STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
INTERNATIONAL INSTALLATIONS, INC.	:	DECISION DTA No. 812307
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Year 1991.	:	

Petitioner International Installations, Inc., 200 Madison Avenue, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issue on March 10, 1994. Petitioner appeared by Alexander J. D. Greeley, Esq. 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 April 21, 1994 stating that it would not be filing a brief, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the petition for redetermination of a deficiency should be dismissed for failure to file the petition within 90 days of the mailing of the Notice of Deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4," "6" and "12" which have been modified and finding of fact "2" which has been deleted.[1] The Administrative Law Judge's

[1]The Administrative Law Judge's finding of fact "2" read as follows:

> "The Division of Taxation ("Division") issued a Notice of Deficiency (L-007035132), dated April 1, 1993, asserting corporation franchise tax due, under

findings of fact and the modified findings of fact are set forth below.

Petitioner, International Installations, Inc., is a subsidiary of McNally International Corp. McNally International Corp.'s principal business activity is transportation service.

On August 31, 1993, petitioner filed a petition with the Division of Tax Appeals for redetermination of the deficiency of corporation tax. A review of the petition discloses the following information:

(a) Petitioner is identified as "International Installations, Inc." and "McNally International Corp.";

(b) Petitioner states (by checking appropriate boxes on the petition form) that it is petitioning for redetermination of a deficiency of corporation franchise tax under Article 9-A of the Tax Law. The years listed are 1988, 1989 and 1991;

(c) The Taxpayer Identification Numbers are listed as: 11-2040702-2 and 11-1904070-6;

(d) The notice/assessment numbers are listed as: L-007035132-5; L-003302585-1; L-003116270-6; L-00302587-8; L-003302586-9;

(e) Petitioner stated that "[t]he amount of tax determined was $2,777.00 and the amount of tax contested is $2,777.00.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The petition states that the taxpayer filed a corporation tax return, as did the parent corporation, on Form CT-183; and that the Commissioner made assessments as minimum tax, "after tax audit" as follows:

Article 9-A, of $957.00, plus interest of $78.82 and penalties of $87.24, for the year 1991."

We deleted this fact because, as explained in the opinion, the Administrative Law Judge did not explain how Notice of Deficiency L-007035132 related to the petition filed by petitioner protesting Notice of Deficiency L-007035132-5.

Year	Assessment	Tax	Penalty	Interest	Total
(1) 1988	L-003302585	$ 175.00	$ 43.59	$ 97.20	$ 315.79
(2) 1989	L-003302586	725.00	165.49	285.18	1,175.67
(3) 1990	L-003302587	920.00	154.22	223.49	1,297.71
(4) 1991	L-007035132	957.00	83.19	70.71	1,010.90
		$2,777.00			$3,800.07

Petitioner asserts that it filed the correct form and paid the correct tax under CT-183 for the above years; and that the corporate return of the parent (McNally International Corp.) clearly states that it is a consolidated return whose figures include the figures of its wholly-owned subsidiary "International Installations, Inc." ID# 11-2040702. Petitioner contends that if the Commissioner were to be upheld, it would be paying tax twice on the above years.

Petitioner alleges that the Notice of Deficiency dated April 1, 1993 was not in fact a 90-day letter since the audit was continuing and not completed. Petitioner contends that the assessments to which the petition refers should be reversed since the taxpayer had already paid the tax in the consolidated return of the parent, McNally International Corp., Form 1120 - ID #11-190407-6, "which was filed as part of the tax return with New York State." Petitioner asserts that the Notice of Deficiency for the year 1991, dated April 1, 1993, was the only one served. Furthermore, petitioner alleges that the Notice of Deficiency, for the year 1991, is defective "insofar as it is addressed to International Installations, Inc." rather than the parent corporation, McNally International Corp., which had filed a consolidated return.

Attached to the petition is a letter dated August 20, 1993 from the Division to petitioner that states, in part:

> "This is in reference to your protest of our above New York State Franchise tax assessment for the period ending December 31, 1991.
>
> "The original 1120 filed with the federal government

attached to the CT-183 did not indicate consolidated.

"The original 1120, filed with the federal government, appears to be the proper 1120.

"The assessment is sustained."[2]

By letter dated September 7, 1993, the Division of Tax Appeals advised petitioner as follows:

"Attached hereto you will find the petition which you recently filed on behalf of the above-referenced taxpayer. The petition has been returned because it was deemed to be not in proper form. Specifically, you neglected to submit the documents necessary for us to determine if the Division of Tax Appeals has jurisdiction over this matter.

"The administrative hearing process begins with the filing of a petition within ninety days from the date of issuance of a Notice of Deficiency. Consequently, we require copies of the Notices which your client is petitioning.

"Please resubmit the petition with copies of the Notices referred to in item (5) on page 1 of the petition. If you fail to submit Notices of Deficiency or the petition is found to be untimely as explained above, then the petition will be dismissed pursuant to the Tax Appeals Tribunal's Rules of Practice and Procedure."

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

On September 22, 1993, petitioner resubmitted the petition, along with a copy of the Notice of Deficiency for tax year 1991, dated April 1, 1993. In the upper right hand corner, this notice bears the number L-007035132-5 and in the upper left corner the number L-007035132-C002-7. None of the other notices of deficiency referenced in the petition were submitted.[3]

By letter dated November 10, 1993, the Division of Tax Appeals advised petitioner as follows:

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

"Pursuant to section 1089(b) of the Tax Law, a petition must be filed within 90 days from the date a Notice of Deficiency is issued.

"The Notice of Deficiency was issued on April 1, 1993 but the petition was

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[2] We modify finding of fact "4" by adding the last five paragraphs to more accurately reflect the record.

[3] We modify finding of fact "6" by adding the second sentence to reflect the record in greater detail.

not mailed until August 31, 1993, or one hundred fifty-two days later.

> "Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments."

Copies of this notice were sent to the Division and to Alexander J. D. Greeley, Esq.

On November 19, 1993, the Division of Tax Appeals received from petitioner its written comments, which included an affirmation of Alexander J. D. Greeley, Esq., a copy of the Notice of Deficiency, a copy of the 1991 CT-184, Franchise Tax Return on Gross Earnings, for McNally International Corp., and a copy of the 1991 Form 1120, U.S. Corporation Income Tax Return, for "McNally International Corp. and Subsidiary."

Mr. Greeley's affirmation reiterates the assertions contained in petitioner's petition that in 1991 the corporation, International Installations, Inc., "filed its tax return as a wholly owned subsidiary of McNally International Corp. . . . and paid tax thereon under art. 9-184", and that therefore any Notice of Deficiency should be addressed to "the taxpayer as appears on the return i.e. McNally International Corp." He also states in his affirmation that the correct procedure would have been to audit the 1991 tax return of McNally International Corp. as filed, and that if there were any changes, there would be a credit to the figures reported by the parent since it filed a consolidated return. Lastly, Mr. Greeley states that the position taken by the auditor subjects the taxpayer to be taxed twice under Article 9-A and Article 9 and is unconstitutional.

On December 7, 1993, the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits made by Donna Biondo and Daniel LaFar, a copy of the Division's certified mail record for April 1, 1993, and a copy of the Notice of Deficiency dated April 1, 1993.

Donna Biondo is the Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance, which relates to the Division's computer system for generating, among other documents, notices of deficiency to taxpayers under Article 9-A of the Tax Law. Her affidavit sets forth the normal and routine procedures followed in the CARTS Control Unit in the processing of notices of deficiency prior

to shipment to the Division's Mechanical Section for mailing.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> In her affidavit, Ms. Biondo stated that she supervises the processing of notices of deficiency prior to shipment to the Division's Mechanical Section for mailing. As part of her duties, she receives a computer printout referred to as a "certified mail record", and the corresponding notices of deficiency generated by CARTS. She indicated that the notices are pre-dated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the certified mail record. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Biondo stated that in the regular course of its business, the Division does not request, demand or retain receipts from certified or registered mail.
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> Attached to Ms. Biondo's affidavit as Exhibit "A" are the 18 pages of the certified mail record containing a list of the notices allegedly issued by the Division on April 1, 1993, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.[4] Page three of the mail record lists certified mail control number P 911 205 902, Notice of Deficiency number L-007035132, addressed to International Installations, Inc. at 200 Madison Avenue, New York, New York 10016-3903.
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> The certified mail record consists of 18 pages with certified control numbers running consecutively from P 911 205 874 through P 911 206 064 and there are no deletions. Each of the 18 pages has 11 entries with the exception of page 18 which contains 4 entries, for a total of 191. Each page of the certified mail record is date stamped April 1, 1993 by the Albany, New York, Roessleville Branch, of the U.S. Postal Service and page 18 bears the signature of a postal representative beneath the circled number 191. All 18 pages bear the certified mail record print date of March 22, 1993, changed manually on the first page only to April 1, 1993, and a record time of 22:35:48. Ms. Biondo explained 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 manually review the notices and to process the postage. She noted that personnel in the Division's mailroom changed the print date to conform to the actual date of delivery of the notices to the U.S. Postal Service. She also identified that the original document consisted of 18 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the U.S. Postal Service; and that the pages remain connected when the

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[4] Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

> postmarked document is returned by the U.S. Postal Service after mailing unless she requests that the pages be disconnected.[5]

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include the supervision of mailroom staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on April 1, 1993.

Mr. LaFar identified that after a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the staff weighs and seals each envelope; postage and fees are affixed and the postage and fee amounts are recorded on the mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here CARTS).

The LaFar affidavit affirms that on April 1, 1993, an employee of the mailroom delivered a sealed post-paid envelope for delivery by certified mail addressed to International Installations, Inc., 200 Madison Avenue, New York, New York 10016-3903 to the Roessleville Branch of the U.S. Postal Service in Albany, New York.

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[5] We modified finding of fact "12" by deleting the last sentence of the second paragraph which read as follows:

> "The certified and notice numbers match those on the Notice of Deficiency issued to petitioner."

OPINION

The Administrative Law Judge acknowledged that the Division bore the burden to demonstrate the proper mailing of the Notice of Deficiency. The Administrative Law Judge concluded that the Division established that the Notice of Deficiency "at issue in this proceeding" was mailed to petitioner on April 1, 1993 (Determination, conclusion of law "E"). Because the petition was not filed until August 31, 1993, the Administrative Law Judge determined that the petition was not timely and dismissed it. The Administrative Law Judge also dismissed the petition with respect to notices of deficiency L-003302585-1, L-003116270-6, L-00302587-8 and L-003302586-9 because petitioner failed to submit copies of these notices in response to the Division of Tax Appeals' letter dated September 7, 1993.

On exception, petitioner asserts that the dismissal with respect to all notices of deficiency other than L-007035132-5 should be without prejudice with leave to file additional petitions at a later date after notices of deficiency have been issued. Petitioner also asserts that the Notice of Deficiency dated April 1, 1993 was not properly mailed, pursuant to section 1091 of the Tax Law, because it was addressed to the wrong taxpayer. Petitioner also claims that if the notice had been properly addressed it would have been timely protested.

The Division did not respond.

Although the Administrative Law Judge acknowledged petitioner's argument that the Notice of Deficiency was defective because it was issued to the wrong corporation, the Administrative Law Judge did not address this issue. To receive the benefit of the Administrative Law Judge's analysis on this issue, as well as the parties' responses to it, we are remanding this matter to the Administrative Law Judge for a supplemental determination (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994) addressing whether the notice was properly issued and, if not, the effect of the error. Further, because this issue appears to involve a factual question and no hearing has been held on this matter, we direct that a hearing be scheduled to allow the parties to introduce evidence on whether the notice was properly issued to petitioner. If the parties agree to proceed without a

hearing, then a hearing need not be held.

Because this matter is being remanded, we also direct the Administrative Law Judge to reconsider her decision with respect to the mailing of the notice "at issue in this proceeding."

The mailing evidence in the record relates only to a Notice of Deficiency L-007035132. The Notice of Deficiency submitted by petitioner bears the numbers L-007035132-5 and L-007035132-C002-7. The Administrative Law Judge did not explain how she reached the conclusion that the mailing evidence related to the Notice of Deficiency submitted by petitioner, nor do we see anything in the record that explains how the mailing evidence relates to this Notice of Deficiency. In the supplemental determination, we direct the Administrative Law Judge to explain her conclusion. The parties may submit evidence on this issue at the hearing to be scheduled.

With respect to petitioner's request that we rule that it be allowed to file additional petitions at a later date after notices of deficiency have been issued, we believe that the right to file a timely petition after the issuance of a notice of deficiency is given by section 1089(b) of the Tax Law and petitioner does not require our decision to give it such a right. However, we affirm the Administrative Law Judge's determination to the extent that it dismissed the petition with respect to notices of deficiency L-003302585-1, L-003116270-6, L-00302587-8 and L-003302586-9 because petitioner failed to submit a copy of these notices as required by 20 NYCRR 3000.3(b)(8) for the purpose of determining the timeliness of the petition. Contrary to petitioner's suggestion, the Administrative Law Judge's determination does not state, nor does the record indicate, that the only notice issued to petitioner was L-007035132. The Administrative Law Judge found that L-007035132 was mailed on April 1, 1993 but no evidence was submitted, and the Administrative Law Judge made no findings, about the issuance of any other notices.

In accordance with this decision, this matter is remanded for a hearing and a supplemental determination by the Administrative Law Judge. If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the

determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall become final for purposes of section 2016 of the Tax Law after the period for filing an exception to the determination on remand has expired.

Accordingly, the petition of International Installation, Inc. is dismissed with respect to notices of deficiency L-003302585-1, L-003116270-6, L-00302587-8 and L-003302586-9. With respect to Notice of Deficiency L-007035132-5, the petition is remanded for a hearing in accordance with this decision.

DATED: Troy, New York
September 15, 1994

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

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