STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL RAKUSIN	:	
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, 1991 through November 30, 1995.	:	DECISION DTA NOS. 817336 AND 817337
In the Matter of the Petition	:	
of	:	
MICHAEL RAKUSIN	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period December 1, 1990 through December 31, 1990.	:	

Petitioner Michael Rakusin, 2776 East 66th Street, Brooklyn, New York, 11234-6807, filed an exception to the determination of the Administrative Law Judge issued on September 21, 2000. Petitioner appeared by Warren Wynshaw, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether the Administrative Law Judge properly granted summary determination to the Division on the ground that petitioner's request for a conciliation conference with the Bureau of Conciliation and Mediation Services was untimely.

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") purportedly issued to petitioner, Michael Rakusin, six notices of determination dated June 11, 1996, identified by Assessment ID Nos. L012192151, L012192152, L012192153, L012192154, L012192155, L012192156, and four notices of estimated determination L012192157, L012192158, L012192159 and L012192160, bearing certified mail control numbers P 911 172 910 through P 911 172 919, respectively. Such notices asserted additional sales and use taxes due for the period September 1, 1991 through November 30, 1995, as follows:

Assessment No.	Tax	Interest	Penalty	Total Amount Due
L012192151	$ 5,864.60	$ 343.17	$ 879.66	$ 7,087.43
L012192152	8,651.61	784.33	1,577.24	10,993.18
L012192153	10,140.65	1,258.90	2,129.46	13,529.01
L012192154	10,071.27	1,597.90	2,417.06	14,086.23
L012192155	12,063.81	3,226.39	3,618.98	18,909.18
L012192156	8,285.89	2,863.47	2,485.58	13,634.94
L012192157	18,135.66	10,213.61	5,440.56	33,789.83
L012192158	18,135.66	11,084.03	5,440.56	34,660.25

L012192159	18,135.66	11,981.18	5,440.56	35,557.40
L012192160	18,135.66	12,693.99	5,440.56	*33,055.18

*Reflects assessment payments or credits in the amount of $3,215.03.

The notices of determination and notices of estimated determination are each addressed to petitioner at "2776 E 66 St, Brooklyn, NY 11234-6807" and have been made a part of the record herein. All of the notices refer to petitioner's alleged liability as an officer or responsible person of Stern & Wynch. The six notices of determination state that the notices may be challenged by filing a request for a conciliation conference or a petition for a tax appeals hearing by "09/09/96." The notices then state, in part, "[i]f we do not receive a response to this notice by 09/09/96: This notice will become finally and irrevocably fixed and subject to collection action."

The four notices of estimated determination state that the tax has been estimated in accordance with Tax Law § 1138 and may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a tax appeals hearing by "09/09/96."

The Division purportedly issued to petitioner, Michael Rakusin, a Notice of Estimated Deficiency, Assessment ID No. L012192921, bearing certified mail control number P 911 172 920, dated June 11, 1996. Such notice asserted a penalty due for the period December 1, 1990 through December 31, 1990, in the amount of $3,555.00. The penalty is equal in amount to the tax not paid by Stern & Wynch, of which petitioner is alleged to be an officer or responsible person. The Notice of Estimated Deficiency is addressed to petitioner at "2776 E 66 St, Brooklyn, NY 11234-6807," and has been made a part of the record herein. The notice states that the estimated assessment on which the penalty is based was issued because a required tax return was not filed by Stern & Wynch.

Concerning the notices assessing sales and use tax and personal income tax, two conciliation orders dismissing request, dated June 25, 1999, were issued by the Bureau of Conciliation and Mediation Services ("BCMS"), bearing the following explanation:

> The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on June 11, 1996, but the request was not mailed until May 18, 1999, or in excess of 90 days, the request is late filed.

Petitioner filed two petitions with the Division of Tax Appeals in protest of the orders on September 29, 1999.

The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing; James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office; and Terrence Atwater, Director in the Personal Income Tax Returns Processing Bureau, whose duties include overseeing the analysis and testing of computer systems which process tax return information. These affidavits describe the general procedures for the preparation and mailing of the notices in issue, and describe how such procedures were followed in this case.

The general process for issuing and mailing notices of determination and deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Presort Qualified Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding statutory notices. The CMR is printed approximately ten days

prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are 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 each. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually

picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

In support of its position that the procedures outlined above were followed in this case, the Division has also submitted a copy of pages 1, 10, 20, 30, 40, 46, 47, 50, 60, 70, 80, 90, 100, 110, 120, 130, and 134 of the CMR listing the 10 sales and use tax notices at issue in this matter. The CMR consists of 134 pages with 11 entries on each page, with the exception of page 134 which bears 5 entries. It shows a printed date of "6/1/96" on each of the 36 pages. On page one the printed date has a line through it and above it is handwritten the date of "6-11-96." There is a consecutive listing of 1,468 certified control numbers beginning with P 911 172 405 and ending with P 911 173 872. There is a Postal Service postmark of June 11, 1996 on pages 1, 47, and 134 of the CMR. A Postal Service postmark without a clear date appears on page 46. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 1,468, which is circled. There is no amount next to "TOTAL PIECES RECEIVED AT POST OFFICE." There is a signature under the number 1,468 on the last page.

Petitioner's name is listed on page 46 for one notice and page 47 of the CMR for the remaining nine notices. The certified numbers listed for the notices sent to petitioner are P 911 172 910 through P 911 172 919, which match the certified numbers shown at the top of the ten notices issued to petitioner. The notice numbers listed on the CMR for petitioner's notices are consecutively L 012192151 through L 012192160, which match the numbers appearing on the

notices.[1] The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notices.

The same CMR is submitted into evidence as proof of mailing of Notice of Estimated Deficiency No. L012192921 under certified control number P 911 172 920. Petitioner's name is listed on page 47 of the CMR. The certified number listed for the notice sent to petitioner matches the certified number shown at the top of the notice issued to petitioner. The notice number listed on the CMR for petitioner's notice (L012192921) matches the number appearing on the notice. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notice.

Terrence Atwater is the Director in the Personal Income Tax Returns Processing Bureau in the New York State Department of Taxation and Finance and has been employed by the Department for seven years. As part of his regular duties, Mr. Atwater oversees the analysis and testing of computer systems which process tax return information. These systems store information derived from various sources and generate printed documents which are sent to taxpayers as well as printouts of purged information.

After the taxpayer's information is captured from the taxpayer's return or application for an extension to file a return onto the Returns Processing Database, it is stored in a record format. The taxpayer's address represented on the printout is the information used to process the taxpayer's return or application for an extension to file. Based on his review of the computer printout of petitioner's Application for Automatic Extension of Time to File for Individuals for

[1] The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

the year 1995, Mr. Atwater could determine that petitioner's address as listed on such application was 2776 E. 66th St, Brooklyn, NY 11234-6807.

Petitioner submitted an affidavit in opposition to the Division's motion stating, in pertinent part, that he does not dispute the *mailing* of the notices on June 11, 1996, but rather claims to never have received them, since he did not reside at 2776 E. 66th Street, Brooklyn, New York after February 1995. He asserts that he never received the ten notices assessing sales and use tax, and this should be viewed as rebutting the presumption of receipt. Concerning the income tax estimated notice of deficiency, petitioner maintains that the Division failed to show any due diligence to determine whether the address to which the notices were mailed was petitioner's last known address. As a result, he argues that the Division's motion should be denied and petitioner should be granted the right to have the merits of his case heard.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge referenced applicable regulations of the Tax Appeals Tribunal and pertinent case law which provide that any party appearing before the Division of Tax Appeals may bring a motion for summary determination. The motion shall be granted if, based upon all the papers and proof submitted, no material and triable issue of fact is presented. However, the motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

The Administrative Law Judge also noted that when the Division of Taxation issues a Notice of Determination to a taxpayer pursuant to Tax Law § 1138(a)(1), that determination finally and irrevocably fixes the tax due unless the person against whom it is assessed files a petition with the Division of Tax Appeals or requests a conciliation conference in BCMS seeking

revision of the determination within 90 days of the mailing of the notice. This timely 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.

The Administrative Law Judge recited that Tax Law § 1147(a)(1) requires a Notice of Determination 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 Division bears the burden of proving both the date and fact of mailing of the statutory notice. A notice is considered to be mailed when it is delivered into the custody of the USPS. Further, the Administrative Law Judge noted that if sufficient evidence of mailing has been produced, a presumption of delivery to the person to whom it is addressed arises.

The Administrative Law Judge cited applicable case law which has established what is required to prove mailing: there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and there must be proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge considered the affidavits of Ms. Mahon, Mr. Baisley and Mr. Atwater submitted by the Division in support of its position that the notices of determination, estimated determination and estimated deficiency were issued to petitioner on June 11, 1996. The Administrative Law Judge concluded that such affidavits contained sufficient proof to establish the standard procedure of the Division for issuing such notices. The Administrative Law Judge also concluded that the Division's proof established that the notices of determination,

estimated determination and estimated deficiency at issue were mailed to petitioner on June 11, 1996.

The Administrative Law Judge found that petitioner did not challenge the method of mailing of the eleven notices dated June 11, 1996. However, petitioner disputed receiving such notices. The Administrative Law Judge concluded that petitioner's statement alone was not sufficient to rebut the presumption of delivery.

The Administrative Law Judge found that the Division established that it mailed the notice assessing personal income tax to petitioner on June 11, 1996 at his last known address (2776 E. 66th Street, Brooklyn, New York), which was acquired from Form IT-370, a personal income tax extension form filed in the name of petitioner and his (then) spouse for tax year 1995. The Division's documents show a filing date for Form IT-370 of April 15, 1996. The Administrative Law Judge rejected petitioner's arguments that he did not file such extension and had not been living in his former marital residence since February 1995.

Accordingly, the Administrative Law Judge found that petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of June 11, 1996, or no later than September 9, 1996. Since the request for conciliation conference was not made until May 18, 1999, the Administrative Law Judge found that it was time barred. As a result, the Administrative Law Judge granted the Division's motion for summary determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he raised a triable issue of fact by his assertion that he did not receive the notices at issue. Petitioner argues that the Administrative Law Judge erred in concluding that the Division had mailed the notices at issue to his last known address.

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 (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Rules 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).

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).

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, 91).

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, James Baisley and Terrence Atwater, 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 and compliance with that general procedure for mailing the notices at issue herein. Exhibit "A" of each of the Mahon affidavits

(collectively referred to hereinafter as "exhibit 'A'") contains a total of 17 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 that 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.

Pages numbered 46 and 47, where petitioner's name appears, cannot be associated with pages numbered 1, 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130 or 134 of exhibit "A" of the Mahon affidavit. The date on page number 1 has been changed from June 1, 1996 to June 11, 1996. Page number 1, therefore, bears a different date than pages numbered 46 and 47. The 17 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 numbered 1, 10, 20, 30, 40, 46, 47, 50, 60, 70, 80, 90, 100, 110, 120, 130, and 134 of the CMR 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.

Pages numbered 46 and 47 of exhibit "A" of the Mahon affidavit, standing alone, are insufficient to show that the items of mail listed on that page were actually delivered to the USPS (***see***, ***Matter of Kushner***, Tax Appeals Tribunal October 19, 2000). 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 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 matters relevant to the issue of timely mailing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael Rakusin 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

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

DATED: Troy, New York
July 26, 2001

/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