

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS HUANG	:	DECISION
	:	DTA No. 812285
for Revision of a Determination or for Refund of Tax on	:	
Gains Derived from Certain Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

Petitioner Thomas Huang, 36-09 Main Street, Flushing, New York 11354, filed an exception to the determination of the Administrative Law Judge issued on August 4, 1994. Petitioner appeared by Ettelman & Hochheiser, P.C. (Gary Ettelman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter on November 7, 1994 stating it would not be filing a brief in opposition, and this date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner timely filed a request for conciliation conference in response to a Notice of Determination of real property transfer gains tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "9" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

In support of its motion for summary determination, the Division of Taxation ("Division")

submitted an affidavit of its representative along with attached exhibits. The Division asserts in its affidavit that, since petitioner did not file a request for conciliation conference or a petition with the Division of Tax Appeals within the 90-day time period prescribed by Tax Law §§ 170(3-a) and 1441(1), the late request for conciliation conference was properly denied and the petition before the Division of Tax Appeals should be dismissed, with prejudice, for lack of jurisdiction.

Attached to the Division's affidavit are the following exhibits: (1) a copy of petitioner's petition, received by the Division of Tax Appeals on September 30, 1993, which addresses petitioner's arguments on the merits (i.e., that the assessment is improper because a credit for real estate brokerage fees payable on the sale of the real property in question was disallowed, making the consideration received for the transfer artificially high and subject to the gains tax) and also contests the Conciliation Order dismissing as late filed petitioner's request for conciliation conference, claiming that (a) petitioner's wife, Alice Huang, previously filed a timely request for a conciliation conference with respect to the identical sales of real property and the identical assessment in issue, having been sent a separate (identical) assessment; (b) it was improper in any case for the State to issue separate assessments to a husband and wife, transferring a piece of property as tenants by the entirety; and (c) the previously timely filed request for conciliation conference by Alice Huang should be deemed to include the same request for petitioner, as the State's rejection of petitioner's individual request as untimely was improper; (2) a copy of a Request for Conciliation Conference dated March 15, 1993, signed by Alice Huang, regarding assessment number L-006900787-9, and referencing a Notice of Determination dated December 28, 1992 in the amount of \$166,188.98; (3) a copy of a Notice and Demand for Payment of Tax Due issued to Thomas Huang, dated April 8, 1993 regarding assessment number L-006900788-8, asserting tax in the amount of \$168,836.31, which includes the following statements:

"The original notice sent to you on 12/28/92 showed the detailed computation of the additional amount due. Please refer to the COMPUTATION SUMMARY

SECTION for a computation of the current balance due.

* * *

"If we do not receive full payment of the total amount due or your disagreement by 04/18/93:

"We will take legal action to compel payment of the balance due.

"Interest and any applicable penalty will continue to be added to the balance due until full payment is received;"

(4) a copy of a Request for Conciliation Conference dated April 14, 1993, signed by Thomas Huang, regarding assessment number L-006900788-8, and referencing the April 8, 1993 notice and demand; (5) a copy of the envelope in which petitioner's Request for Conciliation Conference was mailed, bearing a U.S. postmark of April 14, 1993, with a Bureau of Conciliation and Mediation Services ("BCMS") "received" stamp dated April 20, 1993; (6) a copy of petitioner's Conciliation Order (CMS No. 130498), dated July 2, 1993, dismissing the conciliation conference request as late filed; and (7) an incomplete microfiche copy of a sheet in petitioner's file listing, inter alia, the following information: "Thomas Huang - taxpayer", "taxpayer ID - B 05 0562857 SS 3", "joint taxpayer ID - none", "assessment stage date - 04/19/93", "ASMT posted date - 12/17/92", and "Not [and] Demand date - 04/08/93", and with certain notations made on the copy in black marker, including: "Not. of det. 12.28.92", "L-006900788", "Amt. 20,424.85", "per. 2.2.88", "ART. 31B", "Request late", "rec'd 4.20.93", and "pet 4.14.93".

It should be noted that while no copy (either in microfiche or otherwise) of the Notice of Determination allegedly issued to Alice Huang is in evidence, reference to the assessment number of the notice is made on her conciliation conference request. The Division, in its February 24, 1994 answer to petitioner's petition did not deny that petitioner and his wife were issued separate, identical notices of determination regarding the assessment in question; however, the Division denied petitioner's allegations regarding the impropriety of issuing separate notices and further denied that petitioner's wife's request for conciliation conference in

response to the notice should be deemed to include petitioner.

In order to establish proof of mailing of the Notice of Determination to petitioner, the Division also submitted the affidavits of Donna Biondo, Daniel LaFar, and Carl Moeske, employees of the Division.

The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Control Unit of the Division, sets forth the Division's general procedure for mailing notices of determination (and deficiency) to taxpayers, including the delivery of the notices to the post office and the Division's receipt of the postmarked documents following the mailing. In addition, the affidavit explains that the computerized preparation of notices of determination includes the simultaneous preparation of a certified mail record, the record listing those taxpayers to whom notices are being issued and the certified control number assigned to each notice. According to Ms. Biondo, the pages of the certified mail record remain fan-folded, or connected to each other, before the notices are accepted by the United States Postal Service and even after the mail record is returned to the Division. She states that it is only upon her request that the pages of the mail record are disconnected from one another.

Ms. Biondo attests to the truth and accuracy of the copy of the certified mail record attached to her affidavit (see, Exhibit "A") which contains a list of the notices allegedly issued by the Division on December 28, 1992, including one addressed to petitioner. This copy of the certified mail record consists of 21 pages, through which the certified control numbers run consecutively from P 911 206 272 on page 1 to P 911 206 496 on page 21, with 11 entries per page except for page 21, on which there are only five entries.

Page 11 contains certified mail control number P 911 206 383, Notice of Determination number L 006900788, addressed to petitioner, Thomas Huang, at 39 15 234 St., Douglaston, NY 11363-1536. The notice number listed matches that on the Notice of Determination issued to petitioner (see, microfiche copy of petitioner's Notice of Determination, Exhibit "B" attached to Biondo affidavit).

As Ms. Biondo attests, each of the 21 pages of the certified mail record submitted is date

stamped December 28, 1992 (a few of the postmarks are extremely light, but the date is recognizable nonetheless) by the Roessleville branch of the United States Postal Service in Albany, New York. The date stamp of December 28, 1992 is visible on page 11 of the mail record, the page on which petitioner's notice is listed, as well as on pages 1 and 21, the first and last pages of the record. Each of the pages of the certified mail record bears the print date of December 17, 1992, changed manually on the first page only to December 28, 1992, and the record print time of 21:06:45. Ms. Biondo explains in her affidavit that the print date for certified mail records is approximately 10 days prior to the mail date, in order to give sufficient time to review the notices by hand and to process the notices for postage. She notes that the print date here was changed by personnel in the Division's mail room to conform to the actual date of delivery of the notices to the United States Postal Service.

It is noted that while the certified mail record submitted contains, on the last page, a total for the number of pieces listed (i.e., "225"), it does not contain a total for the number of pieces received at the post office. Ms. Biondo mentions that there were no deletions from the list.

The two-page microfiche copy of the Notice of Determination sent to petitioner (see, Exhibit "B" attached to Biondo affidavit) is dated December 28, 1992 and is an assessment in the amount of \$166,168.98, including penalty and interest. On the first page is the following statement: "You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 03/28/93."

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the Roessleville Branch of the U.S. Postal Service for pieces of certified mail. Finally, Mr. LaFar asserts that the staff's regular procedures were followed in mailing the notice of determination in question to petitioner on December 28, 1992.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as

follows:

The affidavit of Carl Moeske, a Computer Programmer Analyst in the Information Systems Management Bureau of the Division, discusses the Division's regular practice of retaining microfiche copies of statutory notices, rather than hard copies of the notices themselves. Specifically, Mr. Moeske attests that:

"4. It is the Department's regular business practice to retain microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hardcopies of statutory notices. The manner in which microfiche copies of statutory notices are generated and retained by the Department of Taxation and Finance is explained below.

"The Organization of Assessment Data

"5. During the course of every business day, the Department's keyboard operators enter assessment data into the Department's CARTS (Case and Resource Tracking System) computer system from computer terminals. From the computer terminal, they direct the computer system to add a new 'case' using the information that has been entered. The 'on line' program which controls the data entry procedure then stores the data entered in a record format in the control area of the computer system until the close of business. After business hours each night, the 'Create Assessment' program within the computer system 'sweeps' the data, accumulated during the course of the day, in the computer's control area.

"6. This nightly sweep procedure takes the data in the computer, organizes it by assessment and for each assessment, by filing period, assigns assessment numbers to the data for all the respective taxpayers and sets up a CARTS case in the computer system for each individual assessment. For example, in this matter, the data for Petitioners was organized and set up under assessment number L 006900788. Once a case has been set up in the CARTS system in this manner, Department personnel can access the case information from a computer terminal by keying in the assessment number.

"The Generation of Statutory Notices

"7. After the case has been set up in the CARTS system, the creation of statutory notices is controlled by the billing program within the system. This program updates interest and penalties and stores a record of the statutory notices and other documents which are generated by the CARTS system and sent to the taxpayer and/or the representative (e.g., Statement of Proposed Audit Changes, Notice of Deficiency, Notice and Demand, Etc.). This record includes a description of the document generated and sent, the date on the document, the amounts due which were set forth in the document, the address on the document, and any other addresses to which the document was to be sent.

"8. The billing program produces a document when told to do so via a command entered by a data entry person. Once the particular notice has been created within the computer system by the billing

program, but prior to printing, the data is copied onto one large computer disk referred to as the billing output file, so that it can be run through the Department's pre-sort procedure.

"The Presort Procedure

"9. The purpose of the pre-sort procedure is to prepare the particular notice for mailing. The presort procedure is run by computer program which, among other things, organizes the data so that the notices are sorted according to whether they are to be sent by regular first class mail or certified mail (Notices of Deficiency and Notices of Determination). They are then sorted within each batch by zip code, which results in a discount to the Department on postage costs. The hard copies of the notices are later printed and stacked according to zip code to facilitate the insertion of the statutory notices and any attached pages into envelopes by a sophisticated machine referred to as an intelligent inserter.

"10. During the pre-sort procedure, bar codes are placed in the upper left hand corner of each page of the notice so that the intelligent inserter knows how many pages are included with each statutory notice so that all pages can be inserted together into one envelope. The pre-sort procedure also entails the assignment of a certified mail control number to the particular notice. This number will correspond with the number appearing on the mailing log and the certified mail documentation affixed to the envelope at the time of mailing. The pre-sort program then inserts a code in the data which will be printed in the right margin of the microfiche. This code, which has been highlighted in yellow in the right margin of Exhibit 'A' is inserted so that the microfiche copy of the notice can be sorted according to the particular Tax Department organizational unit that generated the statutory notice.

"11. Once the pre-sort procedure is complete, a computer file containing the data which will be printed on each statutory notice is recorded on computer tape (hereinafter 'the record tape'). During the production of the record tape, the pre-sort program omits the bar codes and job control language (print formatting commands) such that the information generated, when applied to the microfiche, will not be in the same format as the printed hard copy.

"12. Although the format is different, the content is identical except that (1) the microfiche contains a numerical code (highlighted in the upper left corner of the microfiche [Exhibit 'A']) which, among other things, represents the day and time that the nightly sweep procedure begins, and (2) the hard copy contains a similar code (highlighted in the lower left hand corner of the hard copy). The content of the microfiche copy is discussed in greater detail below. After the record tape has been generated, the pre-sorted data is then sent to the print phase of the computer system so the hard copy can be printed and sent to the taxpayer.

"13. A record tape is then sent to the New York State Office of General Services (OGS) twice a week. The computer system at

OGS reads the information from the computer tape and the information is then applied to microfiche using a special machine located at OGS. OGS then sorts the microfiche using the organizational unit code in the right hand margin (see, Par.10) and, within approximately two days, sends the prepared microfiche to the Department at Building 9, Second Floor, where it is retained.

"A Comparison of Microfiche with a Hard Copy

"14. Attached hereto as Exhibit 'B' is a copy of a Notice of Determination which was generated by the CARTS system and sent to another individual taxpayer. The assessment information has been redacted to preserve confidentiality. Also attached as part of Exhibit 'B' is the microfiche copy of the Notice of Determination for this case. The microfiche copy has been marked up and numerically cross-referenced to the hard copy of the Notice of Determination to illustrate that the microfiche copy is indeed an unformatted copy of the hard copy of the Notice of Determination.

"15. Attached as Exhibit 'C' is a copy of the form which, at the time the Notice of Determination for this case was generated, was the overlay, i.e., the blank form that the hard copy was printed on. As the form indicates, the Department letterhead and logo, the boxing notation and the language, 'KEEP THIS NOTICE FOR YOUR RECORDS', is preprinted on the first page of the form. The language, 'KEEP THIS NOTICE FOR YOUR RECORDS', is also preprinted on the second page of the form. The fact that these notations are preprinted on the form explains why they do not appear on the microfiche copy.

"16. In summary, based upon a review of Exhibits 'A' 'B' and 'C' it is clear that, with the exception of the computer codes mentioned above, the content of the microfiche copy of the Notice of Determination contains all the information printed on the hard copy" (Affidavit of Carl Moeske, pp. 1-4).

Mr. Moeske also attests to the fact that the microfiche copy of the notice sent to petitioner on December 28, 1992 and submitted with Mr. Moeske's affidavit is a true and accurate copy (see, Exhibit "A" attached to Moeske affidavit).¹

In response to the Division's motion, petitioner submitted an affidavit in opposition in which he restated the reasons for his challenge of the assessment on the merits and, as pertinent here, outlined his objections to the denial of his conciliation conference request. Specifically,

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We modified finding of fact "9" of the Administrative Law Judge's determination by deleting the second second sentence which read "Mr. Moeske also attests to the fact that the microfiche copy of the notice sent to petitioner on December 28, 1992 and submitted with Mr. Moeske's affidavit is a true and accurate copy (see, Exhibit "A" attached to Moeske affidavit)" and by adding numbers "4" through "16" of Mr. Moeske's affidavit of March 1, 1994.

petitioner claims the following in regard to the filing of a request for conciliation conference:

"5. Although at the present time I cannot state for certain, I do not believe that a Notice of Assessment was addressed and sent to me at that time [in or about the first week of January, 1993]. It is possible that my wife and I received separate Notice [sic] of Assessment, however, because of the fact that we sold the property, as husband and wife, I believed that there was only one such assessment. As a result, I only forwarded one copy to my attorney for the purpose of filing a request for a conciliation conference. Apparently, that copy was the assessment regarding my wife Alice Huang, because our attorney timely filed a request for a Conciliation Conference with respect to that assessment.

"6. It was not until in or about the second week of April, 1993 when I received a Notice and Demand for Payment of Tax Due regarding this very same matter, and upon discussion of same with my attorney, that I realized that there was a separate Notice of Determination and assessment [sic] applicable to me separately from my wife. My attorney, thereupon immediately filed a request for Conciliation Conference on my behalf."

In addition, petitioner asserts that it was improper and inequitable for the Commissioner to deny his conciliation conference request for the following reasons: (1) the transaction in issue was conducted by his wife and himself as tenants by the entirety; (2) it was unreasonable for the State to have sent out individual notices to petitioner and his wife and it was reasonable for petitioner to believe that there was only one notice covering both of them which had to be appealed; (3) when petitioner's attorney timely filed the conciliation conference request on behalf of petitioner's wife, petitioner, in good faith, believed that his interests were protected as well; and (4) there would be no logical reason for petitioner's wife to have contested the assessment of the tax if petitioner were not challenging the identical tax.

Petitioner claims further, that even if his wife is successful in her appeal of the assessment, "such victory will be rendered meaningless" if he is not permitted a conciliation conference or some other means of appeal. In this same vein, petitioner insists that it would not only be "illogical, improper, and inequitable" for the same set of facts to result in two different determinations, it would "elevat[e] form over substance to an improper degree." Finally, petitioner argues that the case should be determined on its merits, especially where petitioner was "clearly justified in believing that [he] had acted in a timely and appropriate manner."

Petitioner's representative, in his affirmation of petitioner's affidavit, asserts that the Notice of Determination purportedly mailed to petitioner on December 28, 1992 was not in compliance

with Tax Law § 171² and, as such, should be deemed a nullity. Among the reasons petitioner's representative lists for noncompliance with Tax Law § 171 are that: (1) the notice sent petitioner did not advise him that it was separate, apart from, and in addition to the notice sent petitioner's wife with respect to the identical transaction; and (2) the notice did not advise petitioner that he was being assessed individually and would therefore have to file a separate request for conciliation conference or petition for appeal apart from his wife. Petitioner urges that it was particularly improper for the notice to have these deficiencies as only one of the multiple individuals comprising a transferor need sign the real property transfer gains tax affidavit and real estate transfer tax returns. Moreover, contends petitioner, these deficiencies were particularly egregious since the multiple individuals comprising the transferor in this case are husband and wife. Petitioner's representative maintains that:

"it was incumbent upon the Commissioner to have notified petitioner in clear, unequivocal and unambiguous fashion that each co-transferor, including husbands and wives, must separately file requests for Conciliation Hearings or petitions for appeal and failure to do so within the ninety day period would bar further review" (emphasis in original).

Because the Commissioner failed to so notify petitioner, avers petitioner's representative, and, in consideration of the facts of this case, petitioner acted reasonably in his belief that only one request was necessary, and the motion for summary determination should therefore be denied.

OPINION

The Administrative Law Judge granted the Division's motion for summary judgment on the ground that petitioner failed to file a request for a conciliation conference before the Division or petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination.

The Administrative Law Judge determined that:

"[t]hrough the evidence it has submitted, the Division has established that the Notice of Determination in question was, in fact, mailed to petitioner on December 28, 1992.

²Tax Law § 171(1) requires, inter alia, that the Commissioner promulgate regulations advising the public of the legal force and effect of each of the Division's methods of communicating tax policy and interpretation.

"First, the Division introduced adequate proof of its standard mailing procedures via affidavits of three Division employees involved in the notice generation and issuance process. In particular, the Biondo, LaFar and Moeske affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the microfiche copy of the Notice of Determination sent to petitioner as certified number P 911 206 383, assessment number L 006900788.

"Second, the Division established that the general issuance procedure was followed on December 28, 1992, in the generation and mailing of petitioner's notice. For, although the certified mail record submitted does not contain, on the final page, a total for the number of items received at the post office, the entire certified mail record is in evidence and the Biondo affidavit attests to the fact that there were no deletions from the list. As well, each of the 21 pages of the mail record submitted -- most notably, page 11 on which petitioner's notice is listed -- is date stamped December 28, 1992 by the Roesseville branch of the United States Postal Service in Albany, New York.

"In short, these three affidavits, consistent in all respects with the information listed on the face of the notice in question, provide direct documentary evidence confirming the December 28, 1992 date and fact of mailing of the subject notice (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, the presence of the Postal Service date stamp on page 11 of the certified mail record -- the page containing the information regarding the Notice of Determination issued to petitioner -- directly supports the conclusion that the mailing of said notice occurred as claimed by the Division (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991).

"Thus, the Division has, in fact, introduced evidence in support of its motion for summary determination -- namely that it properly mailed the Notice of Determination in this matter to petitioner on December 28, 1992" (Determination, conclusions of law "F" and "G").

The Administrative Law Judge rejected petitioner's assertions that the Notice purportedly mailed to petitioner was not in compliance with Tax Law § 171(1) because (1) the notice sent to petitioner did not advise him that it was separate, apart from, and in addition to the notice sent petitioner's wife with respect to the identical transaction and (2) the notice did not advise petitioner that he was being assessed individually and would therefore have to file a separate request for a conciliation conference or petition for a hearing apart from his wife. He rejected petitioner's assertion that it was particularly improper for the notice to have these deficiencies as only one of the multiple individuals comprising a transferor need sign the real property transfer gains tax affidavit and real estate transfer tax returns and that it was particularly egregious since

the multiple transferors in this case are husband and wife.

The Administrative Law Judge rejected petitioner's assertion that petitioner's request should be deemed timely because the request filed by his wife was timely.

The Administrative Law Judge determined that, under the Division's regulations, petitioner and his wife as tenants by the entirety were individually liable for the entire amount of the tax. The Administrative Law Judge determined that the notice sent to petitioner adequately informed him of his individual liability and his rights to contest the notice.

On exception, petitioner requests that we make the following conclusions of law:

"1. The Notice of Determination mailed to Petitioner was deficient insofar as it failed to adequately advise petitioner of his obligation, separate from his wife and co-transferor, to file a notice of appeal or request for Conciliation Conference.

"2. The request for Conciliation Conference timely filed by Petitioner's wife with respect to the transaction in issue was sufficient to advise the Commissioner that both Petitioner and his wife objected to the Notice of Determination.

"3. The request for Conciliation Conference, timely filed by Petitioner's wife was sufficient to preserve Petitioner's rights to dispute the Notice of Determination on the merits.

"4. Under the facts of this case, the timely filing by Petitioner's wife shall be deemed to have been a timely filing by Petitioner of a request for Conciliation Conference by Petitioner" (Petitioner's exception, p. 2).

The Division asserts that the determination of the Administrative Law Judge is correct.

We reverse the determination of the Administrative Law Judge.

The exclusive ground for the Administrative Law Judge's granting the motion for summary judgment was that petitioner's request for a conciliation conference was not timely. While this issue is not raised directly by petitioner in his exception, it is an issue which is jurisdictional in nature and which may be raised by this Tribunal (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).

Our first concern is whether a notice was issued by the Division. At hearing, petitioner asserted that while he could not state for certain he did not believe that a notice was addressed to him in or about the first week of January 1993 and that it was not until about the second week

of April 1993 when he received a Notice and Demand for Payment of Tax Due regarding this matter that he realized there was a separate Notice of Determination and assessment applicable to him as an individual. Petitioner submitted a copy of the Notice of Demand with his petition.

We conclude, based on our review of the record, that the Division has proven that a notice was, in fact, issued to petitioner. We rely on the affidavit of Mr. Moeske which spells out in detail first, how statutory notices are generated, and then, the Division's regular practice of generating and retaining microfiche copies of statutory notices, rather than hard copies of the notices themselves. Mr. Moeske, in his affidavit, explains in detail any differences in appearance between the microfiche copy of the notice introduced in this matter, and a standard original hard copy notice. He then attests to the fact that the "microfiche copy of the Notice of Determination contains all the information printed on the hard copy" of the notice issued to petitioner. "Establishing the authenticity and reliability of records depends on the accuracy of the process or system used to produce the record, the source of the information in the record, and the method and time of its preparation" (State Archives and Records Administration, University of the State of New York/State Education Dept., Guidelines for the Legal Acceptance of Public Records in an Emerging Electronic Environment, p. 3 [1994]). The affidavit of Mr. Moeske, in this case, provides sufficient information on each of these components to convince us that a notice was issued to petitioner.

However, the fact that a Notice was issued to petitioner does not prove the date of mailing of the notice to petitioner. On this issue, we find insufficient evidence in the record to determine the date on which the notice was mailed to petitioner. Specifically, we find that the certified mail record submitted by the Division is flawed in that while it contains, on the last page, a total number of pieces listed (i.e., "225"), it does not contain a total for the number of pieces received at the post office. Therefore, the certified mailing record does not establish that the 11 pieces listed on page 11 were received by the post office (see, Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Auto Parts Ctr., Tax Appeals Tribunal, February 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995). In view of this

fact, we find that the Division has not established the date on which the Notice of Determination was mailed to petitioner. Therefore, we deem petitioner's petition timely and remand the matter to the Division for conduct of a conciliation conference.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas Huang is granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The request for a conciliation conference filed by Thomas Huang is granted.

DATED: Troy, New York
April 27, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner