STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of TREVOR WISDOM, OFFICER OF WIZARD PETROLEUM, INC. for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1986 through November 30, 1987.	: : :DETERMINATION DTA NO. 812655 : : :

Petitioner, Trevor Wisdom, officer of Wizard Petroleum, Inc., 875 Cedar Swamp Road, Old Brookville, New York 11545, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1986 through November 30, 1987.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on December 14, 1994 at 1:15 P.M., with all briefs to be submitted by April 10, 1995. Petitioner, appearing by Uncyk, Borenkind and Nadler (Norman R. Berkowitz, Esq., of counsel), submitted a brief on February 10, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel), submitted its brief on March 17, 1995. Petitioner submitted his reply brief on April 7, 1995. The reply brief due date of April 10, 1995 commenced the six-month period to issue a determination in this matter.

ISSUES

I. Whether petitioner's request for a conciliation conference was timely filed.

II. Whether petitioner's representatives had filed powers of attorney which entitled them to copies of the notices sent to petitioner.

III. Whether the notices of determination were jurisdictionally defective and therefore invalid.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Trevor Wisdom, three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990.[1] The first notice (Notice No. S900720806M) assessed sales and use taxes due for the period June 1, 1986 through July 30, 1987 in the amount of $4,204,879.69, plus penalty of $2,102,439.98 and interest of $2,159,125.64, for a total amount due of $8,466,445.58. The second notice (Notice No. S900720807M) assessed sales and use taxes for the period June 1, 1987 through September 30, 1987 in the amount of $234,707.39, plus penalty of $117,353.70 and interest of $93,583.82, for a total amount due of $445,644.91.

On each of the foregoing notices, a box was checked next

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

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

to the statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notices also contained the following statement:

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

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

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

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

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

of Tax Appeals on March 7, 1994. The petition states:

> "(a) Although the Notices of Determination (Forms AU-16) are all dated July 20, 1990, they were not received by the taxpayer until forwarded to the taxpayer's attorney on September 2, 1993 by Counsel to the Department of Taxation and Finance.
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> "(b) A Request for Conciliation Conference (Form CMS-1) was filed with the Bureau of Conciliation and Mediation Services, Department of Taxation and Finance, by Certified Mail, on October 6, 1993, which is within 90 day period permitted.
>
> "(c) The Statute of Limitations for making assessments for sales and use tax and for penalties related to such taxes for the periods involved has expired and, consequently, such assessments are barred by law.
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> "(d) The Sales Tax Bureau's computations with respect to the proposed adjustments are incorrect and are based on arbitrary and capricious assumptions, which are unsupported by any evidence or facts.
>
> "(e) The underlying corporate taxpayer (Wizard Petroleum, Inc.) has various receipts, vouchers and other evidentiary data to support its sales as set forth on its tax returns for the periods involved.
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> "(f) The underlying corporate taxpayer (Wizard Petroleum, Inc.) and this taxpayer deny any fraud with respect to the sales tax returns in question. Therefore, the burden of proof relating to the proposed fraud penalty is on the Department of Taxation and Finance.
>
> "(g) The penalties proposed pursuant to Section 1145 of the Tax Law only includes one period (the period ending August 31, 1987) for which the taxpayer is being assessed a tax. As a result, such proposed penalties must be nullified."

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

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

1988, inclusive, and assessment numbers S900720806M, S900720807M and S900720808M.

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

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

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

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

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

In his affidavit, Mr. Hika stated that he was familiar with the Bureau's procedures, as they existed in July 1990, for mailing sales tax notices of determination. He indicated that the notices of determination issued to petitioner (Notice Nos.

S900720806M, S900720807M and S900720808M [converted to L006580919, L006580920 and L006580921, respectively]), dated July 20, 1990, were prepared by the Bureau, proofread and then deposited in envelopes addressed to petitioner. He also indicated that the Bureau prepared and attached a return receipt request, or Postal Form 3811 ("green card"), to each envelope. According to Mr. Hika, "the address on each envelope and green card is taken from the enclosed Notice." The envelopes containing the notices, with the attached green cards, were then brought to the mailroom.

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

> "The taxpayer's name and address are written on the certified mail record. The certified mail number from certified mail record [sic]. The certified mail number from each envelope's green card is entered on the certified mail record. The envelopes are compared with the certified mail record to verify that all Notices are accounted for.
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> "Mail-room [sic] personnel then deliver the envelopes containing the Notices to the United States Postal Service, which then stamps the certified mail record. A copy of the stamped certified mail record is returned to the Bureau.
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> * * *
>
> "When 'green cards' are returned to the D.O. they are forwarded by the mail-room [sic] to the Bureau."

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

Notices" to petitioner.

Attached to Mr. Hika's affidavit as Exhibit "A" are copies of the notices of determination (S900720806M, S900720807M and S900720808M), which he asserts were mailed on July 16, 1990 and were delivered on July 18, 1990 to petitioner's address at 875 Cedar Swamp Road, Old Brookville, New York 11545. Attached to Mr. Hika's affidavit as Exhibit "B" is the certified mail record ("CMR"), consisting of PS Form 3877, which contains the list of the notices allegedly mailed on July 16, 1990.[2] Attached to the affidavit as Exhibit "C" are three original PS Forms 3811, Domestic Return Receipt Cards ("green cards"), Article Numbers 752 453, 752 454 and 752 455, respectively, and copies of the front and back of each of these green cards. Mr. Hika stated that the "three returned receipts" were returned to him at the Bureau.

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

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

form.[3] Lines 4, 5 and 6 contain the entries which appear to pertain to petitioner as follows:

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

Across the bottom of the page are spaces for total number of pieces listed by sender, the number of pieces received at the post office and the name of the post office's receiving employee. Review of the bottom of the PS Form 3877 indicates that there is a circled "12" in the space for total number of pieces listed by sender;[5] nothing appears in the space for total number of pieces received by post office. No signature appears in the space for the name of the post office's receiving employee. This CMR has the date stamped July 16, 1990 by the United States Postal Service twice on it,

although both postmarks are partly faint and illegible.[6] There appear to be some extraneous words written at the bottom of the CMR as well.

Included as part of the Hika affidavit are the originals of

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

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

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

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

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

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

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

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

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

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

because there were:

> "any number of irregularities with respect to this mailing which cannot be addressed by an affidavit and have been sloughed over in this affidavit. And I think that an employee of the State of New York should be present and testify so as to clarify these irregularities for the Court and to the petitioner in view of the fact, particularly, that there's $13 million of taxes involved -- taxes, penalties and interest" (tr., p. 10).

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

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

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

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

Petitioner's Exhibit "1" is the Field Audit Report ("report") for "Wizard Petroleum Corp." Included in the report is a document entitled "Tax Field Audit Record" ("record") which contains the contacts and comments for all audit actions.[10] The taxpayer's representatives listed on the

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

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

record were Ben Doloboff and Arnie Frager. The report submitted into the record does not include any executed power of attorney forms.

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

Q. "And did Mr. Frager -- if Mr. Frager received a copy of these notices, would he have given them to you?"

A. "Yes."

Q. "Did he ever do so?"

A. "No."

Q. "Did he ever tell you he received these notices, copies of these notices?"

A. "Never received a notice" (tr., pp. 38-39).

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

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

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

A. "Yes, he did."

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

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

Mr. Doloboff testified that when Wizard received three notices

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

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

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

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

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

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

During the period in issue, Wizard's sales and use tax returns did not report any taxes due. Other than the sales tax

returns, none of the returns have been questioned as not timely filed. In most instances, the returns included tax payments (tr., p. 46).

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

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

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

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

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

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

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

Petitioner's Exhibit "6" is a portion of the transcript in

the Matter of Jarwood (Administrative Law Judge hearing held on July 13, 1994) which contains the testimony of Ashley Jarwood, an officer of Wizard.

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

According to Ms. Jarwood, tax returns were presented to her by Ms. Frank with paper clips on the pages which required signatures. The envelopes were attached by paper clips to those papers. Ms. Jarwood just went to those pages that had paper clips on them and returned the papers to Ms. Frank. In the general course of business, Ms. Jarwood would ask Ms. Frank if the tax returns were mailed on time.

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

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

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

Petitioner's Exhibit "4" consists of two letters written

by James Hika of the Division to Norman R. Berkowitz, Esq., regarding Wizard Petroleum, CMS #108091. In the first letter, dated June 24, 1991, Mr. Hika wrote:

> "Pursuant to your request of 6/18/91, enclosed are copies of the worksheets for the Sales Tax Adjustments.
>
> "The figures were extracted from copies of returns provided by the subject during the audit with the exception of May '87 where the tax rate was adjusted to .064 per gallon to arrive at the tax due."

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

Petitioner's Exhibits "2" and "3" indicate that Ashley Jarwood timely protested sales and use taxes for the period June 1, 1986 through November 30, 1987.[11] According to petitioner's Exhibit "3", a conciliation conference was held on January 14, 1992 concerning Notice Nos. S900720804M and S900720805M. The conciliation conferee sustained the statutory notices in a Conciliation Order (CMS No. 116663) dated July 31, 1992.

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

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

accountant is Ben Doloboff and his attorney is Norman Berkowitz.

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

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

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

In her affidavit, Mrs. Wisdom states:

> "4. I am fully familiar with Trevor Wisdom's signature.
>
> "5. I have examined the three (3) Domestic Return Receipts attached to this Affidavit and the signature on Line 5, which purports to be the signature of Trevor Wisdom.
>
> "6. I categorically state that the signature on Line 5 of the attached Domestic Return Receipts is not that of my husband, Trevor Wisdom.
>
> "7. I categorically state that the signature on Line 5 of the attached Domestic Return Receipts is not my signature.

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

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

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

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

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

The Division submitted as its Exhibits "E" and "F" two regular envelopes addressed to Ashley Jarwood which were returned to the Division because they were unclaimed. Each of these envelopes bears a U.S. postage meter stamp dated "July 16, 1990" from "Brooklyn, NY". The Division's Exhibit "E" bears

Certified Mail No. 752457, while Exhibit "F" bears Certified Mail No. 752456.

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

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that the Division has failed to prove that the notices of determination were properly mailed. He asserts that the Hika affidavit "must be rejected since it is completely conclusory and fails to articulate the step-by-step procedure by which a Notice of Deficiency [sic] is made up and then processed through the Post Office" (Petitioner's brief, p. 6). Petitioner also contends that the certified mail record is deficient.

In addition, petitioner argues that the Division's failure to present Mr. Hika or any other witness with direct knowledge concerning the mailing procedure must result in an adverse determination for the Division.

Assuming, arguendo, that the notices of determination were properly mailed, petitioner contends that he has overcome the statutory presumption of receipt. He argues that he has established that he did not receive the notices of determination and that the signatures on the return receipt cards were not his.

Petitioner also contends that since he has common

interests in the proposed sales tax assessments involved in this matter with Ashley Jarwood, his request for a conciliation conference should be considered timely based on Ms. Jarwood's timely request for a conciliation conference. He maintains that both he and Ms. Jarwood are officers of Wizard and have the same attorney and accountant. Petitioner states:

> "[i]n this matter, one taxpayer's (Jarwood) Conciliation Conference certainly gave the Tax Department a view of the entire course of conduct so as to call into question the tax liability of everyone -- including another taxpayer, the Petitioner herein" (Petitioner's brief, p. 12).

He further contends that Ms. Jarwood's timely request for a conciliation conference validated his request for a conference.

Petitioner avers that the Division failed to send copies of the notices of determination to his appointed representatives, Ben Doloboff and Arnie Frager. He maintains that the Division's own records list Mr. Doloboff and Mr. Frager as his representatives. Petitioner argues that the 90-day period for filing a request for a conciliation conference is tolled in this case because his representatives were not served with the notices of determination.

Lastly, petitioner argues that the notices of determination for the period beginning June 1, 1986 and ending May 31, 1987 were mailed after the time for assessing additional tax had expired. Furthermore, he asserts that although all of the notices stated that the tax assessed was "estimated in accordance with Section 1138(a)(1) of the Tax Law", none of the notices was based on estimates. Petitioner maintains that the Division's failure to properly instruct him:

> "by alerting him to the nature of the assessment thwarted the very purpose of the Tax Law, that is providing him with the correct information necessary to properly challenge the assessments against him and, consequently, was prejudicial to him" (Petitioner's brief, p. 16).

Petitioner avers that the Division's prejudicial notices mailed after the period of limitations for making assessments had expired were rendered void as jurisdictionally defective. He maintains that he is not required to respond to notices of determination which are void on their face as jurisdictionally defective.

The Division contends that the Hika affidavit along with the certified mail record establish that the notices of determination were mailed on July 16, 1990. It asserts that if the CMR is deemed inadequate to establish the date on which the notices at issue were mailed, the Division may rely instead upon the return receipt cards. In the instant case, the Division has submitted three signed return receipt cards. It contends that the signature on each of the green cards appears to be "K. Wisdom". The Division states that petitioner testified that, in July 1990, his four adult children resided in his home. One of these children was named Kenneth. The Division argues that:

> "[i]t would be reasonable to conclude that Kenneth Wisdom signed the three green cards and accepted delivery on behalf of his father. Petitioner has not offered any evidence to rebut this assumption" (Division's brief, p. 9).

The Division argues that it "is relying on the green cards as proof of mailing, which provides the presumption of receipt pursuant to Tax Law § 1147(a)(1), not as proof of actual receipt

by Petitioner" (Division's brief, p. 11; emphasis in original). It maintains that it has demonstrated that the notices were received at petitioner's residence on July 18, 1990 and, therefore, it has established that the notices were mailed no later than that date. The Division further contends that although petitioner has the right to rebut the presumption of receipt, the rebuttal must consist of more than a mere denial of receipt. It avers that:

> "petitioner has presented no evidence apart from his mere denial of receipt, he has failed to rebut the presumption and his protest of the Notices must be found untimely" (Division's brief, p. 10).

The Division also contends that since petitioner has failed to establish a statute of limitations defense, the notices were timely issued. It argues that the assessments against petitioner were based upon the corporate sales tax liability of Wizard and, therefore, the statute of limitations with respect to assessments issued against petitioner is dependent upon the filing of the corporate returns. The Division asserts that petitioner has failed to establish both the fact of any such filing and the date of such filing.

The Division maintains that there are no facial defects in the subject notices which affect their validity. It states that petitioner appears to argue that the notices are facially defective because they erroneously indicate that estimation techniques were utilized. The Division maintains that in order for petitioner to prevail on the issue of the validity of the assessments, he would have to demonstrate that the facial defect in the notices hindered his ability to effectively challenge the

assessments. It contends that petitioner failed to do that and, therefore, the defects do not affect the validity of the notices.

The Division contends that it was not required to serve any other party with copies of the notices at issue. It asserts that "no testimony or other evidence has been introduced to indicate whether Petitioner had a duly authorized representative at the time the notices were issues [sic]" (Division's brief, p. 16; emphasis in original). The Division maintains that the contact sheet submitted into evidence by petitioner was part of the audit workpapers for Wizard, not petitioner. According to the Division, the contact sheet merely indicates that the corporation had a representative. Thus, the Division avers, petitioner has failed to demonstrate that the Division failed to serve a representative such that the statutory period must be tolled.

Lastly, the Division maintains that petitioner's argument that Ms. Jarwood's timely protest makes his protest timely is without merit. Citing relevant case law, the Division argues that petitioner is attempting to overcome the effect of his own tardiness.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in pertinent part, that:

> "Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing . . . ."

B. Tax Law § 1147(a)(1) provides that:

> "[a]ny notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article 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. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

C. A petitioner has the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services upon receipt of the Notice of Determination, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]).

D. Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish both the fact and date of mailing of the Notice of Determination (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The proof required consists of evidence of a standard procedure for the issuance of such notices offered by one with personal knowledge of such procedures and evidence that establishes that the procedure was followed in the particular case under consideration (see, Matter of Montesanto, Tax Appeals

Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533).

E. As noted in Conclusion of Law "D", the required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavit of Mr. Hika in support of its position that the notices of determination were issued to petitioner on July 16, 1990.

Petitioner argues that the Division has failed to prove that the notices of determination were properly mailed. He contends that the Hika affidavit:

> "fails to state (a) the date of mailing; (b) the reason that the Notices were mailed from Brooklyn rather than from Albany; (c) the reason that the sales tax notices were mailed by the Transaction and Transfer Tax Bureau rather than by the Sales Tax Bureau; (d) the names of the various persons who performed the various functions described and the dates these functions were performed; and (e) the reason that the Notices did not contain the certified mail numbers" (Petitioner's brief, pp. 6-7).

Petitioner argues that the Division has failed to explain the question of the date of mailing of the notices. He states that the notices are all dated July 20, 1990; however, the certified mail record attached to the Hika affidavit has two dates,

July 16, 1990 and July 18, 1990. Petitioner maintains that the record does not contain an affidavit of mailing by the person who actually delivered the notices to the U.S. Postal Service. He also contends that the CMR is wholly deficient because:

> "(a) it does not state the number of pieces received by the Post Office; (b) does not contain the signature or the initials of the Post Office employee receiving the mail; and (c) does not contain the Petitioner's assessment or notice numbers" (Petitioner's brief, p. 8).

Petitioner argues that the failure and refusal of the Division to present Mr. Hika or any other witness with direct knowledge concerning the mailing procedure must result in an adverse determination for the Division. He cites Matter of Donahue (Tax Appeals Tribunal, December 8, 1994) in which the Tribunal stated that the Division of Tax Appeals has:

> "the responsibility for 'providing the public with a just system for resolving conflicts' with the Division [of Taxation] (Tax Law Section 2000). A necessary element of such a system is that petitioners are able to obtain the testimony of the Division employees who participated in generating the assessment . . . . Obviously, the taxpayers must have access to this testimony, or the burden to prove the assessment erroneous may be insurmountable."

Petitioner contends that:

> "the failure to provide Mr. Hika as a witness merits the strongest possible negative inferences and the conclusion that he did not appear because he could not have truthfully corrected or explained the multiple irregularities contained in his Affidavit" (Petitioner's reply brief, p. 7).

F. I will first address petitioner's argument that a negative inference should be drawn because of the Division's failure and refusal to call Mr. Hika as a witness. Petitioner's argument is meritless. The Division was not required to present

Mr. Hika as a witness. The Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.10[d][1]) specifically provide that affidavits, containing relevant facts, may be received into evidence at hearings, "for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits." Petitioner has cited Matter of Donahue (supra) in support of his position. The situation in the instant case is far different from that in Donahue. In Donahue, the taxpayer had subpoenaed a Division tax compliance agent who failed to appear at the hearing held in that matter. The Division could not offer any legal or factual reasons for his failure to appear. In the instant case, the record indicates that petitioner did not make a request of this Administrative Law Judge to subpoena either Mr. Hika or any other witness, an action authorized by State Administrative Procedure Act § 304(2) and the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.6[c]).

Petitioner's arguments that Mr. Hika's affidavit contains numerous deficiencies and therefore should be rejected are without merit. Mr. Hika's affidavit sets forth the procedures and practices used by the Transaction and Transfer Tax Bureau in the issuance and mailing of notices of determination in July 1990.

However, the CMR which allegedly proves that the notices were mailed to petitioner on July 16, 1990 is inadequate. I find that the PS Form 3877 is not properly completed. While the one-page CMR does contain the certified number, name of

petitioner, the date and postmark, it does not contain petitioner's address, the number of pieces received by the post office or the signature of a postal employee acknowledging receipt (see, Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995). As the Tribunal noted in Matter of Montesanto (supra):

> "As we discussed in Katz and Clark, a properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the taxpayer's representative, the date, postmark and the signature of a Postal Service employee acknowledging receipt."

I find that the evidence submitted fails to satisfy the Division's burden that the notices were properly mailed to petitioner on July 16, 1990. As the Tribunal noted in Matter of Katz (supra):

> "proof of mailing requires evidence of the ordinary issuance procedure as well as evidence of the fact that the procedure was actually followed in a particular case."

G. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). In support of its proof of receipt, the Division submitted the three returned postal receipts, Form PS 3811 (green cards), Article Nos. 752453, 752454 and 752455, each of which is

addressed to "Trevor Wisdom, 875 Cedar Swamp Road, Old Brookville, New York 11545" (see, Finding of Fact "11"). Based on this evidence, the statutory 90-day period may be measured from the date of receipt, i.e., the date of the United States Postal Service postmarks on the three PS Form 3811's, to wit, July 18, 1990 (see, Matter of Avlonitis, supra).

H. While petitioner does not contend that the address listed on each of the notices of determination was not his last known address, he testified that he did not receive the three notices (see, Finding of Fact "34"). He further testified that the signatures on the three return receipts were not his (see, Finding of Fact "35"). Petitioner submitted the affidavit of his wife, Iris Wisdom, in support of his assertion that it was not petitioner's signature on the three return receipts (see, Finding of Fact "36"). In addition, he offered the testimony of his accountant that it was not petitioner's signature on the three return receipts (see, Finding of Fact "18"). Petitioner has argued that the Division's contention that one of petitioner's four children, Kenneth Wisdom, may have signed the return receipts is absurd. He contends that the signature is illegible and it is impossible to determine who signed those three return receipts. In Matter of Blau Par Corporation (Tax Appeals Tribunal, May 21, 1992), although the petitioner asserted nonreceipt, the Tribunal found that return receipt cards which contained illegible signatures of the persons accepting delivery constituted proof of proper mailing as of the date of receipt.

The evidence supports the Division's assertion that on July 18, 1990 the three notices of determination were received by petitioner at his last known address. Petitioner's unsupported allegation of nonreceipt is insufficient to rebut the Division's evidence of receipt (see, Conclusion of Law "B"; see also, Matter of American Cars "R" Us v. Chu, 147 AD2d 795, 537 NYS2d 672; Matter of Blau Par Corporation, supra).

I. As noted in Conclusions of Law "A" and "C", a notice of determination becomes final and irrevocable unless the taxpayer files either a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS within 90 days after the notice is issued. The last day on which petitioner could have timely filed either a request for a conciliation conference or a petition was October 16, 1990, unless there was a tolling of the 90-day period.

Petitioner argues that, in accordance with Matter of Multi Trucking (Tax Appeals Tribunal, October 6, 1988, citing Matter of Bianca v. Frank, 43 NY2d 168, 401 NYS2d 29), the 90-day period for the filing of petitions should be tolled in this case because his representatives were not served with the notices of determination. He argues that the Division's records, submitted into evidence as Petitioner's Exhibit "1", list Mr. Doloboff, his accountant, as well as Mr. Frager, an employee of Mr. Doloboff's accounting firm, as his authorized representatives (see, Finding of Fact "14"). Petitioner proffered the testimony of Mr. Doloboff, who stated that neither he nor Mr. Frager received copies of the notices at issue (see,

Findings of Fact "13" and "15"). Petitioner contends that the Division failed to cross examine Mr. Doloboff with regard to his testimony concerning the subject notices of determination and, therefore, "this uncontroverted evidence must be accepted as true and correct" (Petitioner's brief, p. 13).

The Division maintains that petitioner's argument is meritless because "no power of attorney was introduced into the record and there was no testimony or other evidence offered which tended to prove that such a power had been executed and filed with the Division" (Division's brief, p. 15). Furthermore, the Division asserts that the contact sheet upon which petitioner relies was for Wizard, the corporation, not for petitioner. The Division contends that "[n]o testimony or other evidence has been introduced to indicate whether Petitioner had a duly authorized representative at the time the notices were issues [sic]" (Division's brief, p. 16; emphasis in original).

The Division is correct. Petitioner has not submitted any evidence to show that, prior to the issuance of the notices of determination, Mr. Doloboff and Mr. Frager, a member of the former's accounting firm, were petitioner's representatives for sales taxes during the relevant period. The Field Audit Report and the contact sheets contained in that report pertain to Wizard, not petitioner. In fact, although it appears that Mr. Doloboff and Mr. Frager were Wizard's representatives with regard to the motor fuel tax/sales tax audit, a copy of that power of attorney was not submitted into evidence either (see, Finding of Fact "14"). It was petitioner's burden to introduce

evidence that Messrs. Doloboff and Frager had filed powers of attorney, and the party upon whom the burden of proof rests loses if no evidence is offered on the fact at issue (see, Matter of Grace & Co., Tax Appeals Tribunal, September 13, 1990). No such evidence was produced here (see, Matter of Sliford Restaurant, Tax Appeals Tribunal, October 10, 1991).

Since the 90-day period was not tolled in this case, the last day on which petitioner could have timely filed either a request for conciliation conference or a petition was October 16, 1990. Petitioner's request was mailed on November 10, 1993 (see, Finding of Fact "4"). Unfortunately, this date is well past the 90-day period within which a request may be filed. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

J. As an alternative argument, petitioner contends that he is entitled to a conciliation conference based on the timely request of Ashley Jarwood, a taxpayer with a common interest. He maintains that both he and Ms. Jarwood were officers of Wizard and have the same attorney and accountant. Ms. Jarwood timely requested a conciliation conference for the same periods as are in issue in this matter. Her conciliation conference was held on January 14, 1992. Petitioner asserts that Ms. Jarwood, at her conciliation conference, "indicated to the conferee the various officers of Wizard and the responsibilities of each of the officers." He argues that Ms. Jarwood's conciliation conference gave the Division "a view of the entire course of

conduct so as to call into question the tax liability of everyone -- including another taxpayer", himself (Petitioner's brief, p. 12). Petitioner maintains that Ms. Jarwood's timely request for a conciliation conference validated his request for a conference. I find petitioner's argument to be meritless.

Tax Law § 170(3-a)(b) provides that "[a] request for a conciliation conference shall be applied for in the manner as set forth by regulation of the commissioner . . . ." The regulations provide that the request for a conciliation conference should contain:

> "(i) the name and address of the requester;
>
> "(ii) the name and address of the requester's representative, if any;
>
> "(iii) if applicable, the taxable years or periods involved and the amount of tax in controversy;
>
> "(iv) the action or actions of the operating division or bureau which are being protested;
>
> "(v) the facts and law which the requester asserts are relevant to the controversy;
>
> "(vi) the signature of the requester or the requester's representative beneath a statement that the request is made with knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law;
>
> "(vii) a legible copy of the statutory notice being protested; and
>
> "(viii) the original or a legible copy of the power of attorney" (20 NYCRR 4000.3[b][1]).

In Matter of Crispo (Tax Appeals Tribunal, April 13, 1995), the Tribunal found the situation where the taxpayer claimed a timely, yet informal, request for refund had been made to be analogous to the situation where the taxpayer claimed a timely,

yet informal, request for a conciliation conference had been made. The Tribunal found the analysis employed in the refund situation to be applicable in the determination of whether there has been a timely request for a conciliation conference. The Tribunal stated:

> "In analyzing whether a taxpayer has made an informal claim for refund, the Supreme Court has stated:
>
> > 'a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period' (United States v. Kales, 314 US 186, 194).
>
> "Lower courts applying this standard have held that:
>
> > '[i]t is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer' (American Radiator & Standard Sanitary Corp. v. United States, 318 F2d 915, 63-2 USTC ¶ 9525, at 89,179; see also, Rosengarten v. United States, 181 F Supp 275, 60-1 USTC ¶ 9303, cert denied 364 US 822)" (Matter of Crispo, supra).

The record is silent as to what facts and law were contained in Ms. Jarwood's request for a conciliation conference. It is impossible to determine whether or not the information in Ms. Jarwood's request related to petitioner at all and if it would satisfy any of the requirements specified in the Division's regulations or fairly advise the Division of petitioner's claim so as to constitute an informal request. Additionally, it is not enough for petitioner to claim that the

Division should have deduced that petitioner's tax liability should be called into question based on Ms. Jarwood's conciliation conference (see, Matter of Crispo, supra).

In sum, petitioner has failed to prove that he made a timely request for a conciliation conference.

K. Petitioner claims that he is not required to respond to the notices of determination because they are jurisdictionally defective. He asserts that the three-year statute of limitations for assessment of sales and use taxes (Tax Law § 1147[b]) expired before the Division issued the notices of determination to petitioner for the period June 1, 1986 through May 31, 1987. Petitioner also contends that although all of the notices stated that the tax assessed was "estimated in accordance with Section 1138(a)(1) of the Tax Law", none of the notices was based on estimates. He asserts that the Division's failure to provide him with the correct information necessary to properly challenge the assessments issued against him was prejudicial to him. Petitioner maintains that:

> "as a result of the Tax Department's prejudicial notices mailed after the period of limitations for making assessments had expired, these Notices were rendered void as jurisdictionally defective" (Petitioner's brief, p. 16).

L. I will first address petitioner's argument that the notices of determination are defective because the box was checked next to the statement that the tax assessed was estimated in accordance with Tax Law § 1138(a)(1) on each of the notices, when in fact it was not. The Tax Appeals Tribunal was presented with similar situations in Matter of Bowen (Tax

Appeals Tribunal, January 20, 1994), Matter of Framapac Delicatessen (Tax Appeals Tribunal, July 15, 1993), and Matter of A & J Parking Corporation (Tax Appeals Tribunal, April 9, 1992). In each of these cases, the Tribunal held that notices of determination which fail to indicate that assessments have been estimated are nevertheless valid unless the petitioner can demonstrate prejudice.

In the instant case, petitioner has asserted that he was prejudiced. However, he has failed to carry his burden of proof to show that he was so prejudiced by the statement on the notices that the tax was estimated. Petitioner has offered no testimony or evidence to demonstrate in what way he was prejudiced; therefore, the notices are considered valid (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892).

As for the statute of limitations argument raised by petitioner, this issue goes to the merits of the case. Since I have found that petitioner's request for a conciliation conference was not timely filed, and that the Division of Tax Appeals is without jurisdiction, I cannot address this issue (see, Conclusion of Law "I").

M. The petition of Trevor Wisdom, officer of Wizard Petroleum, Inc., is hereby dismissed.

DATED: Troy, New York
October 5, 1995

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE