner is entitled to a hearing to challenge the assessment of tax due (***Matter of Brager***, Tax Appeals Tribunal, May 23, 1996). In this proceeding, the parties were allowed to address both the timeliness of the petition and the underlying merits of the assessment.

The August 8, 1994 Notice of Determination was issued to petitioner as a person liable for sales and use taxes due from Mendon Two. It has already been established that petitioner was such a person. The Division did not offer any evidence of the basis for this notice. However, it is well established that a notice of determination is entitled to a presumption of correctness, and the burden is on the taxpayer to show that the notice is incorrect (Tax Law § 1132[c]; ***see***, ***Matter of Shukry v. Tax Appeals Tribunal***, 184 AD2d 874, 875-876; ***Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995). In this case, petitioner offered no evidence to show that the amount of tax assessed is incorrect; therefore, the notice must be sustained.

Notice Numbers L-011107833 through L-011107835

E. The analysis applied above applies equally to the notices of determination dated September 25, 1995. Again, the CMR form used by the Division includes a space which, apparently, is intended to be completed by a USPS employee, i.e., to enter the number of pieces of mail received by the USPS. In this case, the number of items listed on the CMR was changed manually from 168 to 167 to reflect the fact that one item was pulled from the mailing after the CMR was printed. The number 167 was circled. However, the number of items of mail received by the USPS is not shown, and no explanation was provided to rectify this omission. Accordingly, the Division of Tax Appeals has jurisdiction to consider the petition with regard to these notices.

Notice numbers L-011107833 through L-011107835 were issued to petitioner as a person responsible for the collection of tax on behalf of Rytown Millwork, Inc. There is scarcely any evidence in the record regarding this corporation. However, petitioner did state that Rytown Millwork was one of the many corporations which he formed and for which he acted as general manager. Inasmuch as petitioner offered no evidence challenging the correctness of these tax assessments, he must be found liable for the taxes assessed in the notices of determination (***see***, ***Matter of Hammerman, supra***).[4]

F. During the course of the proceeding, petitioner claimed to be under the protection of a bankruptcy court. Petitioner provided very little information regarding any personal bankruptcy proceeding. Although petitioner was afforded a hearing based upon a petition which appears to have protested assessments listed on a Statement of Consolidated Tax Liabilities, it appears that

[4] It would appear from a Statement of Consolidated Tax Liabilities entered into evidence by petitioner that these tax liabilities have been satisfied. This determination sustains the notices themselves. It does not address the amount of tax remaining due.

the parties have been treating these assessments as fixed and final and that petitioner has entered into deferred payment agreements for most of them. The collection activities of the Division, whether pursued in connection with a bankruptcy proceeding or otherwise, are not within the jurisdiction of the Division of Tax Appeals (***Matter of Pavlak***, Tax Appeals Tribunal, February 12, 1998; ***Matter of Driscoll***, Tax Appeals Tribunal, April 11, 1991).

F. The petition of William T. Jackling is denied, and the following notices of determination are sustained: L-008890841 through L-008890847, L-009322891 and L-011107833 through L-011107835.

Dated: Troy, New York
January 20, 2000

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE