

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TREVOR WISDOM	:	DECISION
OFFICER OF WIZARD PETROLEUM, INC.	:	DTA No. 812655
	:	
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, 1986	:	
through November 30, 1987.	:	

Petitioner Trevor Wisdom, Officer of Wizard Petroleum, Inc., 875 Cedar Swamp Road, Old Brookville, New York 11545, filed an exception to the determination of the Administrative Law Judge issued on October 5, 1995. Petitioner appeared by Uncyk, Borenkind & Nadler, L.L.P. (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter December 7, 1995 stating it would not be filing a brief in opposition, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioners Koenig and DeWitt concur.

ISSUES

- I. Whether petitioner's request for a conciliation conference was timely filed.
- II. Whether petitioner's representatives had filed powers of attorney which entitled them to copies of the notices sent to petitioner.
- III. Whether the notices of determination were jurisdictionally defective and therefore invalid.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner, Trevor Wisdom, three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990.¹ The first notice (Notice No. S900720806M) assessed sales and use taxes due for the period June 1, 1986 through July 30, 1987 in the amount of \$4,204,879.69, plus penalty of \$2,102,439.98 and interest of \$2,159,125.64, for a total amount due of \$8,466,445.58. The second notice (Notice No. S900720807M) assessed sales and use taxes for the period June 1, 1987 through September 30, 1987 in the amount of \$234,707.39, plus penalty of \$117,353.70 and interest of \$93,583.82, for a total amount due of \$445,644.91.

On each of the foregoing notices, a box was checked next to the statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notices also contained the following statement:

"You are liable individually and as Officer of Wizard Petroleum Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law. In addition, fraud penalties of 50 percent of the amount of tax due plus interest have been added pursuant to Section 1145(a)(2) of the Tax Law" (emphasis in original).

The third notice (Notice No. S900720808M) assessed penalty only for the period June 1, 1986 through November 30, 1987 in the amount of \$443,958.72. As in the case of the other two notices issued to petitioner, the box was checked next to the statement concerning the estimation of the tax. The "Explanation" section also contained the following:

¹Each of these notices of determination were addressed as follows:

"Trevor Wisdom (Officer of)
Wizard Petroleum Inc.
875 Cedar Swamp Road
Old Brookville, New York 11545-2108."

"The following penalties are being imposed pursuant to Section 1145 of the Tax Law. This notice is in addition to Notice number S900720806M & S900720807M" (emphasis in original).

The Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order (CMS No. 134508) dated January 14, 1994, in which the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on July 20, 1990 and the request was not mailed until November 10, 1993, or more than 90 days from the date of the notice, the request was untimely filed.

Petitioner filed a petition with the Division of Tax Appeals dated March 1, 1994 by U.S. Postal Service first class certified mail. The U.S. Postal Service postage-paid stamp is dated March 2, 1994. The petition was received by the Division of Tax Appeals on March 7, 1994. The petition states:

"(a) Although the Notices of Determination (Forms AU-16) are all dated July 20, 1990, they were not received by the taxpayer until forwarded to the taxpayer's attorney on September 2, 1993 by Counsel to the Department of Taxation and Finance.

"(b) A Request for Conciliation Conference (Form CMS-1) was filed with the Bureau of Conciliation and Mediation Services, Department of Taxation and Finance, by Certified Mail, on October 6, 1993, which is within 90 day period permitted.

"(c) The Statute of Limitations for making assessments for sales and use tax and for penalties related to such taxes for the periods involved has expired and, consequently, such assessments are barred by law.

"(d) The Sales Tax Bureau's computations with respect to the proposed adjustments are incorrect and are based on arbitrary and capricious assumptions, which are unsupported by any evidence or facts.

"(e) The underlying corporate taxpayer (Wizard Petroleum, Inc.) has various receipts, vouchers and other evidentiary data to support its sales as set forth on its tax returns for the periods involved.

"(f) The underlying corporate taxpayer (Wizard Petroleum, Inc.) and this taxpayer deny any fraud with respect to the sales tax returns in question. Therefore, the burden of proof relating to the proposed fraud penalty is on the Department of Taxation and Finance.

"(g) The penalties proposed pursuant to Section 1145 of the Tax Law only includes one period (the period ending August 31, 1987) for which the taxpayer is being assessed a tax. As a result, such proposed penalties must be nullified."

Petitioner also reserved the right to submit other grounds with respect to the issues involved in this matter.

A power of attorney executed by petitioner on October 1, 1993 appointing Norman R. Berkowitz, Esq., as his representative was included as part of the Division's Exhibit "B". This power of attorney references sales and use taxes for 1986 through 1988, inclusive, and assessment numbers S900720806M, S900720807M and S900720808M.

The Division, in its answer dated May 17, 1994, stated that: (1) petitioner failed to timely protest the notices of determination; and (2) petitioner has the burden to prove by clear and convincing evidence that the assessments made by the Division are erroneous and/or improper.

The Division submitted as part of its Exhibit "A" the letter dated November 7, 1994 in which the Division of Tax Appeals notified petitioner of the following:

"The timeliness of the request for conference and/or petition filed in the above matter has been raised as an issue. Since this is a threshold jurisdictional issue which must be resolved before a hearing on the merits of your case can be allowed, the hearing which has been scheduled will confine itself strictly to this timeliness issue."

Copies of this letter were sent to petitioner, his representative and the Division's representative.

At the hearing, the Division submitted the affidavit of James Hika, with attachments, as its Exhibit "D". James Hika is an Excise Tax Auditor II in the Transaction and Transfer Tax Bureau ("Bureau") of the Metropolitan District Office ("D.O.") and has held this position since 1973. His affidavit sets forth the custom and practice in the preparation and mailing of notices of determination.

In his affidavit, Mr. Hika stated that he was familiar with the Bureau's procedures, as they existed in July 1990, for mailing sales tax notices of determination. He indicated that the notices of determination issued to petitioner (Notice Nos. S900720806M, S900720807M and S900720808M [converted to L006580919, L006580920 and L006580921, respectively]), dated

July 20, 1990, were prepared by the Bureau, proofread and then deposited in envelopes addressed to petitioner. He also indicated that the Bureau prepared and attached a return receipt request, or Postal Form 3811 ("green card"), to each envelope. According to Mr. Hika, "the address on each envelope and green card is taken from the enclosed Notice." The envelopes containing the notices, with the attached green cards, were then brought to the mailroom.

Mr. Hika explained that it was and is the procedure of the mailroom to prepare a certified mail record for each day's set of notices sent by certified mail. He stated that:

"The taxpayer's name and address are written on the certified mail record. The certified mail number from certified mail record [sic]. The certified mail number from each envelope's green card is entered on the certified mail record. The envelopes are compared with the certified mail record to verify that all Notices are accounted for.

"Mail-room [sic] personnel then deliver the envelopes containing the Notices to the United States Postal Service, which then stamps the certified mail record. A copy of the stamped certified mail record is returned to the Bureau.

* * *

"When 'green cards' are returned to the D.O. they are forwarded by the mail-room [sic] to the Bureau."

The Hika affidavit affirms that the certified mailing of the notices of determination to petitioner was in compliance with regular Bureau mailing procedures. He further indicated that he was "unaware of any problems that arose with respect to executing the required Bureau procedures for mailing the Notices" to petitioner.

Attached to Mr. Hika's affidavit as Exhibit "A" are copies of the notices of determination (S900720806M, S900720807M and S900720808M), which he asserts were mailed on July 16, 1990 and were delivered on July 18, 1990 to petitioner's address at 875 Cedar Swamp Road, Old Brookville, New York 11545. Attached to Mr. Hika's affidavit as Exhibit "B" is the certified mail record ("CMR"), consisting of PS Form 3877, which contains the list of the notices

allegedly mailed on July 16, 1990.² Attached to the affidavit as Exhibit "C" are three original PS Forms 3811, Domestic Return Receipt Cards ("green cards"), Article Numbers 752 453, 752 454 and 752 455, respectively, and copies of the front and back of each of these green cards.

Mr. Hika stated that the "three returned receipts" were returned to him at the Bureau.

The mailing record (PS Form 3877) contains the following: the name and address of the sender is listed as "DEPARTMENT OF TAXATION & FINANCE"; and the box is checked next to "Certified" in the column marked "Indicate type of mailing". PS Form 3877 lists in table form for each item sent the article number, the name and address of the addressee, the postage, fees, charges and remarks. There are entries on 12 of the 15 lines of the form.³ Lines 4, 5 and 6 contain the entries which appear to pertain to petitioner as follows:

Line 4 - "	453	Trevor Wisdom	Old Brookville ⁴
Line 5 - "	454	"	"
Line 6 - "	455	"	"

Across the bottom of the page are spaces for total number of pieces listed by sender, the number of pieces received at the post office and the name of the post office's receiving employee.

Review of the bottom of the PS Form 3877 indicates that there is a circled "12" in the space for total number of pieces listed by sender;⁵ nothing appears in the space for total number of pieces received by post office. No signature appears in the space for the name of the post office's receiving employee. This CMR has the date stamped July 16, 1990 by the United States Postal Service twice on it, although both postmarks are partly faint and illegible.⁶ There appear to be some extraneous words written at the bottom of the CMR as well.

²Portions of Exhibit "B" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

³The entries on Lines 13, 14 and 15 were scratched out completely.

⁴The ditto marks in the article number column refer to the first three numbers listed on Line 1, "752." In the name and address column, there appears to be an "N" and some other letter above the "ille" of Brookville.

⁵The "2" in the number 12 is written over a number "5."

⁶The date July 16, 1990 and "Brooklyn, NY 112" are clear; the remainder is illegible on both stamps.

Included as part of the Hika affidavit are the originals of the PS Form 3811 ("green cards"), as well as copies of the front and back of each green card. On the back of the first green card, item 3, "Article Addressed to:", contains the typed entry "Trevor Wisdom, 875 Cedar Swamp Road, Old Brookville, New York 11545." Item 4, "Article Number", has handwritten "752 453". "Type of Service" checked is "certified". Item 5, "Signature-Address", contains an illegible signature.⁷ Item 6, "Signature-Agent", is blank, and item 7, "Date of Delivery", contains the handwritten entry "7/18/90". This green card is date stamped July 18, 1990 by the United States Postal Service, although the postmark is somewhat faint and slightly illegible.⁸

The front of the green card had the following typed in the sender's name, address and zip code space: "Department of Taxation & Finance, Misc. Tax, 55 Hanson Place 11th Floor, Brooklyn, New York 11217-1579." The lower left hand corner of the green card contains the following: "Att: J. Hika".

The other two green cards contained the same things in each of the items except in item 4, "Article Number", the second card contained "752 454", while the third contained "752 455".

Petitioner's representative objected to the introduction of the Division's Exhibit "D", the Hika affidavit, into evidence because there were:

"any number of irregularities with respect to this mailing which cannot be addressed by an affidavit and have been sloughed over in this affidavit. And I think that an employee of the State of New York should be present and testify so as to clarify these irregularities for the Court and to the petitioner in view of the

fact, particularly, that there's \$13 million of taxes involved -- taxes, penalties and interest" (tr., p. 10).

In response to Mr. Berkowitz's objection, the Division's representative, Mr. Matthews, stated that:

⁷The first and last two letters of the first name are legible, "K" and "tt," while the remainder is illegible. The first and last letter of the last name are readable, "W" and "d," while the remainder is illegible.

⁸The date July 18, 1990 is clear as is "USPO"; however, only "Glen" is clear in the name of the branch and the remainder is illegible.

"I think the decisions of the Tax Appeals Tribunal demonstrate that the affidavits are routinely accepted to demonstrate mailing of notices" (tr., p. 11).

The affidavit was allowed into evidence as the Division's Exhibit "D" (tr., p. 12).

Benet Doloboff testified that his accounting firm, Silverstein and Doloboff, has a professional relationship with Wizard Petroleum, Inc. ("Wizard") and Trevor Wisdom (tr., p. 14).⁹ When asked by petitioner's representative if he ever received a copy of the "Notice of Deficiency" [sic] as addressed to Mr. Wisdom, Mr. Doloboff responded in the negative (tr., p. 15).

Petitioner's Exhibit "1" is the Field Audit Report ("report") for "Wizard Petroleum Corp." Included in the report is a document entitled "Tax Field Audit Record" ("record") which contains the contacts and comments for all audit actions.¹⁰ The taxpayer's representatives listed on the record were Ben Doloboff and Arnie Frager. The report submitted into the record does not include any executed power of attorney forms.

Mr. Doloboff testified that Mr. Frager was an employee of his at that time (tr., p. 38). Petitioner's representative asked Mr. Doloboff a series of questions about Mr. Frager and how he would have handled any notices he received pertaining to petitioner. The questions and responses follow:

- Q. "And did Mr. Frager -- if Mr. Frager received a copy of these notices, would he have given them to you?"
- A. "Yes."
- Q. "Did he ever do so?"
- A. "No."
- Q. "Did he ever tell you he received these notices, copies of these notices?"
- A. "Never received a notice" (tr., pp. 38-39).

⁹The length of these relationships is not part of the record.

¹⁰According to the auditor's notes in the record, the field audit began sometime in June 1987.

Mr. Doloboff, when asked what petitioner's practice was when he received assessment notices from either the Internal Revenue Service or the Division, testified as follows:

"Well, his immediate response would be to call me to tell me that he got these notices. And secondly, he would fax me a copy of the notice. And to the best of my belief, he would also fax you a copy of the notice as his attorney."

Q. "And in all of these cases, he had an accountant and attorney ready, willing and able to defend him and file appropriate documentation on his behalf?"

A. "Yes, he did."

Q. "And has he done that all of the time in the past?"

A. "Absolutely" (tr., pp. 33-34).

Mr. Doloboff testified that when Wizard received three notices similar to the ones at issue, he received the notices faxed to his office before the company even telephoned him to find out what the notices were all about (tr., p. 35).

Petitioner's representative asked Mr. Doloboff whether he was familiar with petitioner's signature and his response was in the affirmative. When asked how and why Mr. Doloboff was familiar with petitioner's signature, he stated:

"Well, Mr. Wisdom and the corporations that he is an officer of are clients of our office. And I've been present when he has signed tax returns that were forwarded to various taxing authorities. He signs checks paying out fees, which I see his signature on. His own personal income tax, when it's delivered to his office, he signed them, so I have some knowledge of his signature" (tr., p. 29).

The green cards were shown to Mr. Doloboff and he was asked if the signatures on line 5 of these green cards were petitioner's. He responded: "Not to my knowledge, it is not" (tr., p. 27).

According to Mr. Doloboff, Wizard was on a monthly filing basis for its sales and use tax returns. During the period in issue, he stated that his office prepared Wizard's sales and use tax returns contemporaneously with the envelopes for filing the returns prior to the due date for filing (tr., pp. 31, 41-45).

Mr. Doloboff estimated that Wizard filed approximately 35 to 40 returns a year. The required returns included motor fuel tax returns, State and Federal withholding tax returns, Federal excise tax returns, commercial rent tax returns and corporate income tax returns (tr., pp. 45, 47-48).

During the period in issue, Wizard's sales and use tax returns did not report any taxes due. Other than the sales tax returns, none of the returns have been questioned as not timely filed. In most instances, the returns included tax payments (tr., p. 46).

Mr. Doloboff testified that his office prepared all required tax returns for several related companies, including Janus Petroleum, On-Site Petroleum Unlimited, Terminelle Corporation and Terminyx Corporation. He estimated that all the related companies combined were required to file 80 or so returns a year. He further stated that he never received any notices that the returns were not timely filed (tr., pp. 48-50).

Mr. Doloboff stated that, in his experience, if tax returns were not filed with New York State, within a short period of time the taxpayer would receive a notice concerning the missing return. If the taxpayer failed to respond, the Division would normally file an arbitrary assessment for the tax. According to Mr. Doloboff, the taxpayer must then file a return to show what is the proper amount of tax due. If the taxpayer fails to file the return, the Division starts collection procedures.

Mr. Doloboff stated that, in this case, the Division did not make an arbitrary assessment (tr., pp. 50-51).

Sylvia Frank was the bookkeeper for the related group of corporations. Mr. Doloboff's office would prepare the returns with the appropriate envelopes, which were then given to Ms. Frank. Mr. Doloboff reviewed with her on a monthly basis whether the returns were mailed. He stated she never informed him that the returns were not mailed (tr., p. 51).

As his Exhibit "5", petitioner submitted the affidavit of Sylvia Frank. Ms. Frank has been employed by Janus Petroleum, Inc. and its related corporations, including Wizard, since 1985.

In her affidavit, Ms. Frank states that she is and was responsible for the filing of the various Federal, New York State and City tax returns of these corporations. Each month she reviews with the accountants which returns must be filed that month and how much tax is due for each return. Prior to the due date of each return, she obtains an officer's signature on each return and a check for the appropriate amount. According to Ms. Frank, she attaches the appropriate payment check to the proper tax return and inserts the return and check, if any, in the pre-addressed envelope provided by the accounting firm and affixes the proper amount of postage on the pre-addressed envelopes.

Ms. Frank states that she checks the tax returns to be filed against the list of tax returns previously reviewed with the corporation's accountants to verify that all of the returns are ready for mailing. Ms. Frank avers that she provides the mail clerk with the paid pre-addressed envelopes containing the tax returns for mailing. Each month she verifies with the corporation's mail clerk that all of the tax returns were properly and promptly mailed. On the basis of the foregoing, Ms. Frank states that she is certain that the sales tax returns for the period June 1, 1986 through November 30, 1987 were timely filed.

Petitioner's Exhibit "6" is a portion of the transcript in the Matter of Jarwood (Administrative Law Judge hearing held on July 13, 1994) which contains the testimony of Ashley Jarwood, an officer of Wizard.

Ms. Jarwood was Wizard's treasurer. As treasurer, she bought and sold product and oversaw the running of the office. She signed checks which were made payable to creditors and had access to the company records. Wizard was a young company which could not afford to compensate Ms. Jarwood for her services.

According to Ms. Jarwood, tax returns were presented to her by Ms. Frank with paper clips on the pages which required signatures. The envelopes were attached by paper clips to those

papers. Ms. Jarwood just went to those pages that had paper clips on them and returned the papers to Ms. Frank. In the general course of business, Ms. Jarwood would ask Ms. Frank if the tax returns were mailed on time.

Review of the transcript from her hearing indicates that Ms. Jarwood testified that all of the appropriate sales tax returns for the period in issue were filed by Wizard. She further stated that neither she nor anyone from Wizard ever received a notice that tax returns were not filed.

When asked if he knew how the taxes assessed on the three notices of determination at issue in this matter were computed, Mr. Doloboff responded:

"Well, to the best of my knowledge, what happened was a sales tax return was filed by Wizard Petroleum and no formal audit was done. A credit was taken against the sales tax due. And the State just arbitrarily, in our opinion, removed the credit and just took the tax that was shown on the return" (tr., p. 30).

Petitioner's Exhibit "4" consists of two letters written by James Hika of the Division to Norman R. Berkowitz, Esq., regarding Wizard Petroleum, CMS #108091. In the first letter, dated June 24, 1991, Mr. Hika wrote:

"Pursuant to your request of 6/18/91, enclosed are copies of the worksheets for the Sales Tax Adjustments.

"The figures were extracted from copies of returns provided by the subject during the audit with the exception of May '87 where the tax rate was adjusted to .064 per gallon to arrive at the tax due."

In his subsequent letter dated July 16, 1991, Mr. Hika reiterated what he had previously written to Mr. Berkowitz about the source of the figures used in the audit and further wrote, "[t]here are no additional worksheets other than those which were already provided."

Petitioner's Exhibits "2" and "3" indicate that Ashley Jarwood timely protested sales and use taxes for the period June 1, 1986 through November 30, 1987.¹¹ According to petitioner's Exhibit "3", a conciliation conference was held on January 14, 1992 concerning Notice Nos.

¹¹Petitioner's Exhibit "2" is a letter from BCMS conciliation conferee Lance Sonners scheduling a conciliation conference for CMS #116663. It is addressed to Ashley Jarwood, Officer of Wizard Petroleum, Inc. Petitioner's Exhibit "3" is a BCMS Conciliation Order (CMS No. 116663) issued to Ashley Jarwood, Officer of Wizard Petroleum, Inc.

S900720804M and S900720805M. The conciliation conferee sustained the statutory notices in a Conciliation Order (CMS No. 116663) dated July 31, 1992.

Petitioner testified that he did not receive the three notices dated July 20, 1990. He stated that if he had received them, he "would have brought them both to my attorney and to my accountant" (tr., pp. 67-68). Petitioner testified that his accountant is Ben Doloboff and his attorney is Norman Berkowitz.

According to Mr. Wisdom, his past practice has been that when he received a Notice of Deficiency from either the Federal government or the State, he would immediately send it to his accountant and his lawyer for further handling. When Wizard received the three notices of determination similar to those at issue, they were immediately faxed, mailed and brought to its accountant and lawyer (tr., pp. 67-68).

Petitioner was asked by his representative if his signature appeared on line 5 of each of the green cards to which he responded, "[t]hat's not my signature" (tr., p. 67). He acknowledged that his signature did appear on the power of attorney form included as part of the Division's Exhibit "B" (tr., p. 67).

Petitioner's Exhibit "7" is the affidavit of Iris Wisdom. Mrs. Wisdom is petitioner's wife and has been married to him for over 25 years.

In her affidavit, Mrs. Wisdom states:

"4. I am fully familiar with Trevor Wisdom's signature.

"5. I have examined the three (3) Domestic Return Receipts attached to this Affidavit and the signature on Line 5, which purports to be the signature of Trevor Wisdom.

"6. I categorically state that the signature on Line 5 of the attached Domestic Return Receipts is not that of my husband, Trevor Wisdom.

"7. I categorically state that the signature on Line 5 of the attached Domestic Return Receipts is not my signature.

"8. Our home at 875 Cedar Swamp Road, Old Brookville, New York 11545 is a private residence, which during July 1990 was occupied solely by my immediate family, which included my husband and four children.

"9. During July 1990, I was the only person at the house during business hours as my husband and all four of my children were at work during business hours."

The Division's representative asked petitioner about his four children who live or lived at home with him. Petitioner stated that his oldest son has died; however, there were four at that time. He testified that their names were: "Trevor Wisdom, Jr., Kenneth Mark Wisdom, Brian [phonetic] Wisdom, and Deborah [phonetic] Wisdom" (tr., p. 69).

The Division's representative asked petitioner whether, at that point in time, all of his children were adults above 18 years of age. Petitioner responded in the affirmative (tr., p. 69).

Petitioner's representative questioned Mr. Doloboff about the Hika affidavit (Division's Exhibit "D") and the irregularities contained in that affidavit. He testified that, in his experience, the Sales Tax Bureau usually issued sales tax notices rather than the Transaction and Transfer Tax Bureau. It was also his experience that most of the notices came in window envelopes (tr., pp. 16-18).

The Division submitted as its Exhibits "E" and "F" two regular envelopes addressed to Ashley Jarwood which were returned to the Division because they were unclaimed. Each of these envelopes bears a U.S. postage meter stamp dated "July 16, 1990" from "Brooklyn, NY". The Division's Exhibit "E" bears Certified Mail No. 752457, while Exhibit "F" bears Certified Mail No. 752456.

The Division's representative stated that he submitted these envelopes because petitioner's representative raised an issue of whether or not the Division used window envelopes. "And this is an envelope which was mailed on the same date as the envelopes in question" (tr., p. 58).

OPINION

The Administrative Law Judge determined that the "evidence submitted [by the Division] fails to satisfy the Division's burden that the notices were properly mailed to petitioner on July

16, 1990" (Determination, conclusion of Law "F"). Relying on Matter of Avlonitis (Tax Appeals Tribunal, February 20, 1992), Matter of Bryant Tool & Supply (Tax Appeals Tribunal July 30, 1992) and Matter of Blau Par Corp. (Tax Appeals Tribunal, May 21, 1992), the Administrative Law Judge held that in lieu of such proof "demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt" (Determination, conclusion of law "G").

The Administrative Law Judge found that the submission by the Division of "the three returned postal receipts, Form PS 3811 (green cards), Article Nos. 752453, 752454 and 752455, each of which is addressed to 'Trevor Wisdom, 875 Cedar Swamp Road, Old Brookville, New York 11545'" was sufficient evidence to prove receipt of the notices at his last known address (Determination, conclusion of law "G"). In reaching her determination, the Administrative Law Judge rejected petitioner's assertions that he did not receive the notices, that the signature on the three forms were not his and that the signature on the forms is illegible. She concluded that:

"[t]he evidence supports the Division's assertion that on July 18, 1990 the three notices of determination were received by petitioner at his last known address. Petitioner's unsupported allegation of nonreceipt is insufficient to rebut the Division's evidence of receipt (see, Conclusion of Law 'B'; see also, Matter of American Cars 'R' Us v. Chu, 147 AD2d 795, 537 NYS2d 672; Matter of Blau Par Corporation, *supra*)" (Determination, conclusion of law "H").

The Administrative Law Judge concluded that the 90-day statutory period for the filing of the request for conference should be measured from the date of the United States Postal Service postmarks on the three PS Form 3811s, i.e., July 18, 1990. The Administrative Law Judge rejected petitioner's assertion that the statute should be tolled because his representatives were not served with the notices of determination. She found that:

"[p]etitioner has not submitted any evidence to show that, prior to the issuance of the notices of determination, Mr. Doloboff and Mr. Frager . . . were petitioner's representatives for sales taxes during the relevant period. The Field Audit Report and the contact sheets contained in that report pertain to Wizard, not petitioner" (Determination, conclusion of law "I").

The Administrative Law Judge concluded that:

"[s]ince the 90-day period was not tolled in this case, the last date on which petitioner could have timely filed either a request for conciliation conference or a petition [for hearing] was October 16, 1990. Petitioner's request was mailed on November 10, 1993 Unfortunately, this date is well past the 90-day period within which a request may be filed. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case" (Determination, conclusion of law "I").

The Administrative Law Judge also found no evidence in the record to support petitioner's assertion that he was entitled to a conciliation conference based on the timely request of Ashley Jarwood, a taxpayer with common interest. The Administrative Law Judge stated:

"[i]t is impossible to determine whether or not the information in Ms. Jarwood's request related to petitioner at all and if it would satisfy any of the requirements specified in the Division's regulations or fairly advise the Division of petitioner's claim so as to constitute an informal request. Additionally, it is not enough for petitioner to claim that the Division should have deduced that petitioner's tax liability should be called into question based on Ms. Jarwood's conciliation conference In sum, petitioner has failed to prove that he made a timely request for a conciliation conference" (Determination, conclusion of law "J").

The Administrative Law Judge also found no evidence to support petitioner's assertion that he was prejudiced by the fact that the notice indicated the tax was estimated when in fact it was not estimated.

Finally, the Administrative Law Judge rejected petitioner's argument that the issuance of the notices dated July 20, 1990 for the period June 1, 1986 through July 30, 1987 was barred by the three-year statute of limitations in section 1147(b) stating that the argument "goes to the merits of the case. Since I have found that petitioner's request for a conciliation conference was not timely filed, and that the Division of Tax Appeals is without jurisdiction, I cannot address this issue" (Determination, conclusion of law "L").

Petitioner raises the following arguments on exception.

First, petitioner, relying on Matter of Novar TV & Air Conditioner Sales & Serv. (Tax Appeals Tribunal, May 23, 1991), asserts that "[w]here the [Division] has failed to provide the

date of mailing of the Notices of Determination, but evidence in the record established that such Notices were received by the taxpayer, as it does here, the appropriate remedy is to deem the Request for Conciliation Conference timely filed" (Petitioner's brief in support, p. 8).

We cannot agree. Petitioner's reliance upon Novar is misplaced. In Novar, the Division proved that the notices were mailed but could not prove the date upon which they were mailed or the date on which they were received. Accordingly, we concluded that the petitions were timely filed. Here, the Division by virtue of the Postal Form 3811s has proven the date of receipt. That is the date from which we measure the 90-day period for filing the petition (Matter of Avlonitis, supra; Matter of Blau Par Corp., supra).

Petitioner next asserts that since it has been established that the notices were not properly mailed by the Division there is no presumption of receipt pursuant to section 1147(a)(1) of the Tax Law. Petitioner asserts that the three postal receipts, Postal Form 3811s, do not prove mailing. Petitioner asserts that the signatures on the cards were not legible and, referring to the testimony at hearing, that the signatures were not that of petitioner.

"The [Division] argues that it 'is relying on the green cards as proof of mailing, which provides the presumption of receipt by Petitioner' ([Division's] brief, page 11; emphasis in original). This backwards and convoluted reasoning means -- 'although the Petitioner didn't actually receive the Notices, we should pretend he did, because we mailed the Notices and the proof of the mailing means the Notices were received, even though we all know they were not received by the Petitioner. The proof of mailing is the very receipt, which the Petitioner did not sign'" (Petitioner's brief in support, p. 12).

We affirm the determination of the Administrative Law Judge. We find no basis to overturn the Administrative Law Judge's rejection of petitioner's assertion of nonreceipt of the notices. The return receipts (Form 3811) show that the notices were received at petitioner's last known address. Return receipt notification cards (i.e., Form 3811) constitute proof of proper mailing as of the date of receipt (Matter of Avlonitis, supra).

Next, petitioner argues that the notices were not served on his listed representatives. Petitioner refers to his Exhibit "I," the field audit report of Wizard Petroleum, as proof that the Division's own records support his assertion.

We cannot agree. The field audit report is for the audit of Wizard Petroleum. The liability of petitioner as a responsible officer of the corporation is separate and distinct from that of Wizard. The representations concerning Wizard do not bear upon petitioner's case (see, Matter of On-Site Petroleum Unlimited, Matter of Ashley Jarwood, as Officer of On-Site Petroleum Unlimited, Matter of Trevor Wisdom, as Officer of On-Site Petroleum Unlimited, Tax Appeals Tribunal, February 8, 1996 [consents signed by Mr. Doloboff as representative of On-Site did not bind Ms. Jarwood or Mr. Wisdom because he was not their representative]).

Next, petitioner argues that the notices were "jurisdictionally defective" since they indicated tax was estimated when in fact it was not. "The [Division's] failure to properly instruct the Petitioner by alerting him to the nature of the assessment thwarted the very purpose of the Tax Law, that is providing him with the correct information necessary to properly challenge the assessments against him and, consequently, was prejudicial to him" (Petitioner's brief in support, p. 18).

The Administrative Law Judge dealt fully and properly with this issue and we affirm her determination for the reasons stated therein.

Petitioner's last argument is that "a taxpayer is not required to respond to notices of determination which are served after the statute of limitations has expired" (Petitioner's brief in support, p. 19). Petitioner asserts that the statute of limitations for the notices for the period beginning June 1, 1986 and ending May 31, 1987 expired before the alleged mailing date of July 20, 1990. Petitioner asserts that "the Tax Tribunal has directed Administrative Law Judges not to moot issues, but rather to address all issues raised by the parties [cite omitted]" (Petitioner's brief in support, p. 21). Petitioner implies that the Administrative Law Judge has violated this policy by not dealing with the issue.

We affirm the determination of the Administrative Law Judge. First, the issue of whether the notices themselves were mailed within the period of limitation for assessment of sales and use taxes is an affirmative defense (Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887) and, without a timely request for a hearing having been filed, this Tribunal has no jurisdiction to address this issue (Tax Law § 170[3-a][e]; Matter of Batavia Coal & Oil, Tax Appeals Tribunal, February 2, 1995).

Second, petitioner's argument fails for lack of proof essential to support his position. Tax Law § 1147(b) provides, with exceptions not relevant here, that "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time." In order to successfully challenge the validity of the notices on the basis that they were issued after the statute, petitioner must establish the date of the filing of the returns. The returns at issue are the corporate returns.¹² Petitioner, solely through the testimony of Mr. Doloboff, Wizard's representative (see, Matter of Wizard Petroleum, Tax Appeals Tribunal, March 24, 1994), attempted to prove the date of filing of the corporate sales tax returns. We find such testimony, standing alone, insufficient to prove the date and filing of the returns (see, Matter of Wizard Petroleum, *supra*). Having failed to prove the date on which the corporate returns were filed, petitioner cannot establish that the notices were issued more than three years after such filing (Matter of Jencon, Inc., Tax Appeals Tribunal, December 20, 1990).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Trevor Wisdom, Officer of Wizard Petroleum, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

¹²The Division has by regulation relieved the responsible officers of corporations from the requirement of filing individual returns (see, 20 NYCRR 526.11[b][3]).

3. The petition of Trevor Wisdom, Officer of Wizard Petroleum, Inc. is dismissed.

DATED: Troy, New York
March 21, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner