STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION DTA NO. 817039
IRWIN KUSHNER	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period July 5, 1997 through November 15, 1997 and for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for Period September 1, 1997 through November 30, 1997.	:	

Petitioner, Irwin Kushner, 3 Pat Malone Drive, Suffern, New York 10901, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period July 5, 1997 through November 15, 1997 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1997 through November 30, 1997.

The Division of Taxation ("Division") by its representative, Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated July 16, 1999, returnable August 16, 1999, for an order directing the entry of summary determination in favor of the Division on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency and notice of determination. Petitioner, appearing by Stein Riso Mantel Haspel & Jacobs, LLP (Dennis L. Stein, Esq., of counsel), filed an affirmation and affidavit in opposition to the motion.

Upon review of all of the papers filed in connection with this motion, Arthur S. Bray, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts

that since petitioner did not protest the notices in these matters within 90 days of the date the notices were issued, the Division of Tax Appeals lacks jurisdiction to review these notices.

2. Petitioner's petition, which was received by the Division of Tax Appeals on April 7, 1999, challenged two notices asserting deficiencies of withholding tax. It also challenged an assessment of sales tax. Two notices and demands, dated December 3, 1998, asserted deficiencies of withholding tax as follows:

Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
9/27/97	$0.00	$0.00	$12,303.58	$0.00	$12,303.58
11/15/97	0.00	0.00	5,681.07	0.00	5,681.07

According to a Consolidated Statement of Tax Liabilities, which was attached to the petition, there is also an outstanding liability of sales tax in the amount of $164,840.95 plus interest in the amount of $19,961.70 and penalty in the amount of $34,597.59 less payments or credits of $945.00 for a balance due of $218,455.24.

3. The petition included a copy of a conciliation order, CMS No. 172456, dated January 15, 1999, which denied petitioner's request for a conciliation conference because “the notices were issued on August 10, 1998, but the request was not received until December 14, 1998, or in excess of 90 days, the request is late filed.”

4. The Division included with its motion papers a copy of its answer to the petition, dated June 10, 1999, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, two notices of deficiency dated August 10, 1998 and a notice of determination dated August 10, 1999.

5. As noted, the Division submitted two affidavits pertaining to the mailing of the notices. The first affidavit was that of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center who attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of

the U.S. Postal Service ("USPS"). Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to a branch of the United States Postal Service in the Albany area. The postal employee affixes a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley states that:

> [h]ere the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office. The U.S. Postmark on each page of the mail record is the official acknowledgment of the U.S. Post Office of the receipt of the pieces of mail recorded on the certified mail record. My knowledge that the postal employee circled the 'total number of pieces' for the purposes of indicating that 357 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phase 'total pieces and amounts listed' if the number of pieces received equals that listed or 2) by writing the total number received after the phrase 'total pieces received at the Post Office.' (Baisley affidavit, p. 2.)

He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on August 7, 1998 an employee of the mail processing center delivered three pieces of certified mail addressed to Irwin Kushner to the Colonie Center Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the postmarked certified mail record delivered to and accepted by the Postal Service on August 7, 1998 for the records maintained by the CARTS

control unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

6. In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to the mailing at issue consisted of 33 fan-folded (connected) pages and included the 3 notices issued to Irwin Kushner on August 7, 1998. She described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

7. Attached to Ms. Mahon's affidavit, as exhibit "A," is a copy of pages 1, 14 and 33 of the original certified mail record issued by the Division on August 8, 1998. The certified mailing record includes notices L015453886, L015453887 and L015453888 issued to Irwin Kushner. According to Ms. Mahon, the certified control numbers run consecutively without any deletions. There are 11 entries on each page with the exception of page 33 which contains 5 entries. Ms. Mahon notes that portions of the certified mailing record, which are attached to her affidavit, have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

The fifth paragraph of Ms. Mahon's affidavit states:

> [i]n the upper left hand corner of page 1 of the certified mail record the date July 30, 1998 was manually changed to August 7, 1993. The typewritten date, July 30, 1998, was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice(s) so that there is sufficient lead time for the Notice(s) to be manually reviewed and then processed for postage, etc. by the Department's Mechanical Section. The handwritten change of the date from July 30, 1998 to August 7, 1998 was made by personnel in the

> Department's mail room, who changed the date so that it conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the U.S. Postal Service. (Mahon affidavit, p. 2.)

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. Ms. Mahon states that in this instance a Postal Service representative initialed page 33 of the certified mail record and affixed a postmark to each of the 33 pages.

As Ms. Mahon points out, page 14 of the certified mail record indicates that notices numbered L015453886, L015453887 and L015453888 were sent to Irwin Kushner, by certified mail using control numbers P 911 008 814, P 911 008 815 and P 911 008 816. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on August 7, 1998. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS control unit.

8. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mailing record and a copy of each of the notices. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." The upper right-hand corners of the pages are numbered 1, 14 and 33, respectively. The upper left-hand corner of each page contains the printed date of "7/30/98." On the first page, this date was crossed out and a new date of "8/7/98" was written above the original printed date. Each of the three pages contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and

P.O. Address," "Postage," "Fee" and "RR Fee." Certified numbers are listed in a vertical column on the left side of each page running successively. Page 14 contains three entries which sets forth petitioner's name and address, notice numbers (L 015453886 through L 015453888) and a certified control numbers (P 911 008 814 through P 911 008 816). The notice numbers and the certified control numbers correspond with those found on the notices which are attached to the affidavit of Ms. Mahon. On page 33, the "total pieces and amounts listed" is stated to be 357. Also, the number 357 is circled adjacent to the statement "total pieces received at the post office." In addition, the total fee of $481.95 is consistent with the mailing of 357 pieces of mail at a fee of $1.35. A stamp of "August 7, 1998" from the Colonie Center Branch of the United States Postal Service appears on each of the three pages of the certified mailing record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on page 33.

9. As exhibit B, the Division offered copies of two notices of deficiency and a notice of determination. Each of the notices of deficiency are dated August 10, 1998 and state that withholding tax is due. The first notice of deficiency lists assessment number L 015453886, states that the total amount due is $5,681.07 and has certified mail number P 911 008 814 printed at the top. The second notice of deficiency lists assessment number L 015453887, states that the total amount due is $12,303.58 and has certified control number P 911 008 815 printed at the top. The notice of determination lists assessment number L 015453888, states that the total amount due is $205,985.10 and bears certified control number P 911 008 816.

10. In opposition to the motion for summary determination, petitioner's representative, Dennis L. Stein, Esq., states that the Division concluded that petitioner was responsible for withholding and sales tax as an officer of U.S. Bus Manufacturing, Inc. According to Mr. Stein, petitioner first received notice of this determination on or about December 3, 1998 when he received a Notice and Demand for Payment of Tax Due. This notice contained a Consolidated Statement of Liabilities for the periods ended September 27, 1997, November 15, 1997 and

November 30, 1997.

Upon receiving the Notice and Demand, petitioner filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services ("BCMS") received the request on December 15, 1998. On January 15, 1999, BCMS dismissed the request as untimely finding that the time to request a conference had expired on August 10, 1998.

In his affirmation, Mr. Stein argues that neither the Baisley nor Mahon affidavits establish the general mailing procedures for mailing notices of deficiencies. After referring to the sixth paragraph of Mr. Baisley's affidavit (***see***, Finding of Fact "5"), Mr. Stein asserts that Mr. Baisley's knowledge is not based on first hand knowledge and therefore fails to establish that the circle around "357" and the initials on page 33 of the CMR were placed there by an employee of the Postal Service. Furthermore, after referring to the fifth paragraph of Ms. Mahon's affidavit (***see***, Finding of Fact "6"), petitioner's representative states:

> Mahon does not supervise the mail room personnel. In fact, Mahon's responsibilities encompass the processing of notices prior to shipment to the Division's Mail Section. Rather, this supervision would presumably would presumably fall under the purview of Baisley. Yet, Baisley's affidavit is silent as to the date change. Moreover, Mahon's affidavit fails to state the basis of her presumption that the date was changed by mail room personnel. Moreover, Mahon states that '[e]ach statutory Notice is placed in an envelope by Department personnel' (see Mahon affidavit at paragraph 7). Yet, Mahon fails to identify what Department that personnel belongs to and whether she has direct knowledge of those procedures. Finally, Mahon's affidavit contains errors with regard to the manual date change of the CMR . . . .
>
> In addition, the mailing procedures described by Mahon and Baisley fail to demonstrate a chain of custody of the CMR and the corresponding notices. Mahon's affidavit fails to state how the notices and the CMR get from her unit to the mail unit supervised by Baisley. Mahon's affidavit also fails to describe any controls that might exist to ensure that a CMR and the corresponding notices are associated with each other and remain associated when they are forwarded to the mail room. (Citation omitted.)

Mr. Stein contends that the foregoing dates are crucial where, as here, the purported mailing date predates the date printed on the notice by three days. According to Mr. Stein, the inconsistencies prevent the Division from showing that it actually mailed the notices to petitioner. Mr. Stein concludes that as a result of the inconsistencies and lack of first hand

knowledge, it is impossible to know whether the dates were changed by employees of the Division or by someone else and whether the dates were changed before or after the CMR was delivered to the Postal Service.

Petitioner also submitted an affidavit which confirmed that on or about December 3, 1998 he first received notice that the Division had determined that he was a responsible person for the withholding tax and sales tax liabilities of U.S. Bus Manufacturing, Inc. Mr. Kushner explained that he received the notice in the form of a Notice and Demand for Payment of Tax Due. Mr. Kushner further states that upon receipt of the notice, he immediately contacted his attorney and made a request for a conciliation conference. This request was denied on the grounds that he had not requested a conference within 90 days of an August 10, 1998 Notice of Deficiency. Petitioner concludes with the statement that he never received any of the notices purportedly sent on August 7, 1998 and he did not refuse to sign for any certified letters.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, *shall recite all the material facts and show that there is no material issue of fact*, and that the facts mandate a determination in the moving party's favor. The *motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact (emphasis added).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 487 NYS2d 316, 317, ***on remand*** 111 AD2d 138, 489 NYS2d 970). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick &***

Dolleck, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see, Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 1147(a)(1) provides as follows:

> Any notice authorized or required under the provisions of this article 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. The *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 (emphasis added).

Pursuant to Tax Law § 1138(a)(1), a notice of determination:

> shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state . . . *After ninety days* from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same (emphasis added).

Tax Law § 681(a) states, in part:

> [i]f upon examination of a taxpayer's return . . . the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.

Tax Law § 681(b) also provides, in relevant part, that:

> [a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . .

Upon receipt of the notice of deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends

the running of the limitations period for the filing of a petition (Tax Law § 170[3-a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (***see, Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

C. Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (***see, Matter of T. J. Gulf, Inc. v. New York State Tax Commn.***, 124 AD2d 314, 508 NYS2d 97; ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

This burden is imposed on the Division for different reasons, depending upon whether the notice sent was a Notice of Determination or Notice of Deficiency. For a Notice of Determination, Tax Law § 1147(a)(1) provides that the proper mailing of a Notice of Determination (i.e., the certified or registered mailing of the notice to the taxpayer at his last known address) is presumptive evidence of the receipt of the notice by the person to whom the notice is addressed. As explained by the Court of Appeals in ***Matter of Ruggerite, Inc. v. State Tax Commn.*** (64 NY2d 688, 485 NYS2d 517, 518), this language in Tax Law § 1147(a)(1) "makes 'receipt' a part of the procedural equation and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption." Thus, it is crucial that the Division proves that the notices were properly issued, even in the face of possible rebuttal evidence introduced by the petitioner.

In ***Matter of Malpica*** (Tax Appeals Tribunal, July 19, 1990), the Tax Appeals Tribunal held that Tax Law § 681(a) does not require actual receipt by the taxpayer. Therefore, a notice of deficiency sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received ***(see***, ***Matter of Kenning v. State Tax Commn.***, 72

Misc 2d 929, 339 NYS2d 793, ***affd*** 43 AD2d 815, 350 NYS2d 1017, ***appeal dismissed*** 34 NY2d 653, 355 NYS2d 384, ***lv denied*** 34 NY2d 514, 355 NYS2d 1025; ***see also***, ***Keado v. United States***, 86-1 US Tax Cas ¶ 9321, ***affd*** 853 F2d 1209 [re: parallel Federal provision IRC § 6212(b)(1)]; ***cf.***, ***Matter of Ruggerite v. State Tax Commn.***, 97 AD2d 634, 468 NYS2d 945, ***affd*** 64 NY2d 688, 485 NYS2d 517 [dealing with sales tax assessment under Tax Law § 1147(a)(1)]**)**. Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer (***Matter of Malpica***, ***supra***), i.e., "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" ***(see***, ***Dorff v. Commissioner***, 55 TCM 412). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (***see***, ***Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111, 112).

The mailing evidence required of the Division is twofold: 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 particular instance in question (***see***, ***Matter of Katz***, ***supra***; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, ***supra***).

D. Through the affidavits of James Baisley and Geraldine Mahon and the pages of the certified mailing record, the Division has established its standard procedure for issuing notices of deficiency and determination. The affidavits show that when notices of deficiency are generated a certified control number is assigned to each notice. Thereafter, a certified mail record is created which sets forth, among other things, whom the notice is issued to and the taxpayer's name and address, the assessment number and the certified control number assigned to that notice. The affidavits and pages of the certified control record establish that notices were issued to petitioner. This is confirmed by the fact that the certified control numbers at the top of the notices correspond with the certified mailing record (***see, Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

E. The question remains whether the Division has established when the mailing occurred. The same arguments raised by petitioner in this matter were presented in ***Matter of Service Merchandise Co.*** (Tax Appeals Tribunal, January 14, 1999). In ***Service Merchandise*** the taxpayer also contended that it did not receive the statutory notice and was therefore precluded from contesting the notice on the merits. Specifically, it was argued, among other things, that the alleged basis of the purported knowledge as to the circling of the number of pieces was merely speculation by the affiant. The petitioner in ***Service Merchandise*** also argued that the procedures of the CARTS control unit were limited to the processing of notices before they were sent to the mailing unit and therefore the affiant did not have any knowledge and was unable to describe the process of how the Postal Service receives the CMR from the Division.

In its decision, the Tribunal rejected the taxpayer's arguments. Initially, the Tribunal found that ***Roland*** was inapposite because Mr. Baisley stated the basis for his knowledge that the postal employee circled the "total number of pieces" to indicate the number of pieces received at the Post Office. That is, the Division specifically requested that postal employees either circle the number of pieces or write the number of pieces on the mailing record to show the total number of pieces received. With respect to the remaining arguments, the Tribunal stated:

> In opposition to the Division's evidence, petitioner offers no evidence in support of its position that mailing of the notice at issue did not actually occur on August 5, 1996 or that the Division failed to follow its procedures in mailing this notice. While petitioner argues that the circled number on the CMR is not prima facie evidence that it was placed there by an employee of the USPS or that it indicates receipt by the USPS of the pieces of mail indicated on the CMR, petitioner offers no evidence to contradict that put forward by the Division. Absent such evidence, petitioner has not raised an issue of fact requiring a trial. (***Matter of Service Merchandise Co.***, Tax Appeals Tribunal, January 14, 1999.)

In this case, as in ***Service Merchandise***, petitioner has not offered any evidence to show that the mailing did not occur as claimed by the Division or that the Division failed to follow its procedures. Under these circumstances, petitioner has not raised an issue of fact requiring a trial concerning either the basis of the affiants' knowledge or the chain of custody of the notices and mailing record.

F. The Division's motion for summary determination is granted and the petition of Irwin Kushner is dismissed.

DATED: Troy, New York
November 12, 1999

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE