

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOHN McNAMARA : DECISION
for Revision of a Determination or for Refund : DTA No. 813361
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1989 :
through February 28, 1991. :

Petitioner John McNamara, c/o J. Timothy Shea, Esq., Boyle, Shea & Nornes, 1393 Veterans Memorial Highway, Suite 100-S, Hauppauge, New York 11788, filed an exception to the determination of the Administrative Law Judge issued on September 7, 1995. Petitioner appeared by Eugene B. Fischer, Esq., and Boyle, Shea & Nornes (J. Timothy Shea, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter in lieu of a formal brief in opposition. Petitioner filed a letter in reply. Petitioner's request for oral argument was denied.

Commissioner Pinto delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner DeWitt took no part in the consideration of this decision.

ISSUES

- I. Whether material and triable issues of fact exist warranting a hearing in this matter.
- II. Whether petitioner's request for a conciliation conference was timely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "13" and "14" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

The Division of Taxation ("Division") allegedly mailed to petitioner, John McNamara, a Notice of Determination (Notice No. L-008523436-4) dated March 11, 1994 for sales and use taxes in the amount of \$523,832.00, plus penalties of \$171,624.40 and interest of \$261,934.35, for a total amount due of \$957,390.75 for the period December 1, 1989 through February 28, 1991.¹

The explanation and instruction section contained the following:

"This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.

"Our records indicate that you are/were an Officer/Responsible Person of: McNamara Buick-Pontiac, Inc."²

Petitioner sent a Request for Conciliation Conference ("request"), dated July 14, 1994, which referenced Assessment ID L-008523436-4 to the Bureau of Conciliation and Mediation Services ("BCMS") by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated July 16, 1994. BCMS received the request on July 20, 1994.

By Conciliation Order (CMS No. 140745) dated September 23, 1994, the conciliation conferee denied the request for a conference noting that because the statutory notice was issued on March 11, 1994 and the request was not mailed until July 16, 1994, or more than 90 days from the date of the notice, the request was untimely filed.

A Tax Compliance Levy ("levy") issued by the Division was received by Fleet Bank of Connecticut on November 22, 1994. This levy references Warrant ID No. E-008523436-W001-5 docketed in Suffolk County on

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The Notice of Determination was addressed to "McNamara - John, 108 Van Brunt Manor Rd, East Setauket, New York 11733-3901."

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We modified finding of fact "1" of the Administrative Law Judge's determination by adding the word "allegedly" to the first sentence to more accurately reflect the record and by deleting the computation summary section as being repetitive.

November 16, 1994 in the original warranted amount of \$1,529,426.78. The judgment debtor's name and address were:

"John McNamara
Individually and as a Responsible Person of
McNamara Buick-Pontiac INC.
Winer
400 Garden City Plaza
Garden City, NY 11530-3336."

Petitioner filed a petition with the Division of Tax Appeals dated November 22, 1994 by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated November 23, 1994. The petition was received by the Division of Tax Appeals on November 28, 1994.

Petitioner is seeking a reversal of the order dismissing the conciliation conference request pertaining to the Notice of Determination which assessed sales and use taxes for the period December 1, 1989 through February 28, 1991. The petition challenges the assessment of \$523,832.00 in tax, plus penalty and interest. The petition states:

"1. On or about May 20, 1994 Petitioner received three (3) notices of determination and four (4) notices of estimated determinations for sales tax arising from the operations of Angst Inc.

"2. Included in the aforementioned notices was a page entitled 'consolidated statement of tax liabilities' which listed an eighth (8th) assessment (the subject assessment #L 008523436-4) in the amount of \$523,832 plus interest and penalties.

"3. This was the very first notice petitioner had of such assessment.

"4. On June 8, 1994, Petitioner's attorney, J. Timothy Shea, filed requests for conciliation conferences on the notices of assessment referred to in paragraph 1.

"5. On July 6, 1994, my attorney, J. Timothy Shea, was informed by the New York State Department of Taxation and Finance, Hauppauge, New York, that the eighth (8th) assessment was a sales assessment arising from another corporation, McNamara Buick Pontiac, Inc., notice of which was mailed on June 20, 1994 to the Petitioner.

"6. On July 6 and July 22, 1994 respectively, the Department canceled four (4) of the assessments referred to in paragraph 1.

"7. On July 15, 1994 my attorney filed a request for a conciliation conference with the New York State Department of Taxation and Finance for the subject assessment, #L008-523436-4.

"8. My attorney was notified by order dated September 23, 1994 that notice of the subject assessment #L008523436-4 was issued to the Petitioner on March 11, 1994 and the request for a conciliation conference was denied as untimely.

"9. On November 7, 1994, the Department canceled the remaining three (3) assessments referred to in paragraph 1.

"10. Petitioner [sic] never received any notice of determination or estimated determination of the subject assessment #L008523436-4 from the New York State Department of Taxation and Finance on or after March 11, 1994."

On December 6, 1994, petitioner's former representative, J. Timothy Shea, sent a letter to E. Carlsson of Collections which referenced Assessment Number(s): L-008523436-4 and L-008802052-8.³ Mr. Shea wrote, in pertinent part:

"As you have been made aware, the undersigned represents John McNamara in connection with certain assessments for sales and use taxes that have been imposed upon Mr. McNamara as a result of the operations of McNamara Buick Pontiac, Inc. Warrants have apparently been issued for tax assessments that Mr. McNamara never received notice of. The issue of receipt of notice is on appeal with the Tax Appeals Bureau in Albany.

"Initially, I direct your attention to tax compliance levy dated November 22, 1994 addressed to John McNamara, individually and as a responsible person of McNamara Buick Pontiac, Inc., Winer, 400 Garden City Plaza, Garden City, New York 11530-3336. (Copy enclosed) The address is apparently for an accounting firm which does not represent Mr. McNamara in this matter.

"Also enclosed is a copy of a collection notice dated December 1, 1994 addressed to McNamara [sic] Buick Pontiac, Inc., at PO Box 208, Port Jefferson, New York 11777-0204 for an assessment reflected on the attached consolidated statement of tax liabilities. Please be advised that McNamara Buick Pontiac, Inc. was one of many corporations forfeited to the Federal Government on May 18, 1992 by virtue by [sic] a Federal order of

forfeiture which appointed Dominic DiNapoli of Price Waterhouse as Trustee of McNamara Buick Pontiac, Inc. All notices regarding McNamara Buick Pontiac, Inc. or other forfeited corporations should

³The letter was addressed to: "E. Carlsson, Collections, New York State Department of Taxation and Finance, Suffolk District Office, New York State Office Building, Veteran's Memorial Highway, Hauppauge, New York 11788."

be directed to Dominic DiNapoli, Special Trustee, at Price Waterhouse, 1177 Avenue of the Americas, New York, New York 10036.

"Your department has commenced collection activities against Mr. McNamara for tax assessments for which he has had no notice. The tax assessment number L-008523436-4 in the amount of \$523,832.00 plus interest and penalties and assessment number L-0088020502-8 in the total amount of \$1,462,508.60 are being appealed to the New York State Division of Tax Appeals for the purpose of setting aside the assessments on the basis that Mr. McNamara did not receive the appropriate statutory notice.

"Mr. McNamara insists that no taxes are due to the State of New York for the periods covered in the notices.

"I am led to believe that the Federal Government will cooperate in connection with providing access to the books and records of McNamara Buick Pontiac, Inc. for the contested periods at some time in the future when the Federal Government no longer needs them."

An answer, dated January 24, 1995, was served on petitioner by a transmittal letter also dated January 24, 1995. The Division, in its answer, stated that it lacked "knowledge of information sufficient to form a belief as to the allegations contained in item (6) of the petition." It further stated that: (1) a Notice of Determination (Notice No. L008523436, dated March 11, 1994) was issued to petitioner, pursuant to Articles 28 and 29 of the Tax Law, asserting tax due in the amount of \$523,832.00, plus penalty and interest; (2) that Notice of Determination "bearing certified control number P 911 174 283 addressed to John McNamara, 108 Van Brunt Manor Rd., East Setauket, NY 11733-3901 was stamped 'REFUSED' and returned" to the Division; (3) petitioner failed to request a conciliation conference within 90 days from the issuance of the notice; (4) on September 23, 1994, BCMS issued a Conciliation Order (CMS No. 140745) to petitioner which denied petitioner's request as untimely made; (5) pursuant to Tax Law §§ 170(3-a)(a) and 1138(a)(1), a request for a conciliation conference must be filed within 90 days from the date of the statutory notice; and (6) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of timeliness of petitioner's protest. The answer also states that petitioner has the burden to prove that "the assessment at issue is erroneous or otherwise improper", and to show that petitioner's protest was timely.

On February 27, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1).⁴

In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Geraldine Mahon and Daniel B. LaFar, employees of the Division; a copy of the New York State Department of Taxation and Finance Assessments Receivable certified mail record dated March 11, 1994; a copy of the Notice of Determination dated March 11, 1994; a copy of the envelope used to mail the Notice of Determination; a copy of the envelope which contained petitioner's Request for Conciliation Conference; and a copy of the Request for Conciliation Conference.

Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, which relates to the Division's computer system for generating notices of deficiency and notices of determination to taxpayers under Articles 28 and 29 of the Tax Law.

In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency/determination prior to their shipment to the Division's mechanical section for mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record", and the corresponding notices of determination generated by CARTS. She indicated that the notices are predated 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

⁴The Division's representative, in paragraph 2 of her affidavit, incorrectly stated her second ground as "a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Conciliation Order." However, paragraph 7 of her affidavit correctly stated that:

"[s]ince the Petitioner did not file a Request for Conciliation Conference or a Petition with the Division of Tax Appeals within the time period prescribed by Tax Law sections 170(3-a)(a) and 1138(a)(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."

Service representative, who then affixes his or her initials/ signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the certified mail record containing a list of the notices allegedly issued by the Division on March 11, 1994, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.⁵ Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Determination, addressed to petitioner, which bears assessment identification number L-008523436 and certified control number P 911 174 283.⁶ Page 20 of the certified mail record contains certified control number P 911 174 283, Notice of Determination number L008523436, addressed to petitioner, McNamara - John, 108 Van Brunt Manor Road, East Setauket, New York 11733-3901. The certification and notice numbers listed match those on the notice issued to petitioner.

On this copy of the certified mail record, the certified control numbers run consecutively from P 911 174 073 on page 1 to P 911 174 327 on page 24, with 11 entries per page, except page 24 which contains two entries, as well as the total figures for the certified mail record. All 24 pages of the certified mail record bear the print date of March 2, 1994, changed manually on the first page and last page only to March 11, 1994 and the record print time of 42:29:28. Each of the 24 pages submitted is date stamped March 11, 1994 by the Albany, New York Roessleville Branch of the United States Postal Service. Ms. Mahon explained in her affidavit that the print date for certified mail records is approximately 10 days prior to the mail date in

⁵Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding. The Notice of Determination was sent to "McNamara - John."

⁶The Division's address listed on this Notice of Determination was:

"New York State Department of
Taxation and Finance
Audit Division - Suffolk D.O. - Sales Tax
Veterans Memorial Highway
Hauppauge, NY 11788-5599."

order to give sufficient time to review the notices by hand and to process the postage. She notes that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service. She also identified that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the United States Postal Service after mailing.⁷

It is noted that while the certified mail record submitted contains, on page 24, the total number of pieces listed, 255, it does not contain a total for the number of pieces received at the post office. On page 24, the number 255 is circled on the line entitled "TOTAL PIECES AND AMOUNTS LISTED", and directly beneath the circled number 255 is the illegible initials/signature of the postal representative.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

Daniel B. LaFar is employed as a principal mail and supply clerk in the Division's mail and supply room. Mr. LaFar's duties include the supervision of mail and supply room 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 March 11, 1994.

Mr. LaFar stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail and supply room, a member of the staff weighs and seals each envelope, postage and fees are affixed with a postage meter stamp and the postage and fee amounts are recorded on the certified mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified 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. The postal employee also circles the total number of pieces listed to indicate that this was the total number of pieces received at the post office. After

⁷In paragraph 3 of her affidavit, Ms. Mahon described the certified mail record as follows: "The certified mail record for the block of Notices issued on March 11, 1991 including the Notice of Determination issued to John McNamara consists of 24 fan folded (connected) pages" (emphasis added). There is a typographical error. The correct date is March 11, 1994. All remaining paragraphs of her affidavit recite the March 11, 1994 date.

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 Control Unit).⁸

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

Attached to Ms. Seifert's affidavit as Exhibit "3" is a photocopy of the face side of what appears to be a window envelope, containing what appear to be three window boxes. The window box in the upper left-hand side of the envelope contained the following return address:

"New York State Department of
Taxation and Finance
Audit Division - Suffolk D.O. - Sales T
Veterans Memorial Highway
Hauppauge, NY 11788-5599."⁹

Directly beneath the return address window box is a window box which contained petitioner's address as follows:

"L-008523436-C001-2
MCNAMARA - JOHN
108 VAN BRUNT MANOR RD
EAST SETAUKET NY 11733__901."¹⁰

To the right of the return address window box is what appears to be a window box which has the word "CERTIFIED" directly above the alleged window box and the word "MAIL" directly beneath the window box. The following numbers appeared in the window box: "P 911 174 28."¹¹

The post-paid meter stamp bears "Albany, NY", the date "Mar 11 '94" and U.S. postage of \$1.29. There is a stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contained "RETURNED TO SENDER" and the sleeve contained "REFUSED". There is some extraneous handwriting on the envelope. The envelope also contained a "received" date stamp of

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We modified finding of fact "13" of the Administrative Law Judge's determination by adding the words "with a postage meter stamp" to the second paragraph to more accurately reflect the record.

9

A portion of the return address is not visible in the alleged window box.

10

There is a thick black scribble line through a portion of the address. It has obscured part of the zip code.

11

A portion of the certified control number is not visible in the alleged window box.

March 16, 1994 by the Division's Suffolk District Office Sales Tax Section.¹²

Attached to Ms. Seifert's affidavit as Exhibit "4" is a copy of petitioner's Request for Conciliation Conference and a copy of the envelope which contained petitioner's Request for Conciliation Conference. His request was received by the Division on July 20, 1994. It had been mailed by certified mail and the envelope containing the request bore a postal meter date of July 15, 1994 and was postmarked July 16, 1994.

In opposition to the Division's motion for summary determination, petitioner submitted the affidavit of his representative, Eugene B. Fischer, Esq. Mr. Fischer, in his affidavit, stated that the Division had failed: (1) to prove that it mailed the Notice of Determination on or about March 11, 1994 to petitioner, and (2) to provide any evidence of the Notice of Determination's receipt by petitioner. In his affidavit, he alleged that there were numerous deficiencies in the Division's proffered proof of mailing.

First, he pointed out the inconsistency between the date on the Notice of Determination allegedly issued to petitioner and the postmark date on the copy of the envelope which allegedly was used to mail the Notice of Determination. Mr. Fischer averred that the former had a date of March 11, 1994, while the latter had a metered mail postmark date of March 11, 1991 which was consistent with the date referenced in paragraph 3 of Ms. Mahon's affidavit. He further stated that:

"There are no documents or affirmations included in the Division of Taxation's motion in support of a mailing of a Notice of Deficiency [sic] to the Petitioner on March 11, 1991, nor was there a copy of any mailing envelope or Post Office documents submitted in support of a mailing of a Notice of Deficiency [sic] on March 11, 1994. Therefore, the Division has failed to prove that there was any mailing of the Notice of Deficiency [sic] dated March 11, 1994 to John McNamara" (emphasis in original).

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We modified finding of fact "14" of the Administrative Law Judge's determination by adding the words "what appear to be," "what appears to be" and "alleged" to more accurately reflect the record. In addition, we deleted the words "apparently made by a U.S. Postal Service representative" in the last paragraph to more accurately reflect the record.

Second, he stated that the certified control number on the envelope in which the Notice of Determination was allegedly mailed differed from the certified control number included in the affidavits of Christina L. Seifert and Geraldine Mahon and page 20 of the certified mail record.¹³

Third, he averred that the certified mail record contained material flaws, as follows:

(A) there were two summaries listed on page 24 of the certified mail record: (1) "Total Pieces and Amounts Listed" and (2) "Total Pieces Received at Post Office". The former contained a number while the latter was blank. Mr. Fischer averred that "the failure to include any amounts on that line leads to the logical conclusion that no pieces were received at the Post Office and there was no mailing of any of the pieces listed" in the certified mail record (emphasis in original).

Mr. Fischer further stated that:

"The affidavit of Daniel Lafar [sic] (Division's Exh. 2) in paragraph 6 states unequivocally, apparently but not specifically referring to page 24 of the certified mail record, that the postal employee signed (not initialed) the certified mail record and circled the number of pieces listed to indicate that this was the number of pieces received at the Post Office. There is no indication in either the affidavits of Ms. Mahon or Mr. Lafar [sic] that it is standard Post Office procedure to 'circle' the number of pieces of mail received, and no explanation at all of why the line 'Total pieces received at Post Office' is left blank. Further, Mr. Lafar [sic] does not indicate how he has come to his conclusion that it was a Post Office employee who affixed his signature to the certified mail record. He does not identify the employee, nor indicate that he recognized the signature. Far better evidence in this regard would have been an affidavit from the employee delivering the certified mail record to the Post Office. In the absence of a foundation having been laid for Mr. Lafar's [sic] conclusions concerning the signing and circling on page 24 of the certified mail record, his affidavit must be disregarded in those respects.

* * *

"Ms. Mahon indicates in paragraph 7 of her affidavit that 'the Postal Service representative placed his/her initials on page 24 of the certified mail

¹³Mr. Fischer referenced paragraphs 3 and 5 of Ms. Seifert's affidavit and paragraphs 8 and 11 of Ms. Mahon's affidavit.

record'. However, while there are certain markings on page 24 of the certified mail record, it is impossible to determine if they are initials of any person, and there is no substantiation of the identity of any Postal Service employee who initialed page 24. This is further indication that either this mailing was not handled 'in the regular course of business' and as a common office practice, or that the mailing procedures used in the regular course of business by the Department are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are insufficient to support the proof of mailing of the subject Notice."

(B) Only the first and last page of the certified mail record have a manual date change from the record print date of 03/02/94 to the date on which the notices were allegedly delivered to the post office, 03/11/94. Mr. Fischer noted that there was no change of date on page 20 of the certified mail record, which contained the information related to the alleged mailing of the notice to petitioner:

"and no reason is given for the failure to change the dates manually on all of the intervening pages and whether only the first and last pages were stamped in the ordinary course of business. In addition, there are no initials or other identification of the person making such changes."

Fourth, Mr. Fischer notes that the return address on the envelope in which the Notice of Determination was allegedly mailed was the Division's office in Hauppauge, New York. He further notes that there was a stamp on the envelope which indicated that the envelope was received by the Division's Hauppauge, New York office on March 16, 1994. He averred that:

"There is no explanation of how or why a Division envelope with an address of a Division office in Hauppauge, New York, was processed in the Division's Albany, New York office and mailed in a U.S Post Office in Albany, New York, in the affidavits of Geraldine Mahon or Daniel Lafar [sic]. Further, if the 'Refused' stamp was affixed by the U.S. Post Office . . . the Post Office returned the envelope to the 'sender', the Division's Hauppauge office, and not to the Division's Albany office. The words 'returned to sender' are apparently part of the subject stamp. Therefore, clearly, there is an inconsistency between the affidavits of Geraldine Mahon and Daniel Lafar [sic], and the return address on the mailing envelope concerning the place of mailing that has not been explained by the Division, and such inconsistency reflects upon the veracity of the affiants and/or the record-keeping procedures of the Division in this instance, and as to whether this purported assessment was handled in the regular course of business and pursuant to the practices and procedures of the Mail and Supply Room (Aff., Daniel F. Lafar [sic], ¶¶ 8; 10), or there were unique

circumstances in this matter which caused the alleged assessment not to be handled in the regular course of business.

"There also has been no evidence introduced of any mailing of the assessment from the Division's Hauppauge, New York office" (emphasis supplied in original).

Fifth, Mr. Fischer asserted that the Division did not lay a foundation for the conclusion that the stamped words "returned to sender" and "refused" inside of a hand and sleeve was a "U S Postal stamp". He further asserts that "any conclusions concerning those stamped words must await the introduction of evidence concerning their origin."

Sixth, Mr. Fischer asserted that:

"Petitioner should have the opportunity to cross-examine Ms. Mahon concerning the ability of the Division to produce return receipts in certain instances, the regularity with which such receipts are maintained or produced for evidence in cases, whether a log book is maintained for the receipt of such documents, and her own involvement in the production of receipts in those cases in which the Division introduces same into evidence."

Seventh, he contended that the best evidence of mailing and the receipt or reason for nonreceipt of a document was the maintenance of a log, or other documentary evidence of the return of certified mail documents. He argued that the Division failed to produce the best evidence of the mailing, the refusal and its return, the delivery receipt "which presumably contained a signature or notation as to who refused same." Lastly, he asserted that petitioner denied "ever receiving, refusing to receive, or having any knowledge of any envelope containing the subject assessment."

Attached to Mr. Fischer's Affidavit in Opposition as Exhibit "B" was petitioner's affidavit in which he stated, in pertinent part, that:

"2. Prior to the filing of a Request for Conciliation Conference by my attorney, J. Timothy Shea, on July 15, 1994, in connection with the above-indicated matter, I did not receive, nor did I refuse to receive, nor did I have any knowledge of, any Notice of Determination, or Notice of Deficiency, concerning Sales and Use Tax assessments issued to me personally as a responsible Officer of McNamara Buick-Pontiac, Inc. for the periods 12/01/89-2/28/91, and in particular, I did

not receive, or refuse to take delivery of, or have any knowledge of, Assessment Number L-008523436 prior to July 15, 1994."

OPINION

In her determination below, the Administrative Law Judge concluded that the Division established that, on March 11, 1994, the Notice of Determination was properly mailed to petitioner at his last known address and that petitioner failed to sustain his burden of proof to establish that he did not receive the notice. Therefore, petitioner had 90 days within which to file either a petition with the Division of Tax Appeals or to request a conciliation conference with BCMS. Petitioner's request for a conciliation conference was mailed on July 16, 1994 which was more than 90 days from the date of the mailing of the notice and, thus, the Administrative Law Judge determined that it was not timely filed pursuant to Tax Law § 1138(a)(1). Accordingly, she granted the Division's motion for summary determination and dismissed the petition filed by petitioner in this case.

In his exception, petitioner argues that the postage-paid meter stamp on the envelope which contained the Notice of Determination issued to him has a date of March 11, 1991 and not a date of March 11, 1994 as determined by the Administrative Law Judge. Petitioner also questions certain aspects of the envelope used to mail the Notice of Determination to him such as the return address on the envelope indicates that it originated from the Hauppauge District Office and not the Albany office and the fact that since the last number of the certified mail number is obscured on the face of the envelope, the certified mail number does not match the certified mail number listed in the certified mail record (hereinafter "CMR"). With respect to the CMR, petitioner asserts that, on page 24, the marking near the number 255 is illegible which leads to the conclusion that such marking has no significance and, since, the summary line for number of pieces of mail received by the United States Postal Service is blank, there exists a material flaw in the CMR. Lastly, petitioner argues that the affidavits submitted by the Division are inadequate to establish that standard procedures for mailing the Notice of Determination were followed in this case. Therefore, petitioner asserts that the Division has failed to sustain its burden of proof in this case.

In reply, the Division argues that the envelope which contained the Notice of Determination clearly shows a postage-paid meter stamp dated March 11, 1994. Moreover, in response to petitioner's argument that the certified mail number on the envelope does not match the certified mail number contained in the CMR, the Division asserts that even though the last number on the envelope is allegedly obscured by the window box, the notice number, L008523436, appears on the envelope, which is both the notice at issue and the notice number contained in the CMR. Therefore, the Division contends that since the notice was mailed to petitioner on March 11, 1994 and he failed to request a conciliation conference within 90 days, his petition was properly dismissed by the Administrative Law Judge.

In her determination, the Administrative Law Judge concluded that there were no material and triable issues of fact and that the Division has established that the Notice of Determination was properly mailed to petitioner on March 11, 1994 at his last known address. The Administrative Law Judge further found that petitioner failed to sustain his burden of proof to establish that he did not receive the notice.

Our rules and regulations provide that a summary determination may be granted:

"if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9[b][1]).

Our analysis will begin here because, in our opinion, the record reveals at least one material and triable issue of fact.

Where a petitioner receives a Notice of Determination, he can file a petition within 90 days for a hearing in the Division of Tax Appeals (Tax Law § 1138[a][1]). As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (see, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the fact and date of mailing of the notice (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992).

There is no requirement to produce employees with personal knowledge of the mailing of each individual notice of determination. The act of mailing may be demonstrated by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence establishing that the standard procedure was actually followed (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*). A properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing (Matter of Air Flex Custom Furniture, *supra*; *see also*, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, T.C. Memo 1992-268, 63 TCM 2955). In addition, a properly completed Form 3877 shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (Matter of Air Flex Custom Furniture, *supra*). The Division's computer-generated CMR, which has been approved by the Postal Service for the Division's certified mailings, contains most of the significant elements of the Form 3877 and may serve the same purposes.

In this case, the affidavits of Geraldine Mahon and Daniel LaFar describe a standard procedure for the mailing of the Notice of Determination. Copies of the CMR were submitted to establish that the standard mailing procedure described in the affidavits was actually followed in this case. Thus, the CMR is a crucial piece of evidence since it is the Division's only proof of actual mailing of the Notice of Determination.

What is problematic in this matter is the photocopy of the alleged envelope containing the notice mailed to petitioner. The Administrative Law Judge found as a fact that the envelope "appeared" to be a window envelope with three windows, to wit: one for the Division's return

address; one for petitioner's address; and one for the certified control number. The Administrative Law Judge found as a fact that the certified control number read "P 911 174 28." In a footnote to this number, the Administrative Law Judge explained that a portion of the number "is not visible in the window box" even though there was no evidence in the record of a window envelope. The certified control number on the CMR created and submitted in evidence by the Division was said to be "P 911 174 283." Mr. LaFar stated that a mailroom clerk had verified the numbers on the envelopes against the mailing log. Ms. Seifert, the Division's representative, stated in her affidavit that the envelope she submitted with the affidavit indicated a certified control number of "P 911 174 283," even though the last digit clearly was not on the envelope. None of the Division's employees, in their affidavits or in the exhibits submitted, noted or resolved the difference in the certified control numbers.

The Administrative Law Judge concluded that the Mahon affidavit was remiss in not identifying the type of envelope used herein, i.e., window or regular, but did not find this "flaw" to be material, even though she could not discern whether the photocopy was of a "window" or "regular" envelope. Thus, the Administrative Law Judge ultimately decided that the "window" had obscured a portion of the certified control number without any evidence in the record that a window existed.

The Administrative Law Judge concluded also that the Division had submitted the copy of the envelope in support of its position that the Notice of Determination had been properly mailed. However, given the difference in the certified control numbers, the various extraneous comments written on the envelope of unknown origin, the extraneous markings, the confusion raised by the postage meter stamp affixed by the Division and the overall poor quality of the photocopy, several issues are raised concerning the fact and date of mailing which are not resolved on this motion. For this reason, we reverse the determination of the Administrative Law Judge.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

It is clear from all of the material submitted by both parties hereto that material facts are in dispute and that contrary inferences may be drawn reasonably from undisputed facts, or, at the very least, that doubt exists as to the existence of a triable issue and that a material issue of fact is arguable.

Further, the confusion spawned by the conflicting certified control numbers and other unresolved issues stemming from the envelope submitted by the Division raise triable and material issues of fact which will not permit the granting of summary determination herein because, at the very least, the scenario set forth calls into question whether the standard mailing procedure was followed and, so too, the very fact of mailing. The assumptions and conclusions based on those assumptions made by the Division and the Administrative Law Judge are not based on facts in the record and the confusion raised by the envelope must be most strongly construed against the party who proffered it. In actions for summary relief, the evidence must be construed in the light most favorable to the non-moving party -- in this case petitioner (Gadley v. U.S. Sugar Co., 210 AD2d 983, 620 NYS2d 632; see also, Siegel, NY Prac § 281 at 411 [2d ed]).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of John McNamara is granted to the extent that there is found amaterial and triable issue of fact;
2. The determination of the Administrative Law Judge granting summary determination is reversed; and
3. The matter should be placed on the hearing calendar in the Division of Tax Appeals as soon as possible.

DATED: Troy, New York
January 30, 1997

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner