STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **GIULIO C. MONACO** 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, 1993 through May 31, 1996 and for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Period October 1, 1989 through November 30, 1989.	DETERMINATION DTA NO. 818759

Petitioner, Giulio C. Monaco, 8 DeForest Court, Box 163, West Nyack, New York 11566, 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, 1993 through May 31, 1996; and for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period October 1, 1989 through November 30, 1989.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Ave., New York, New York, on January 22, 2003 at 10:30 A.M., with all briefs to be submitted by October 3, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by DeGraff, Foy, Holt-Harris & Kunz, LLP (James H. Tully, Esq.) and S. Buxbaum and Company, P.C. (Stewart

Buxbaum, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

ISSUES

Notice No. L012598850-3

I. Whether the petition was filed within 90 days of the issuance of Bureau of Conciliation and Mediation Services ("BCMS") Order No. 159481.

II. Whether prior administrative law judge orders issued in this case preclude any further consideration of the timeliness issue at the hearing level.

III. Whether petitioner's request for a BCMS conference on Notice No. L012598850-3 was timely filed.

IV. Whether petitioner has established that the audit methodology employed by the Division of Taxation is unreasonable or that a reduction in the assessment is warranted; and

V. Whether petitioner was personally liable for sales tax due on behalf of G. C. Monaco Electric & Daughter, Inc. for the period June 1, 1993 through August 31, 1995, as a person required to collect and pay tax under Tax Law §§ 1131 and 1133 .

Notice No. L006333447

VI. Whether a hearing can be held on Notice No. L006333447, where no notice is produced for the record.

VII. Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of G.C. Monaco Electric, Inc. for the year 1989, as assessed by Notice No. L006333447.

FINDINGS OF FACT[1]

Assessment No. L-012598850-3

1. The Division of Taxation ("Division") issued a Notice of Determination (Assessment No. L-012598850-3) dated September 5, 1996 to petitioner for the period June 1, 1993 through August 31, 1995, asserting additional sales and use taxes in the amount of $219,515.09, plus interest and penalty of $73,105.73 and $85,258.75, respectively, for a balance due of $377,879.57. The tax assessed was determined due from G.C. Monaco Electric & Daughter, Inc., not paid by the corporation, and thereafter assessed against petitioner as an officer or responsible person of the corporation.

2. G.C. Monaco Electric & Daughter, Inc. executed a consent dated November 8, 1995, extending the statute of limitation for the assessment of sales and uses taxes for the period September 1, 1992 through August 31, 1993 until September 20, 1996.

3. Prior to the hearing in this matter, the Division filed a motion for summary determination concerning Assessment No. L-012598850-3 on the grounds that petitioner failed to file a petition with the Division of Tax Appeals within 90 days of the issuance of the conciliation order. The Division submitted the certified mail record ("CMR") for the mailing of Conciliation Orders Dismissing Requests (for conference) for February 28, 1997, supported by the affidavits of Carl DeCesare and James Baisley setting forth the procedures for the mailing of conciliation orders and indicating that the regular procedures were followed in this case. On the CMR page where petitioner's name appears, the number "14" appears across from "Total Number of Pieces Listed by Sender." There is no entry directly across from "Total Number Of

[1] Since this determination ultimately turns on procedural issues, facts relating to the merits of the audit and officer liability, though developed in the record by the parties, have been omitted from this determination.

Pieces Received at Post Office." The line below such entries where the postal employee indicates receipt there is an entry stating, "14-Houley." The administrative law judge who issued the order concerning the timeliness of the petition found the CMR insufficient inasmuch as the postal employee did not fill in the amount of the total number of pieces received, leaving a question as to what the U.S. postal clerk meant when she entered the number 14 on the page of the mailing record that contained the entry for the conciliation order issued to petitioner. Thus, the mailing proof was deemed flawed and incomplete. The administrative law judge concluded that it would then follow that petitioner would have been entitled at that point to a hearing on the merits of Assessment No. L-012598850-3, except that the administrative law judge was compelled to analyze further the question of whether the Division properly issued the notice in question. Since the administrative law judge determined there to be questions of fact, summary determination was denied as to Assessment No. L-012598850-3, and pursuant to the order dated August 15, 2002, petitioner was "granted a hearing on the merits, thereof, unless within 10 days of the date of issuance of this modified order petitioner elects in writing to compel the Division to prove that it properly issued notice number L-012598850-3, in which case the hearing on the merits of said notice will be converted to a timeliness hearing."

Thereafter, by correspondence dated August 19, 2002, petitioner's representative elected to have a hearing on the merits.

4. The Division obtained a sworn affidavit from the U.S. Postal Service employee who entered the information on the CMR previously discussed, and submitted it at this hearing. Ms. Houley indicated that although she usually places the number of items received next to the designation for total pieces received, she erroneously placed the number representing items

received beside her name. She concluded that the U.S. Postal Service received 14 pieces of mail from the Division on February 28, 1997 including the certified letter addressed to petitioner.

5. The petition in this matter was filed on or about October 1, 2001.

Assessment No. L-006333447

6. The petition in this matter listed Notice No. L-006333447 as a contested liability, which was listed on a Consolidated Statement of Tax Liabilities dated July 10, 2000, attached to the petition. The statement indicated that a withholding tax penalty in the amount of $41,921.08, plus interest in the amount of $34,758.65, less credits of $732.16, was assessed against petitioner. The petition indicates that petitioner has no record or memory of receiving the assessment.

7. The Division in its affidavit in the motion for summary determination, conceded that petitioner is entitled to a hearing on the merits as to Notice No. L-006333447.

8. Neither an original nor a copy of Notice No. L-006333447 was submitted as part of the record in either the motion for summary determination or at the hearing conducted by the Division of Tax Appeals.

9. The Division did not submit a certified mailing record regarding Notice No. L-006333447 at the time of its motion for summary determination or at the hearing conducted by the Division of Tax Appeals.

10. The Division raised the fact that it was attempting to prove the valid issuance of Notice No. L-006333447 numerous times during the hearing and submitted evidence in an attempt to show that Notice No. L-006333447 was properly issued to petitioner. The Division introduced its case contact notes pertaining to collection activity against petitioner, and a master file printout generated from the Division's computer systems pertaining to petitioner's

withholding tax history. The withholding history indicates that a withholding tax return for the period October 1, 1989 through November 30, 1989 was filed on October 16, 1990 reporting New York State, New York City and Yonkers tax withheld in the amount of $41,921.08, which was not remitted.

11. At the time of the withholding period in issue, responsible person assessments were issued manually and not through the Case and Resource Tracking System ("CARTS"). CARTS contains no direct confirmation that an assessment was issued to petitioner.

The Division introduced CARTS information available in more recent years entitled "Assessments Receivable System Assessments Transcript" concerning Notice of Deficiency No. L-006333447. The transcript contains information about issued assessments, including the assessment type, reason, source, status and period, the tax, penalty and interest amounts, and the date of issuance of the notice. The CARTS Assessments Receivable System transcript dated January 15, 2003 shows that the Division generated a withholding tax penalty in the amount of $41,188.92 against petitioner for the period October 1, 1989 through November 30, 1989, and that a corresponding notice of deficiency was dated May 10, 1991.

12. According to the Division's answer to the petition herein, the Division allegedly issued Notice of Deficiency No. L-006333447 to petitioner, dated March 1, 1993, indicating he was being held responsible as an officer or responsible person of G.C. Monaco Electric, Inc. for a penalty in an amount equal to withholding taxes not paid by the corporation.

13. Petitioner conceded that he was the owner and an officer of G.C. Monaco Electric, Inc. during 1989, but denied officer or responsible officer status in G.C. Monaco Electric & Daughter, Inc. at any time.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner maintains that regarding Notice No. L012598850-3, the affidavit of the postal employee submitted into evidence at the hearing should not be considered, and since petitioner's representative made a timely request for a hearing on the merits (an option provided for in the modified administrative law judge order dated August 15, 2002), the merits of the audit and the propriety of the assessment should be considered.

Petitioner argues that he was never a responsible officer of G.C. Monaco Electric & Daughter, Inc. since he only consulted with her during one tax year and had other serious life problems to tend to during the other years.

Petitioner asserts the audit of G.C. Monaco Electric & Daughter, Inc. was not reasonably calculated to reflect the actual taxes due.

Petitioner has no record or recollection of receiving the assessments in issue, including the one which asserts officer liability for withholding taxes for G.C. Monaco Electric, Inc.

15. As to the filing of the petition with regard to Notice No. L012598850, the Division asserts that it has established a mailing date of the conciliation order of February 28, 1997, and since the petition was not filed until October 2001, it is untimely.

Concerning Notice No. L012598850, the Division maintains that petitioner's request for a BCMS conference was filed more than 90 days after receipt of the notice by petitioner, and thus, was untimely.

As to the prior orders issued by another administrative law judge on the Division's prior motion for summary determination, the Division takes the position that the former orders do not preclude the Division from offering additional proof of mailing of BCMS Order No. 159481, nor

preclude the Division from proving for the first time that the request for a BCMS conference was also filed late.

Concerning the audit method used by the Division, the Division asserts that its method was reasonable given the corporation's failure to provide the Division with certain relevant records during the audit.

The Division maintains that petitioner failed to establish his lack of involvement with G.C. Monaco Electric & Daughter, so as to absolve himself of liability for sales tax due for the period June 1, 1993 through August 31, 1995 as a responsible officer of the corporation.

Lastly, as to Notice No. L006333447, the Division maintains that it has established that it mailed this notice to petitioner and since petitioner concedes he was president of G.C. Monaco Electric Inc. during 1989, he should be held responsible for the withholding tax penalty as assessed.

CONCLUSIONS OF LAW

A. The first issue that must be addressed with respect to Assessment No. L-012598850-3 is whether the Division of Tax Appeals has jurisdiction to hear this matter, i.e., whether subject matter jurisdiction exists. Subject matter jurisdiction, which gives a court the right to entertain a given case, is derived from the constitution and the laws of the sovereign it serves. If subject matter jurisdiction is not conferred, the court may not entertain the matter. A defect in subject matter jurisdiction is not curable by waiver, consent or stipulation of the parties, and any judgment rendered where subject matter jurisdiction was lacking is void (Siegel, NY Prac § 8, at 9-10 [3d ed]).

The filing of a petition within the 90-day period provided by statute is a prerequisite to jurisdiction by the Division of Tax Appeals, and without the same, the Division of Tax Appeals

is statutorily precluded from hearing the merits of the case. Subject matter jurisdiction over the petition is thus conferred when the petition is timely filed, measured from the issuance date of the governing document, which in this case is the conciliation order dismissing Assessment No. L-012598850-3 (CMS No. 159481). Since the conciliation order was issued on February 28, 1997, petitioner was required to file a petition contesting the same by May 29, 1997. However, where a petition is filed, but the timeliness of the protest is at issue, the Division of Taxation has the burden of proving the mailing of the governing document, from which the timeliness of the petition will be measured (***see, Matter of Katz, Tax Appeals Tribunal***, November 14, 1991; ***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990), in this case the conciliation order.

The mailing of the conciliation order is presumptive evidence of the receipt of the same by the person to whom addressed ***(Matter of Katz, supra).*** However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (***see, Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111). The Division bears the burden of proving both the date and fact of mailing of the order (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991; ***Matter of Katz***, ***supra***). An order 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), and where an order is found to have been properly mailed, a presumption arises that it was delivered or offered for delivery to the taxpayer in the normal course of the mail (***see, Matter of Katz, supra***). The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of the orders, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question.

B. In the modified order of August 15, 2002, the administrative law judge held that the affidavits presented set forth sufficient proof to establish the Division's standard procedure for issuing conciliation orders. However, the Division's proof in the motion for summary determination that the procedures were adhered to was deficient as to the number of pieces received by the postal employee. In an attempt to cure the defect, at this hearing the Division submitted the sworn affidavit of Ms. Houley, the postal employee who signed the CMR in issue. Petitioner objects to such submission on three grounds: that petitioner waived his right to contest the issuance of the notice of determination in order to go forward with a hearing on the merits; that the Division has had prior opportunities to submit proper evidence and should not be given another opportunity; and lastly that the submission of the Houley affidavit is seeking to change the documents and post office records originally offered into evidence.

Petitioner's arguments are rejected. Petitioner cannot waive subject matter jurisdiction even if it appears that the modified order issued by the administrative law judge in response to the motion for summary determination provided a choice in the matter. Proper jurisdiction must exist before the Division of Tax Appeals may entertain the merits (***see,*** Siegel, NY Prac § 8**,** ***supra***).

Secondly, the prior opportunities that the Division was given to submit proper mailing evidence was in the context of a motion for summary determination and a motion to reargue the original motion. Since the result of the motion as to Assessment No. L-012598850-3 was denial of summary determination due to the existence of questions of fact, it stands to reason that an opportunity to cure such questions would remain. Since the hearing is the next forum for the submission of such evidence, the affidavit was properly submitted.

Lastly, petitioner argues that the Houley affidavit is seeking to change documents submitted into evidence before the administrative law judge who addressed petitioner's prior motion for summary determination. The outcome of the motion as to Assessment No. L-012598850-3 was an order holding that triable issues of fact existed and thus, summary determination was denied as to this notice, a holding which does not have the finality of a determination after hearing. Unlike ***Matter of Anzilotti*** (Tax Appeals Tribunal, February 22, 1996), ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991) and a long history of decisions based on similar facts, where attempted submission of additional evidence was made after the hearing record was closed, the submission in this case was made after denial of a motion for summary determination and during the hearing. Denial of a motion for summary determination only establishes that summary determination is not warranted at that time, and nothing further (Siegel, NY Prac § 287 [3d ed]). There is not yet a final determination. Furthermore, petitioner was afforded the right to confront such evidence during the hearing. Thus, the only issue remaining is whether the Houley affidavit provides the facts necessary for the Division to obtain a determination in its favor as to the timeliness of the petition, measured from the issuance of the conciliation order.

In order to resolve the issues of fact, the Division is permitted to introduce at hearing evidence to establish the facts. Petitioner argues that in a prior case where the Division sought to correct a flawed certified mail record, the Tax Appeals Tribunal disallowed it, citing ***Matter of Brager*** (Tax Appeals Tribunal, May 26, 1996). In ***Brager***, the flaw in the CMR was the fact that the postal employee failed to indicate the number of pieces of mail received for mailing. The attempted corrective action in ***Brager*** was identified as the presence of a postmark on the CMR which the Tribunal decided did not overcome the absence of an indication by the postal

employee of the number of pieces received for mailing. In cases of a flaw in the mailing records, the Tax Appeals Tribunal has deemed additional evidence critical, and has noted that such evidence would be sufficient to prove actual mailing (***Matter of Brager***, Tax Appeals Tribunal, May 23, 1996). In ***Brager***, the Tribunal analyzed another Tax Court case, ***Massie v. Commissioner*** (69 TCM 2471, ***affd*** 82 F2d 423, 96-1 US Tax Cas ¶50237), which found that the IRS "presented competent evidence in the form of testimony by a manager as to the mailing procedures of [the IRS district office]; an incomplete certified mail list, which at least suggests mailing; the original notice of deficiency dated [the date of mailing on the mail list]; and . . . an original envelope bearing the proper article number and the stamp-marks indicating the mail was not claimed by the addressee." In ***Massie***, the Tax Court determined that the evidence overcame a flawed certified mail list and was sufficient to prove mailing. The Court in ***Massie*** dismissed that petitioner's suggestions that there was no direct testimony concerning the mailing of the notice and that there were gaps in the documentary evidence, saying that there was no requirement to produce employees who personally recalled each notice that was mailed.

Likewise, ***Brager*** must be contrasted with ***Epstein v. Commn***. (58 TCM 128), where the Tax Court was presented with an incomplete CMR, and permitted the introduction of a properly completed Postal Form 3877, and more importantly, the testimony of the postal employee, to fill in the gaps left by the incomplete CMR.

Thus, the question to be addressed is whether Ms. Houley's sworn affidavit is the type of additional evidence that would satisfy a gap in the CMR, in order to prove proper mailing of a statutory notice. The Houley affidavit is merely seeking to clarify what could have been reasonably inferred; that the number next to her name was the number of items received, though not written across from the "total number of pieces received" entry but beneath it. Clearly, the

affidavit cures the defect in the mailing documents, thus the Division has shown proper mailing of the conciliation order on February 28, 1997. Since the petition was not filed within 90 days or by May 29, 1997, petitioner did not protest Assessment No. L-012598850-3 in a timely manner, and the Division of Tax Appeals lacks jurisdiction to address the merits of the underlying notice.

C. As noted in Conclusion of Law "B," the administrative law judge orders issued in this case in response to the Division's motion for summary determination and motion to reargue do not preclude any further consideration of the timeliness issue at the hearing level. The grant of summary determination operates as an adjudication on the merits and is entitled to res judicata treatment. However, the denial of a motion for summary determination, as here, establishes nothing except that summary judgment is not warranted at this time (Siegel, NY Prac § 287 [3d ed]) due to the existence of triable facts. The subsequent trial or hearing is the proper place for questions of fact to be resolved.

D. Since it has been determined that the Division of Tax Appeals does not have jurisdiction over Assessment No. L-012598850-3, it is unnecessary to address whether the request for a conciliation conference was timely made in relation to the issuance of notice L-012598850-3. Furthermore, without jurisdiction, the Division of Tax Appeals is without proper authority to address the merits of the Division's audit methodology or whether petitioner was personally liable for sales and use taxes due on behalf of G.C. Monaco Electric & Daughter.

E. Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is a deficiency in income tax. The notice is the jurisdictional document which forms the basis for a valid assessment and allows the Division to proceed against the taxpayer in question.

The statute does not require actual receipt by the taxpayer; the notice 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 667, 355 NYS2d 1028; ***cf., Matter of Ruggerite, Inc. v. State Tax Commn***., 64 NY2d 688, 485 NYS2d 517). In effect, if the notice is properly mailed, the statute places the risk of nondelivery on the taxpayer. After the statutory notice is mailed, the taxpayer has 90 days within which to either request a conciliation conference (Tax Law § 170-3-a[a]) or file a petition for a redetermination (Tax Law § 689[b]).

In this case the petition protested three assessments listed on a Consolidated Statement of Tax Liabilities, and claimed nonreceipt of the jurisdictional notice. Although the Division was on notice that the production of the notice was critical to its case, the Division failed to submit a copy of Notice No. L-006333447 into evidence, and was unable to provide proof of mailing of Notice No. L-006333447. There is no evidence in the record that petitioner actually received Notice No. L-006333447. The Division's submission of proof as to the existence of the assessment at best proves the Division may have generated a notice at some time, but the dates and amounts of the penalty are not consistently set forth (see, Findings of Fact "11" and "12"), leaving even the issue of what may have been generated speculative. Because the issue of nonreceipt was placed before the Division of Tax Appeals, it was incumbent upon the Division to prove the existence of the notice in question as well as the mailing date of such notice.

F. The Division of Tax Appeals is an adjudicative body of limited and statutorily created jurisdiction (***see***, Tax Law §§ 681, 2008). Upon review of the evidence, it must be concluded that the Division has failed to show that it issued Notice No. L-006333447 in compliance with

Tax Law § 681(a). Any weight given to the Division's evidence concerning this assessment is certainly outweighed by the missing documents. Without a copy of Notice No. L-006333447 in evidence in this proceeding, it cannot be concluded that the notice was ever mailed to petitioner as the Division contends (***see, Pietanza v. Commr***., 92 TC 729, ***affd*** 935 F2d 1282; ***Magazine v. Commr.***, 89 TC 321; ***United States v. Wright***, 86-1 US Tax Cas ¶ 9457; ***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). Without proof of a valid notice of deficiency, I am unable to reach a conclusion that a valid assessment exists, and thus it must be canceled (***Matter of Malpica, supra***). Since the failure to issue the notice is jurisdictional in nature and may be raised at any time by a party or by the adjudicating body and may not be waived (***see, United States v. Wright, supra***, 86-1 US Tax Cas ¶ 9457), it must be concluded that the Division of Tax Appeals lacks the jurisdiction to reach the merits of the case. Accordingly, the issue of whether petitioner is liable for withholding taxes of G.C. Monaco cannot be reached.

It should be noted that the conclusion reached is consistent with the ***Matter of New York State Department of Taxation and Finance v. Tax Appeals Tribunal and Richard Scharff*** (151 Misc 2d 326; 573 NYS2d 140). In ***Scharff***, the Tribunal, in a *sua sponte* ruling, canceled an income tax assessment and granted a petition based upon the Division's failure to introduce into the record the Notice of Deficiency which formed the basis for the assessment. The Tribunal determined that it was without jurisdiction to reach the merits of the case without proof of a valid Notice of Deficiency in the record (***see, Matter of Richard Scharff***, Tax Appeals Tribunal, October 4, 1990). The Supreme Court held that the Tribunal had exceeded its authority by canceling an assessment on a ground that had clearly not been raised or litigated below. The court found that the Tribunal had failed to follow its own procedures in dismissing the proceeding without notice to the parties.

This determination also cancels an assessment based upon the Division's failure to introduce notices of deficiency into the record. Unlike ***Scharff***, however, the issue of subject matter jurisdiction in this case was not raised *sua sponte*, but rather by petitioner in the petition, and by the Division in its answer, at hearing and in its brief. Thus, proper notice and opportunity to litigate the issue has been satisfied.

G. The petition is dismissed as to Notice L-012598850-3, dated September 5, 1996; and the petition is granted as to Notice No. L-006333447, which is deemed to be invalid and is canceled.

DATED: Troy, New York
April 1, 2004

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE