

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JI LONG CHEN	:	ORDER
	:	DTA NO. 826885
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period Ending May 29, 2014.	:	

Petitioner, Ji Long Chen, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending May 29, 2014. Petitioner also filed an Application for a Prompt Hearing on a Predecision Warrant, Warrant ID E-507011180-W001-2.

On May 22, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to consider the merits of a petition filed in excess of 30 days following the issuance of a warrant notice.¹ On June 9, 2015, petitioner, appearing by Wang Law Office, PLLC (William R. Stoltz, Esq., of counsel) submitted an affirmation in opposition to the Notice of Intent to Dismiss Petition. On June 19, 2014, the Division of Taxation appearing by Amanda Hiller, Esq. (Leo Gabovich) submitted a letter and attachments in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on June 19, 2015. After due consideration of the documents and arguments

¹ The Division of Tax Appeals assigned DTA No. 826883 to the petition timely filed in protest of the underlying Notice of Determination, L-042582270-9. The subject of the Notice of Intent to Dismiss Petition is the Application for Prompt Hearing on a Predecision Warrant filed by petitioner at the same time as the petition protesting the underlying Notice of Determination.

submitted by the parties and the pleadings and proceedings herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed an Application for a Prompt Hearing on a Predecision Warrant, with the Division of Tax Appeals following the issuance of a predecision warrant.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Ji Long Chen, a Notice of Determination (Assessment ID L-042582270-9), dated March 11, 2015, that assessed cigarette tax penalty in the amount of \$1,453,800.00 for the period ended May 29, 2014. The Division also issued to petitioner a Notice and Demand for Payment of Tax Due (Notice and Demand) (Assessment ID L-042582270-9), dated March 11, 2015, that assessed cigarette tax penalty in the amount of \$1,453,800.00 for the period ended May 29, 2014. Based upon assessment ID L-042582270-9, the Division's Collections and Civil Enforcement Division - CVS issued a Warrant (Warrant ID: E-507011180-W001-2) against petitioner for cigarette tax penalty in the amount of \$1,453,800.00, and filed the same in the Kings County Clerk's Office on March 11, 2015. Petitioner's address was listed as 1867 Shore Pkwy Fl 2, Brooklyn, New York, 11214-6621, on the Notice of Determination, the Notice and Demand, and the Warrant.

2. The Division's Transaction Field Audit Management unit, issued a "Notice and Demand for Payment of Cigarette Tax under Jeopardy Assessment" to petitioner at the Shore Parkway, Brooklyn, New York, address. This notice stated, in pertinent part, that:

"In the belief that the assessment or collection of a deficiency will be jeopardized by delay, the Commissioner of Taxation hereby makes a jeopardy assessment, pursuant to Sections 171(Third), 171(Eighth), 479 and 481 of the New York State Tax Law for the deficiency in the amount of \$1,453,800.00 as shown within the enclosed Notice and Demand and within the enclosed Notice of Determination. Also enclosed, please find notification of your right to a prompt (expedited)

hearing, application forms to request a prompt hearing, the Tax Appeals Tribunal rules of practice and procedure, petition forms and information concerning your rights as a taxpayer, etc. . . .

Explanation:

Please refer to the enclosed statement of facts upon which the Commissioner of Taxation relied in issuing the jeopardy assessment /pre-decision warrant.”

“Enclosures” listed in the “Notice and Demand for Payment of Cigarette Tax under Jeopardy Assessment” consisted of: the Statement of Facts; the Notice and Demand, L 042582270; a Form TA 10, Petition; a Form TA 11.2, Application for Prompt Hearing; a Form TA 12, Notification for your Right to a Prompt Hearing; the Notice of Determination, L 042582270; Publication 131, Your Rights and Obligations Under the Tax Law; a Form DTF-996.1- F, Notice of Taxpayer Rights; and the Tax Appeals Tribunal Rules of Practice and Procedure.

3. The Statement of Facts, dated March 11, 2015, provided the following grounds for the filing of the Warrant and Notice and Demand against petitioner:

“The New York State Department of Taxation and Finance (the ‘Department’) has information which causes it to believe that there are penalties and interest which are due and owing by Ji Long Chen to the Department as a result of his possession in this State of more than two thousand (2,000) cartons of cigarettes whose packs bore the Commonwealth of Virginia Cigarette Tax Stamps on or about May 29, 2014.

The Department also has information causing it to believe that a jeopardy assessment is reasonable under the circumstances. Namely, it appears that (1) Ji Long Chen is a Chinese national and is residing in the United States as a permanent resident; (2) Ji Long Chen is in the process of selling real property which he owns located at 1867 Shore Parkway, Brooklyn, New York; (3) the property at 1867 Shore Parkway, Brooklyn, New York is the only asset of Ji Long Chen that is known to the New York State Department of Taxation and Finance; and (4) we are not currently aware of any business activities conducted by Ji Long Chen within the United States. Based on these facts and others, this Department believes that Ji Long Chen is likely to cause any proceeds realized from the sale of the above referenced property to be, in the short term, dissipated or transferred outside New York State and possibly outside the United States, making it

significantly more difficult to the Department to enforce against such assets.

If you disagree with the amounts asserted, you may request a hearing within **30 days** of receipt as described in the attached *Notice of Taxpayer Rights* (DTF-996.1-F).

Said warrant(s) have been filed in order to preserve the State's interest in your property based on the outstanding liability existing and under the authority of New York State Tax Law sections 171(Third), 171(Eighth), 479 and 481.

You may appeal this judgment if you so desire. The enclosed 'Notice of Rights to Hearing' will explain your rights in this matter."

4. By certified letter dated April 14, 2015, petitioner's representative, William R. Stoltz, Esq., filed a petition challenging Notice of Determination (Assessment No. L-042582270-9), and petitioner's Request for a Prompt Hearing on a Predecision Warrant with the "Supervising Administrative Law Judge, Division of Tax Appeals, Agency Building 1, Empire State Plaza, Albany, New York 12223" (Albany address). Attachments to this letter included an original and two identical copies of the petition, a power of attorney appointing Mr. Stoltz as petitioner's representative for purposes of the petition, an original Application for a Prompt Hearing on a Predecision Warrant (form TA-11.2 [7/89]), and a power of attorney appointing Mr. Stolz as petitioner's representative for purposes of the hearing on the predecision warrant. Both the petition and the Application for a Prompt Hearing on a Predecision Warrant are dated and signed by petitioner on April 2, 2015. Petitioner's address is listed as Shore Parkway, Brooklyn, New York, and is the address on both the petition and the Application for a Prompt Hearing on a Predecision Warrant.

On his Application for a Prompt Hearing, petitioner requested and consented to a consolidated hearing on the merits of the underlying Notice of Determination and the Application for a Prompt Hearing.

5. On May 22, 2015, Daniel J. Ranalli, the Supervising Administrative Law Judge of the

Division of Tax Appeals issued to petitioner and the Division a Notice of Intent to Dismiss Petition. The notice states, in relevant part:

“You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to Tax Law § 2008(2)(c), the Division of Tax Appeals is without jurisdiction to consider the merits of a petition filed in excess of thirty (30) days following the issuance of a notice warrant.

The instant petition appears to have been filed in protest of a Predecision Warrant, Warrant Id. E-507011180-W001-2, issued on March 11, 2015. However, the petition was not filed until April 14, 2015, or thirty four (34) days later.”

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted a letter, dated June 19, 2015, from its representative, Leo Gabovich, stating:

“The Division is in receipt of the Notice of Intent to Dismiss the petition in the above referenced matter. As the petition submitted was thirty four days late from the Predecision Warrant, we are in agreement with the proposed dismissal.”

The four documents attached to this letter included copies of the subject predecision warrant, an “Affidavit of Mailing” of Paula Dietzel, dated March 12, 2015, a one-page United States Postal Service (USPS) form (PS Form 3877), and a USPS Certified Mail Receipt (PS Form 3800).

7. The “Affidavit of Mailing” of Paula Dietzel, a Division employee, states that:

“on the 12th day of March 2015, she served the within tax warrant(s); Notice to Judgment Debtor; Notice and Demand for Payment of Tax Due for Assessment Number L-042582270-9; Statement of Facts dated March 11, 2015, Petition (TA-10); Notification of your Right to a Prompt Hearing on the Issuance of a Predecision Warrant or Warrant Issued Under a Jeopardy Assessment (TA-12) and Application for a Prompt Hearing on a Predecision Warrant (TA 11.2) by certified mail upon Ji Long Chen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ji Long Chen
1867 Shore Parkway Fl 2
Brooklyn, NY 11214-6621

and by delivering the same enclosed in a postpaid wrapper into the exclusive care and custody of an employee of the NYS Taxation and Finance mail room within the State of New York.”

Ms. Dietzel further averred that, “the addressee is the petitioner herein and that the address set forth on the wrapper is the last known address of such petitioner.” No documents were attached to Ms. Dietzel’s affidavit of mailing.

8. In support of dismissal of the petition, the Division submitted a copy of a one-page PS Form 3877. The top of this form contains the following information: the typewritten name and address, “Collection/Civil Enforcement Div., Bldg 8 Room 354 / CAT, NYS Campus, Albany, NY 12227,” which appears in the upper left corner;² boxes labeled “Certified” and “Return Receipt for Merchandise” are checked as the type of mail or service; and the handwritten date “3-12-15” appears in the upper right corner. The following information was handwritten on line 1 of this PS Form 3877: the number “70123460000173278964” appears under the heading “Article Number”; petitioner’s name and the Shore Parkway, Brooklyn, New York, address appear under the heading “Addressee (Name, Street, City, State, & Zip Code)”; and under the headings “Postage,” “Fee” and “RR Fee,” the amounts 1.61, 3.30 and 2.20, respectively, appear. This PS Form 3877 does not identify what the article contained. Although no other entries appear on this PS Form 3877, a large handwritten X runs from line 3 to line 7. On the bottom of the form there are three boxes. The first box, labeled “Total Number of Pieces Listed by Sender,” contains the handwritten number “1.” The second box, labeled “Total Number of Pieces Received at Post Office,” contains illegible initials or signature of a Postal Service employee. The third box,

² Although the name appears to be two lines long, the first line is illegible due to poor photocopying.

labeled “Postmaster, Per (Name of receiving employee),” contains a postmark dated March 12, 2015 of the Colonie Center branch of the USPS.

9. The Division also submitted a copy of the front of a PS Form 3800 U.S. Postal Service Certified Mail Receipt (certified mail receipt). The imprinted number 7012 3460 0001 7327 8964 runs vertically up the left edge of the certified mail receipt. The middle of the certified mail receipt is divided into two spaces. The left space contains separate sequential boxes labeled: “Postage,” “Certified Fee,” “Return Receipt Fee (Endorsement Required),” “Restricted Delivery Fee (Endorsement Required),” and “Total Postage & Fees.” No amounts appear in any of these boxes. In the middle right space labeled “Postmark Here,” nothing appears. The lower part of the certified mail receipt has separate sequential boxes labeled “Sent To,” “Street, Apt. No.; or PO Box No.,” and “City, State, ZIP+4.” The handwritten name “Ji Long Chen” appears in the “Sent To” box, and the handwritten address “1867 Shore Pkwy FL 2, Brooklyn, NY 11214-6621” appears in the remaining address boxes.

10. Petitioner filed the affirmation of William R. Stoltz, Esq., in opposition to the Notice of Intent to Dismiss Petition. Mr. Stoltz asserts that petitioner received a Notice and Demand for Payment of Cigarette Tax under Jeopardy Assessment with Assessment ID L-042582270-9 and the Predecision Warrant number E-507011180-W001-2, along with other supporting documents on or around March 16, 2015 by certified mail. He further asserts that the papers sent by the Division contained instructions that the petition and the application for a prompt hearing should both be sent to the following address: “Supervising Administrative Law Judge, NYS Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180-2894” (Troy address). Mr. Stoltz contends that upon receipt of those papers, petitioner retained counsel, i.e., the Wang Law Office PLLC (William R. Stoltz, Esq., and Chenyu Jean Wang, Esq., of counsel),

who then filed a petition, challenging the Notice of Determination, by certified mail to the Troy address on April 2, 2015. He further contends that at the same time, petitioner's counsel also filed an application for a prompt hearing on a predecision warrant by certified mail to the Troy address. Mr. Stoltz noted that the envelopes, containing both the petition and the application for a prompt hearing on a predecision warrant, were returned to petitioner's counsel based upon the incorrect addresses listed on the same. Mr. Stoltz avers that upon receipt of the returned envelopes, petitioner's counsel contacted the Division of Tax Appeals, and was informed that the address listed on the forms provided by the Division was incorrect, and that the petition and the application for a prompt hearing on a predecision warrant should both be sent to the Albany address. He further avers that upon receipt of that information, petitioner's counsel immediately refiled both the petition and application for a prompt hearing on a predecision warrant by certified mail directed to the Albany address on April 14, 2015.

11. Eight exhibits were attached to Mr. Stoltz's affirmation including, among other documents, copies of the Notification Of Your Right To A Prompt Hearing On The Issuance Of A Predecision Warrant Or Warrant Issued Under A Jeopardy Assessment (form TA-12 [7/89]); the cover letter dated April 2, 2015 from Mr. Stoltz to the Troy address; the Application for a Prompt Hearing on a Predecision Warrant (form TA-11.2 [7/89]) dated and signed by petitioner on April 2, 2015; the Predecision Warrant; an executed power of attorney; a certified mail receipt (PS Form 3800) imprinted with Article number 7014 2870 0002 0563 5790; a sales receipt dated April 3, 2015 from the USPS's Flushing Main Post Office; and the face page of the "returned" envelope addressed to the Troy address.

12. The Notification Of Your Right To A Prompt Hearing On The Issuance Of A Predecision Warrant Or A Warrant Issued Under A Jeopardy Assessment (form TA-12 [7/89])

provided, in relevant part, as follows:

“The enclosed warrant based on New York State tax liabilities has been filed against you. This warrant, which affects your personal property and real estate, was filed by the New York State Department of Taxation and Finance to secure assets for the payment of tax debts as indicated in the enclosed Statement of Facts supporting the warrant

If you wish to protest the issuance of this warrant, you may do so by filing an **Application For A Prompt Hearing (Form TA.11.2)** with the Division of Tax Appeals. Your application must be in writing, must state that It is an application tar [sic] a prompt hearing regarding a predecision warrant

* * *

File your application by **registered or certified mail** or personally deliver it to:

**Supervising Administrative Law Judge
Division of Tax Appeals
Riverfront Professional Tower
50 Federal Street
Troy, New York 12180-2894”**

13. At the bottom of the Application for a Prompt Hearing on a Predecision Warrant (Form TA-11.2 [7/89]), the following filing information was provided:

“Please forward this application and the power of attorney for your representative, if any, by registered or certified mail or personally deliver to:

Supervising Administration [sic] Law Judge
Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street
Troy, New York 12180-2894”

14. In a certified letter, dated April 2, 2015, addressed to the Supervising Administrative Law Judge at the Troy address, petitioner’s representative, Mr. Stoltz, requested a prompt hearing on a predecision warrant. Attachments to this letter included the Application for a Prompt Hearing on a Predecision Warrant and a power of attorney appointing Mr. Stolz as petitioner’s representative for purposes of the hearing on the predecision warrant. Petitioner’s

Application for a Prompt Hearing on a Predecision Warrant contained his name, address and telephone number and the name, address and telephone number of his representative.

15. As proof of mailing of his Application for a Prompt Hearing on a Predecision Warrant on April 3, 2015, petitioner submitted copies of the front of certified mail receipt (PS Form 3800), a receipt dated April 3, 2015 from the USPS's Flushing Main Post Office, and the face page of the returned envelope. The imprinted number 7014 2870 0002 0563 5790 runs vertically up the left edge of the certified mail receipt. Near the top of the form, a box labeled "OFFICIAL USE" contains the typed address "TROY NY 12180." The middle of the certified mail receipt is divided into two spaces. The left space contains separate sequential boxes labeled: "Postage," "Certified Fee," "Return Receipt Fee (Endorsement Required)," "Restricted Delivery Fee (Endorsement Required)," and "Total Postage & Fees." The following typed amounts appear in the postage, certified fee, return receipt fee, restricted delivery fee and total postage and fee boxes: \$1.12, \$3.30, \$0.00, \$0.00 and \$4.42, respectively. In the middle right space labeled "Postmark Here," a USPS postmark dated April 3, 2015 appears along with the handwritten name "Chen, Ji Long." The lower part of the certified mail receipt has separate sequential boxes labeled "Sent To," "Street, Apt. No.; or PO Box No.," and "City, State, ZIP+4." The handwritten name "Supervising Administration [sic] Law Judge, NYS Division of Tax Appeals" appears in the "Sent To" box, and the handwritten address " Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180-2894" appears in the remaining address boxes. The copy of the sales receipt dated April 3, 2015 from the USPS's Flushing Main Post Office lists a number of transactions including the sale of postage in the amount of \$1.12 and certified fee in the amount of \$3.30 for a first class mail letter bearing "USPS Certified Mail # 701470000205635790" to "Troy, NY 12180-2867 Zone-2" and the issuance of postage in the total amount of \$4.42 for such

letter. The copy of the face page of an envelope, addressed to the Troy address, contains the words “CERTIFIED MAIL,” a bar code and corresponding certified number “7014 2870 0002 0563 5790” and bears a machine-metered USPS postage stamp that has been partially obscured by the USPS label bearing the following typed date and words: “8604/07/15, RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD.” The return address on the envelope is listed as “Wang Law Office, PLLC, New York Office, . . . , 36-25 Main Street, 3rd Floor, Flushing, NY 11354.”

CONCLUSIONS OF LAW

A. Tax Law § 2008 provides, in relevant part, as follows:

“1. All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

2. Expedited hearings. (a) Notwithstanding any provision of law to the contrary, any person who receives a written notice that advises that person of (i) the proposed cancellation, revocation, or suspension of a license, permit, registration, or other credential issued under the authority of this chapter excluding a certificate of registration of a retail dealer under section four hundred eighty-a of this chapter, (ii) the denial of an application for a license, permit, registration, or other credential issued under the authority of this chapter excluding an application for registration as a retail dealer under section four hundred eighty-a of this chapter and an application to renew a certificate of authority filed pursuant to paragraph five of subdivision (a) of section one thousand one hundred thirty-four of this chapter and any other law, or, (iii) the imposition of a fraud penalty under this chapter, must file a petition with the division of tax appeals within thirty days of the mailing of that notice (unless that person has requested a conciliation conference as provided in subdivision three-a of section one hundred seventy of this chapter), or the cancellation, revocation, suspension, denial, or penalty will be permanently and irrevocably fixed. An expedited hearing must be scheduled within ten business days of receipt of the petition.

(c) In any case where an expedited hearing is required under this subdivision, if the commissioner believes that the collection of any tax or the public safety will be jeopardized by delay, he or she may immediately cancel, revoke, or suspend a license, permit, registration, or other credential issued under the authority of this chapter before the commencement of those proceedings. Written notice of the cancellation, revocation, or suspension must be given to the licensee, permittee, registrant, or otherwise credentialed person by registered or certified mail or personal service as provided by the civil practice law and rules. The license, permit, registration, or other credential will be permanently and irrevocably cancelled, revoked, or suspended, unless the licensee, permittee, registrant, or otherwise credentialed person, within thirty days of receipt of the written notice, files a petition with the division of tax appeals to review the cancellation, revocation, or suspension. An expedited hearing must be scheduled within ten business days of receipt of the petition.”

B. 20 NYCRR 2394.3 provides that: “[e]very person to whom the provisions of this Part applies is entitled, upon request, to a prompt hearing to determine the probable validity of the department’s claim with regard to the issuance of a predecision warrant.”

20 NYCRR 2394.1(b)(1) defines a predecision warrant as:

“any warrant issued by the State Tax Commission commanding a levy upon the real and personal property of any person prior to the rendering to that person of a decision or determination of the State Tax Commission after a hearing held pursuant to the authority of sections 171, 279-a, 280, 280-a, 288, 295, 430, 478, 503-a, 510, 689, 722, 962, 1007, 1089, 1138, 1139, 1250, 1312, 1468 and 1519 of the Tax Law.”

C. With respect to notice of right to a prompt hearing, the Division’s regulations, at 20 NYCRR 2394.4, provide, in relevant part, as follows:

“(a) Written notice of the right to a prompt hearing to determine the probable validity of the department’s claim with regard to a predecision warrant commanding the levy upon the real and personal property of any person to whom these rules are applicable shall be mailed to such person at his last known address by registered or certified mail no later than five business days after said warrant is issued. The notice shall contain a statement of facts upon which the department relied in issuing the predecision warrant.”

D. With respect to the application for prompt hearing, 20 NYCRR 2394.5 provides, in

relevant part, as follows:

“(a) Written application for the hearing provided for in this Part must be mailed by registered or certified mail to:

New York State Tax Commission
Director of Tax Appeals Bureau
Building 9, State Office Campus
Albany, NY 12227

* * *

(c) The application must state that it is an application for a prompt hearing regarding a predecision warrant and contain the applicant’s name, address and telephone number and the name, address and telephone number of the applicant’s representative, if the applicant has a representative, together with a proper power attorney if one has not previously been furnished.”

E. Pursuant to 20 NYCRR 3000.9(a)(4), the supervising administrative law judge may issue a determination dismissing a petition for lack of jurisdiction. The Notice of Intent to Dismiss Petition provides the parties with the facts and reason underlying the intended dismissal. In this case, the application for a prompt hearing on a predecision warrant was treated as a petition that, on its face, appeared to be untimely filed since the petition was not filed within 30 days of the issuance of the predecision warrant. The notice of intent to dismiss petition cited Tax Law § 2008(2)(c) as the reason for the Division of Tax Appeals lacking jurisdiction to consider the merits of a petition filed in excess of 30 days following the issuance of a warrant notice. Petitioner’s representative, in his affirmation, contended that the papers accompanying the Notice and Demand for Payment of Cigarette Tax under Jeopardy Assessment (Assessment ID. L-042582270-9) and the predecision warrant (Warrant Id. E-507011180-W001-2) clearly indicated that the Division only issued a penalty pursuant to Tax Law § 481(1)(b)(i)(A) for possession of allegedly “unstamped or unlawfully stamped packages” of cigarettes, not one of the limited and distinct categories of cases to which the “expedited hearing” provisions of Tax Law § 2008(2)(a)

are applicable. Petitioner is correct, the predecision warrant is not one of the notices subject to the expedited hearing provisions of Tax Law § 2008(2). Rather, the predecision warrant was issued under the authority of Tax Law §§ 171(1), 171(3), 479 and 481.

F. The Division issued the subject predecision warrant against petitioner for cigarette tax penalty, and filed the same in the Kings County Clerk's office on March 11, 2015 (*see* Finding of Fact 1). The Division was required to provide written notice of the right to a prompt hearing to determine the probable validity of its claim with regard to the predecision warrant by mailing the same to petitioner at his last known address by registered or certified mail no later than five business days after the predecision warrant was issued (*see* 20 NYCRR 2394.4[a]). The notice was required to contain a statement of facts upon which the Division relied in issuing the predecision warrant (*id.*).

G. Where the timeliness of a petition, i.e., the application for a prompt hearing on a predecision warrant, is at issue, the Division must prove proper mailing of the subject notice (*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 Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of the particular document in question (*id.*).

H. To prove mailing, the Division submitted copies of the predecision warrant, Ms. Dietzel's affidavit of mailing, a one-page PS Form 3877 and the front page of PS Form 3800. The Division's proof of mailing is woefully inadequate for a number of reasons. First, although specific documents were identified in Ms. Dietzel's affidavit of mailing, none were attached to the copy of her affidavit submitted by the Division. Second, while Ms. Dietzel's affidavit of mailing alleges that she served specifically identified documents upon petitioner by certified mail

by enclosing them in a “securely sealed postpaid wrapper” addressed to him, her affidavit does not identify the USPS certified mail number assigned to that postpaid wrapper. In addition, Ms. Dietzel’s affidavit of mailing does not indicate that she prepared the one-page PS Form 3877, i.e., the certified mailing record, the front of PS Form 3800, or a USPS return receipt card. Lastly, while the copy of the one-page PS Form 3877 contains the USPS postmark dated March 12, 2015 and the initials of the USPS employee acknowledging receipt of one item bearing article number 70123460000173278964 and petitioner’s name and the Shore Parkway, Brooklyn, New York, address, the Division failed to submit an affidavit of an employee familiar with the Division’s standard mailing procedures. As such, the Division failed to prove mailing of the predecision warrant, the notice of the right to a prompt hearing and the statement of facts to petitioner on March 12, 2015.

I. While petitioner’s representative claimed that petitioner received the predecision warrant and accompanying documents on or about March 16, 2015, the specific date of receipt has not been established. On April 2, 2015, petitioner dated and signed the Application for a Prompt Hearing on a Predecision Warrant, and also executed a power of attorney appointing Mr. Stoltz as his representative for purposes of the prompt hearing on the predecision warrant. In accordance with the directions in both the “Notification Of Your Right To A Prompt Hearing On The Issuance Of A Predecision Warrant Or A Warrant Issued Under A Jeopardy Assessment” (*see* finding of fact 12) and the Application for a Prompt Hearing on a Predecision Warrant (*see* finding of fact 13), petitioner’s representative filed petitioner’s fully executed Application for a Prompt Hearing on a Predecision Warrant and the power of attorney by certified mail on April 3, 2015 to the supervising administrative law judge at the Troy address (*see* Finding of Fact 15). Because the envelope, containing the application, bore incorrect address information supplied by

the Division, the Postal Service returned the envelope to the sender, i.e., petitioner's representative, on April 7, 2015. Upon receipt of the returned envelope, petitioner's representative ascertained the correct mailing address for the Division of Tax Appeals, to wit, the Albany address, and remailed the Application for a Prompt Hearing on a Predecision Warrant by certified mail on April 14, 2015 to the supervising administrative law judge at the Albany address (*see* Finding of Fact 4).

Despite the erroneous address information provided by the Division,³ the record clearly shows that petitioner timely and properly filed his Application for a Prompt Hearing on a Predecision Warrant less than 30 days after the date of the actual receipt of the predecision warrant, the notice of right to a prompt hearing and the statement of facts.

J. The Notice of Intent to Dismiss Petition, dated May 22, 2015, is withdrawn and a prompt hearing on Predecision Warrant, Warrant Id.: E-507011180-W001-2, will be scheduled.

DATED: Albany, New York
September 10, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

³ 20 NYCRR 2394.5(a) lists another incorrect address to which an application for a prompt hearing on a predecision warrant must be mailed.