STATE OF NEW YORK

TAX APPEALS TRIBUNAL

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **IRWIN KUSHNER** | : | DECISION<br>DTA NO. 817039 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period July 5, 1997 through November 15, 1997 and 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 September 1, 1997 through November 30, 1997. | : | |

Petitioner Irwin Kushner, 3 Pat Malone Drive, Suffern, New York 10901, filed an exception to the determination of the Administrative Law Judge issued on November 12, 1999. Petitioner appeared by Stein Riso Mantel Haspel & Jacobs, LLP (Dennis L. Stein, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on May 11, 2000 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## *ISSUE*

Whether the Division of Taxation was entitled to summary determination in its favor on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency and notice of determination.

## *FINDINGS OF FACT*

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

In support of its motion for summary determination, the Division of Taxation (hereinafter the "Division") submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioner did not protest the notices in these matters within 90 days of the date the notices were issued, the Division of Tax Appeals lacks jurisdiction to review these notices.

Petitioner's petition, which was received by the Division of Tax Appeals on April 7, 1999, challenged two notices asserting deficiencies of withholding tax. It also challenged an assessment of sales tax. Two notices and demands, dated December 3, 1998, asserted deficiencies of withholding tax as follows:

| Period Ended | Tax | Interest | Penalty | Payments/ Credits | Balance Due |
|---|---|---|---|---|---|
| 9/27/97 | $0.00 | $0.00 | $12,303.58 | $0.00 | $12,303.58 |
| 11/15/97 | 0.00 | 0.00 | 5,681.07 | 0.00 | 5,681.07 |

According to a Consolidated Statement of Tax Liabilities, which was attached to the petition, there is also an outstanding liability of sales tax in the amount of $164,840.95 plus

interest in the amount of $19,961.70 and penalty in the amount of $34,597.59 less payments or credits of $945.00 for a balance due of $218,455.24.

The petition included a copy of a conciliation order, CMS No. 172456, dated January 15, 1999, which denied petitioner's request for a conciliation conference because "the notices were issued on August 10, 1998, but the request was not received until December 14, 1998, or in excess of 90 days, the request is late filed."

The Division included with its motion papers a copy of its answer to the petition, dated June 10, 1999, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, two notices of deficiency dated August 10, 1998 and a notice of determination dated August 10, 1999.

As noted, the Division submitted two affidavits pertaining to the mailing of the notices. The first affidavit was that of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center who attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to a branch of the USPS in the Albany area. The postal employee affixes a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley states that:

> [h]ere the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office. The U.S. Postmark on each page of the mail record is the official acknowledgment of the U.S. Post Office of the receipt of the pieces of mail recorded on the certified mail record. My knowledge that the postal employee circled the "total number of pieces" for the purposes of indicating that 357 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phase "total pieces and amounts listed" if the number of pieces received equals that listed or 2) by writing the total number received after the phrase "total pieces received at the Post Office." (Baisley affidavit, p. 2.)

He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on August 7, 1998 an employee of the mail processing center delivered three pieces of certified mail addressed to Irwin Kushner to the Colonie Center Branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the postmarked certified mail record delivered to and accepted by the Postal Service on August 7, 1998 for the records maintained by the Case and Resource Tracking System Control Unit of the Division. He concluded that the regular procedures comprising the ordinary

course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to the mailing at issue consisted of 33 fan-folded (connected) pages and included the 3 notices issued to Irwin Kushner on August 7, 1998. She described the certified mail record as having all pages connected when the document is delivered into the possession of the USPS. The pages remain connected until otherwise requested by Ms. Mahon.

Attached to Ms. Mahon's affidavit, as exhibit "A," is a copy of pages 1, 14 and 33 of the original certified mail record issued by the Division on August 8, 1998. The certified mailing record includes notices L015453886, L015453887 and L015453888 issued to Irwin Kushner. According to Ms. Mahon, the certified control numbers run consecutively without any deletions. There are 11 entries on each page with the exception of page 33 which contains 5 entries. Ms. Mahon notes that portions of the certified mailing record, which are attached to her affidavit, have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

The fifth paragraph of Ms. Mahon's affidavit states:

> [i]n the upper left hand corner of page 1 of the certified mail record the date July 30, 1998 was manually changed to August 7, 1993. The typewritten date, July 30, 1998, was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice(s) so that there is sufficient lead time for the Notice(s) to be manually reviewed and then processed for postage, etc. by the Department's Mechanical Section. The handwritten change of the date from July 30, 1998 to August 7, 1998 was made by personnel in the Department's mail room, who changed the date so that it conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the U.S. Postal Service. (Mahon affidavit, p. 2.)

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. Ms. Mahon states that in this instance a Postal Service representative initialed page 33 of the certified mail record and affixed a postmark to each of the 33 pages.

As Ms. Mahon points out, page 14 of the certified mail record indicates that notices numbered L015453886, L015453887 and L015453888 were sent to Irwin Kushner, by certified mail using control numbers P 911 008 814, P 911 008 815 and P 911 008 816. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on August 7, 1998. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS control unit.

As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mailing record and a copy of each of the notices. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." The upper right-hand corners of the pages are numbered 1, 14 and 33, respectively. The upper left-hand corner of each page contains the printed date of "7/30/98." On the first page, this date was crossed out and a new date of "8/7/98" was written above the original printed date. Each of the three pages contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Certified numbers are listed in a vertical column on the left side of each page running successively. Page 14 contains three entries which set forth petitioner's name and address, notice numbers (L015453886 through L015453888) and certified control numbers (P 911 008 814 through P 911 008 816). The notice numbers and the certified control numbers correspond with those found on the notices which are attached to the affidavit of Ms. Mahon. On page 33, the "total pieces and amounts listed" is stated to be 357. Also, the number 357 is circled adjacent to the statement "total pieces received at the post office." In addition, the total fee of $481.95 is consistent with the mailing of 357 pieces of mail at a fee of $1.35. A stamp of "August 7, 1998" from the Colonie Center Branch of the United States Postal Service appears on each of the three pages of the certified mailing record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on page 33.

As exhibit B, the Division offered copies of two notices of deficiency and a notice of determination. Each of the notices of deficiency are dated August 10, 1998 and state that withholding tax is due. The first notice of deficiency lists assessment number L 015453886, states that the total amount due is $5,681.07 and has certified mail number P 911 008 814 printed at the top. The second notice of deficiency lists assessment number L 015453887, states that the total amount due is $12,303.58 and has certified control number P 911 008 815 printed at the top. The notice of determination lists assessment number L 015453888, states that the total amount due is $205,985.10 and bears certified control number P 911 008 816.

In opposition to the motion for summary determination, petitioner's representative, Dennis L. Stein, Esq., states that the Division concluded that petitioner was responsible for withholding and sales tax as an officer of U.S. Bus Manufacturing, Inc. According to Mr. Stein, petitioner first received notice of this determination on or about December 3, 1998 when he received a Notice and Demand for Payment of Tax Due. This notice contained a Consolidated Statement of Liabilities for the periods ended September 27, 1997, November 15, 1997 and November 30, 1997.

Upon receiving the Notice and Demand, petitioner filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services ("BCMS") received the request on December 15, 1998. On January 15, 1999, BCMS dismissed the request as untimely finding that the time to request a conference had expired on August 10, 1998.

In his affirmation, Mr. Stein argues that neither the Baisley nor Mahon affidavits establish the general mailing procedures for mailing notices of deficiencies. After referring to the sixth paragraph of Mr. Baisley's affidavit (***see***, above), Mr. Stein asserts that Mr. Baisley's knowledge

is not based on first hand knowledge and therefore fails to establish that the circle around "357" and the initials on page 33 of the certified mail record were placed there by an employee of the Postal Service. Furthermore, after referring to the fifth paragraph of Ms. Mahon's affidavit (***see***, above), petitioner's representative states:

> Mahon does not supervise the mail room personnel. In fact, Mahon's responsibilities encompass the processing of notices prior to shipment to the Division's Mail Section. Rather, this supervision would presumably fall under the purview of Baisley. Yet, Baisley's affidavit is silent as to the date change. Moreover, Mahon's affidavit fails to state the basis of her presumption that the date was changed by mail room personnel. Moreover, Mahon states that "[e]ach statutory Notice is placed in an envelope by Department personnel" (see Mahon affidavit at paragraph 7). Yet, Mahon fails to identify what Department that personnel belongs to and whether she has direct knowledge of those procedures. Finally, Mahon's affidavit contains errors with regard to the manual date change of the [CMR] . . . .
>
> In addition, the mailing procedures described by Mahon and Baisley fail to demonstrate a chain of custody of the CMR and the corresponding notices. Mahon's affidavit fails to state how the notices and the CMR get from her unit to the mail unit supervised by Baisley. Mahon's affidavit also fails to describe any controls that might exist to ensure that a CMR and the corresponding notices are associated with each other and remain associated when they are forwarded to the mail room. (Citation omitted.)

Mr. Stein contends that the foregoing dates are crucial where, as here, the purported mailing date predates the date printed on the notice by three days. According to Mr. Stein, the inconsistencies prevent the Division from showing that it actually mailed the notices to petitioner. Mr. Stein concludes that as a result of the inconsistencies and lack of first hand knowledge, it is impossible to know whether the dates were changed by employees of the

Division or by someone else and whether the dates were changed before or after the certified mail record was delivered to the Postal Service.

Petitioner also submitted an affidavit which confirmed that on or about December 3, 1998 he first received notice that the Division had determined that he was a responsible person for the withholding tax and sales tax liabilities of U.S. Bus Manufacturing, Inc. Mr. Kushner explained that he received the notice in the form of a Notice and Demand for Payment of Tax Due. Mr. Kushner further states that upon receipt of the notice, he immediately contacted his attorney and made a request for a conciliation conference. This request was denied on the grounds that he had not requested a conference within 90 days of an August 10, 1998 Notice of Deficiency. Petitioner concludes with the statement that he never received any of the notices purportedly sent on August 7, 1998 and he did not refuse to sign for any certified letters.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that the Rules of Practice and Procedure of the Tax Appeals Tribunal provide, at 20 NYCRR 3000.9(b)(1), that a motion for summary determination shall be granted if it has been sufficiently established, based upon all the papers and proof submitted, that no material and triable issue of fact is presented.

The Administrative Law Judge observed that pursuant to Tax Law § 1138(a)(1), a notice of determination of sales and use tax shall become an assessment of the amount specified in such notice unless the person against whom it is assessed either requests a conciliation conference with BCMS or files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. The notice of determination must be mailed by certified or registered mail to the person or persons liable for the collection or payment

of the tax at his last known address in or out of this State. Tax Law § 681 contains nearly identical provisions concerning the mailing of a notice of deficiency. The Administrative Law Judge noted that the filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals.

Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Administrative Law Judge pointed out that the Division has the burden of proving proper mailing of the notice in question. Tax Law § 1147(a)(1) provides that the certified or registered mailing of the notice to the taxpayer at his last known address raises a presumption of the receipt of the notice by the person to whom the notice is addressed. A notice of deficiency, however, sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received. Once deemed properly mailed, the Administrative Law Judge noted that a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. This presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered.

The Administrative Law Judge noted that in order to prove the proper mailing of a notice, the Division bears the burden of showing its standard procedure for the issuance of notices by one with knowledge of the relevant procedures. The Division must also show that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge concluded, based on affidavits of the Division's employees submitted in support of its motion, that the Division had presented sufficient proof to establish its standard procedure for issuing notices of determination and deficiency. Further, the

Division had established that the subject notices were mailed to petitioner on August 7, 1998. As petitioner's request for a BCMS conference was not filed within 90 days of the mailing date as required, petitioner's request was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of the notices of determination or deficiency. The Administrative Law Judge observed that petitioner did not offer any evidence to show that the mailing of the notices did not occur as claimed by the Division or that the Division failed to follow its procedures. Under these circumstances, petitioner had not raised an issue of fact requiring a trial concerning either the basis of the affiants' knowledge or the chain of custody of the notices and mailing record. Thus, the Administrative Law Judge granted summary determination to the Division.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge erred in concluding that the Division had met its burden to show its standards for issuing notices of deficiency and determination or that it followed its procedures in the present case.

Petitioner argues that the affidavits submitted in support of the Division's motion were defective in many respects. Specifically, petitioner emphasizes that the Division did not demonstrate the procedure for the chain of custody of the notices or of the certified mail record nor was either affidavit based on any first hand knowledge of the instant case. Thus, petitioner urges that the Division should not be entitled to rely on a presumption that the notices were mailed.

Petitioner asserts that the Mahon affidavit does not describe the type of envelope used nor does it describe which unit's personnel actually placed the notices in an envelope. Further,

petitioner maintains that there is no description of the controls that exist to ensure that a certified mail record and corresponding notices are associated when the CARTS Control Unit receives them or when they are forwarded to the Mail Processing Center. Petitioner argues that the explanation of the alteration of the July 30, 1998 date on the certified mail record misstates the year of mailing and contains information not based on first hand information nor corroborated by the Baisley affidavit. Although Mahon does not supervise the mail room personnel, her affidavit contains the only explanation of the date change.

Additionally, petitioner claims that the certified mail record does not indicate how many pieces of mail were actually received at the post office on August 7, 1998. There is no identification of the postal employee who allegedly initialed the last page of the certified mail record or the Division employee who took the mail to the post office. Petitioner states that the best evidence of this crucial chain of custody would be an affidavit by the employee who took the items to the post office and a second affidavit by the Postal employee that he counted each item and related them to the certified mail record. With the defects as noted, petitioner asserts that the Division is not entitled to a presumption of regularity.

Petitioner seeks to distinguish this case from that in ***Matter of McNamara*** (Tax Appeals Tribunal, March 9, 2000), where the Division was able to overcome defects in its mailing procedure and establish actual mailing because it received the envelope back from the Post Office marked "Refused." This is not the case here, argues petitioner, and as a result, petitioner's challenge should be considered timely.

The Division, in opposition, argues that the Administrative Law Judge correctly determined the relevant issues in favor of the Division and his summary determination should be affirmed.

***OPINION***

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000, et seq.) provide that 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 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; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177). 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).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309), and the bare affirmation by counsel is without evidentiary value in this regard (***Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.***, 42 NY2d 496, 398 NYS2d 1004). A party opposing the motion "must establish the existence of material facts of sufficient import to create a triable issue" (***Shaw v. Time-Life Records,*** 38 NY2d 201, 379 NYS2d 390, 396). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (***Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990).

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax which will become an assessment unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of determination is to be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." The mailing of such notice is presumptive evidence of its receipt. The taxpayer has

the right to rebut this presumption (***Matter of Ruggerite, Inc. v. State Tax Commn.***, 64 NY2d 688, 485 NYS2d 517).

Similarly, Tax Law § 681 authorizes the Division to issue a notice of deficiency of income tax to a taxpayer, to be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state, which will become an assessment of such tax unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Tax Law § 691(b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequently thereto the taxpayer has notified the Division of a change in address. Tax Law § 681 does not require actual receipt by the taxpayer (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). The timely filing of a request for a conference or a petition is a jurisdictional prerequisite for review of a notice of determination or a notice of deficiency (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it mailed the notice of deficiency at issue to the taxpayer at his last known address (***see, Matter of Malpica***, ***supra***). The Division must prove both the fact and date of mailing of the notice at issue (***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the postal service for mailing (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***Matter of Katz***, ***supra***). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (***see, Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111).

To demonstrate proper mailing, the Division must produce evidence of its standard procedures for the issuance of such notices by one with knowledge of such procedures, corroborated by direct testimony or documentary evidence that this procedure was followed in the particular case at hand (***see, Matter of Novar TV & Air Conditioner Sales & Serv., supra***). The United States Tax Court, interpreting provisions of the Internal Revenue Code analogous to those at issue herein, has decided that a properly completed Postal Service Form 3877 or its counterpart "represents direct documentary evidence of the date and the fact of mailing" of the assessment (***Wheat v. Commissioner,*** T.C. Memo 1992-268, 63 TCM 2955***,*** 2957***, citing Magazine v. Commissioner***, 89 T.C. 321). "Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of [the division]" (***Wheat v. Commissioner, supra,*** 63 TCM, at 2958***, citing United States v. Zolla***, 724 F2d 808, 84-1 USTC ¶ 9175, ***cert denied*** 469 US 830, 83 L Ed 2d 59). When the Internal Revenue Service (hereinafter "IRS") is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

We have found that a properly completed certified mail record is substantively the same as the Postal Service Form 3877 (***see, Matter of Montesanto***, Tax Appeals Tribunal, March 31, 1994). This Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, 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,*** Tax Appeals Tribunal, November 25, 1992). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (***Coleman v. Commissioner,*** 94 T.C. 82; ***Wheat v. Commissioner, supra***).

In this matter, we disagree with the Administrative Law Judge that the Division presented a prima facie case warranting a summary determination in its favor. The Division's proof in this case consists of the affidavits of Geraldine Mahon and James Baisley, which were offered to establish the general procedure for the mailing of notices of deficiency and notices of determination pursuant to Tax Law §§ 681 and 1138. Exhibit "A" of the Mahon affidavit contains three pages of what purports to be a longer multi-page computer-generated certified mail record. This certified mail record was offered to establish that the Division's mailing procedure was followed in this particular instance and is a crucial piece of evidence in this proceeding.

We conclude that exhibit "A" of the Mahon affidavit fails to show that the procedure articulated by the Division's affiants was followed. The Division's affiants describe a procedure which allows each page of the certified mail record to be associated with the other pages: the pages are connected when they are delivered to the USPS and remain connected when they are

returned to the unit which generated the certified mail record (the CARTS Control Unit) and the certified mail numbers run consecutively from page to page. Moreover, the number of pieces of mail listed on the certified mail record is totaled at the bottom of the last page and a postal employee enters the actual number of items received by the USPS and signs or initials the certified mail record. The entries at the end of the certified mail record demonstrate that each item listed on the certified mail record was delivered to the custody of the USPS on the date stamped on the certified mail record.

This procedure, as described by the Division's affiants, seeks to establish that the Division has a method "to ensure the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the Postal Service and returned to the custody of the Division" (***Matter of Greene Valley Liqs.***, Tax Appeals Tribunal, November 25, 1992). In an administrative proceeding, a party may submit into evidence copies or excerpts of any document of which it desires to avail itself (State Administrative Procedure Act § 306[2]). However, the submission of only a portion of a document may be considered in the context of the weight to be accorded to the document (***see***, ***Matter of Swick v. New York State & Local Employees' Retirement Sys.***, 213 AD2d 934, 623 NYS2d 960). We conclude that the truncated certified mail record submitted as exhibit "A" of the Mahon affidavit does not establish that the articulated procedure was followed in this case.

Page 14, where petitioner's name appears, cannot be associated with pages 1 or 33 of exhibit "A" of the Mahon affidavit. The date on page 1 has been changed from July 30, 1998 to August 7, 1998. Page 1, therefore, bears a different date than pages 14 or 33. The three pages of exhibit "A" of the Mahon affidavit are not physically connected; the certified mail numbers run

consecutively on each page but not from page to page; and the pages are not consecutively numbered. As a result, it cannot be positively determined that pages 1, 14 and 33 are from the same certified mail record. Neither the Division's attorney nor its affiants explain the reason for submitting abstracts from the original certified mail record or offer a method of associating the various pages of exhibit "A" of the Mahon affidavit.

Page 14 of exhibit "A" of the Mahon affidavit, standing alone, is insufficient to show that the items of mail listed on that page were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In ***Matter of Roland*** (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address; nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to Roland was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed; i.e., by entering the number of pieces of mail received in the space provided for that entry. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (***see***, ***Matter of Cal-Al Burrito Co.***, Tax Appeals Tribunal, July 30, 1998, ***see also, Matter of Roland, supra***; ***Matter of Huang,*** Tax Appeals Tribunal, April 27, 1995; ***Matter of Fuchs***, Tax Appeals Tribunal, April 20, 1995*;* ***Matter of Auto Parts Ctr.***, Tax Appeals Tribunal, February 9, 1995; ***Matter of Turek***, Tax Appeals Tribunal, January 19, 1995).

The Tribunal's enabling legislation, as implemented by the Tribunal's regulations, provide for *de novo* review of a determination by an Administrative Law Judge (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][1]). Although the Tax Appeals Tribunal usually defers to the Administrative Law Judge's evaluation of the evidence, we are not bound by that determination and the record herein does not support the granting of summary determination to the Division. In addition to the above-stated shortcomings, we are troubled by the Division's failure to demonstrate that it had mailed the notices at issue to petitioner's proper address in accordance with the statute. The Division does not even allege, much less demonstrate, that the address to which the notices at issue were allegedly mailed was petitioner's last known address or that such address was stated on his last return (Tax Law §§ 691, 1147). There was no assertion by the Division that the address used in its mailing met the requirements of either Tax Law § 691 or § 1147. Each of the notices at issue were addressed to petitioner and allegedly mailed to him at: "*1 Ackertown Rd, Chestnut Ridge, NY 10952-4902*." However, petitioner's address, as set forth in his petition, is: *"3 Pat Malone Drive, Suffern, New York 10901*." All the information submitted by petitioner and his representative which is included in the record indicates this latter address for petitioner, including the Power of Attorney executed by petitioner to his representative on July 22, 1998 and filed by petitioner with his petition.[1]

---

[1] Significantly, the Power of Attorney predates the alleged date of mailing of the Notices on August 7, 1998. The Power of Attorney specifically identifies three Notice numbers: L-015453886-4, L-015453887-3 and L-015453888-2, which are the same notice numbers the Division claims to have mailed to petitioner on August 7, 1998. This raises the further question of whether or not petitioner had informed the Division that he had a representative prior to the date of issuance of the notices. If so, then petitioner's representative was also entitled to receive a copy of the notices issued to petitioner. While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, case law has held that the 90-day

(continued...)

Demonstrating that the notices at issue were addressed and mailed to petitioner at petitioner's last known address is a necessary element in the Division's proof of mailing. The Division's failure to assert this element raises another potential material and triable issue of fact.

In conclusion, we reverse the Administrative Law Judge and deny summary determination to the Division. We remand this matter to the Administrative Law Judge for a hearing on all issues relevant to the timely mailing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Irwin Kushner is granted to the extent that there are found to be material and triable issues of fact;

2. The determination of the Administrative Law Judge granting summary determination is reversed; and

---

[1](...continued)
period for filing a petition or request for conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (***see***, ***Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988, ***citing Matter of Bianca v. Frank***, 43 NY2d 168, 401 NYS2d 29).

3. The matter should be placed on the hearing calendar in the Division of Tax Appeals as soon as possible.

DATED: Troy, New York
October 19, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

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

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