

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN McNAMARA	:	DETERMINATION ON REMAND
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 December 1, 1989 through February 28, 1991.	:	DTA NO. 813361

Petitioner, John McNamara, P. O. Box 824, East Setauket, New York 11733, 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 December 1, 1989 through February 28, 1991.

An initial determination was issued by Administrative Law Judge Winifred M. Maloney on September 7, 1995. On exception, the Tax Appeals Tribunal reversed the order of the Administrative Law Judge and remanded the case to the Administrative Law Judge for a hearing on the issue of the timeliness of petitioner's request for a conciliation conference. A hearing on the issue of timeliness only was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 30, 1997 at 9:15 A.M., with all briefs to be submitted by June 29, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by Eugene B. Fischer, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

ISSUES

- I. Whether petitioner's request for a conciliation conference was timely filed.
- II. Whether petitioner was denied due process by the Administrative Law Judge's denial of petitioner's representative's request for a continuance.
- III. Whether petitioner was denied due process, at the hearing, by the Administrative Law Judge's denial of petitioner's request that the Administrative Law Judge issue subpoenas to the Division's affiants.

FINDINGS OF FACT

1. Findings of Fact "2" through "18" were found by the Tax Appeals Tribunal in its decision issued January 30, 1997.
2. The Division of Taxation ("Division") allegedly mailed to petitioner, John McNamara, a Notice of Determination (Notice No. L-008523436-4) dated March 11, 1994 for sales and use taxes in the amount of \$523,832.00, plus penalties of \$171,624.40 and interest of \$261,934.35, for a total amount due of \$957,390.75 for the period December 1, 1989 through February 28, 1991.¹

The explanation and instruction section contained the following:

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

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

3. Petitioner sent a Request for Conciliation Conference ("request"), dated July 14, 1994, which referenced Assessment ID L-008523436-4 to the Bureau of Conciliation and Mediation

¹The Notice of Determination was addressed to "McNamara - John, 108 Van Brunt Manor Rd, East Setauket, New York 11733-3901."

Services ("BCMS") by U.S. Postal Service First Class Certified Mail. The U.S. Postal Service postage-paid stamp is dated July 16, 1994. BCMS received the request on July 20, 1994.

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

5. A Tax Compliance Levy ("levy") issued by the Division was received by Fleet Bank of Connecticut on November 22, 1994. This levy references Warrant ID No. E-008523436-W001-5 docketed in Suffolk County on November 16, 1994 in the original warranted amount of \$1,529,426.78. The judgment debtor's name and address were:

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

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

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

1. On or about May 20, 1994 Petitioner received three (3) notices of determination and four (4) notices of estimated determinations for sales tax

arising from the operations of Angst Inc.

2. Included in the aforementioned notices was a page entitled 'consolidated statement of tax liabilities' which listed an eighth (8th) assessment (the subject assessment #L 008523436-4) in the amount of \$532,832 plus interest and penalties.
3. This was the very first notice petitioner had of such assessment.
4. On June 8, 1994, Petitioner's attorney, J. Timothy Shea, filed requests for conciliation conferences on the notices of assessment referred to in paragraph 1.
5. On July 6, 1994, my attorney, J. Timothy Shea, was informed by the New York State Department of Taxation and Finance, Hauppauge, New York, that the eighth (8th) assessment was a sales assessment arising from another corporation, McNamara Buick Pontiac, Inc., notice of which was mailed on June 20, 1994 to the Petitioner.
6. On July 6 and July 22, 1994 respectively, the Department canceled four (4) of the assessments referred to in paragraph 1.
7. On July 15, 1994 my attorney filed a request for a conciliation conference with the New York State Department of Taxation and Finance for the subject assessment, #L008-523436-4.
8. My attorney was notified by order dated September 23, 1994 that notice of the subject assessment #L008523436-4 was issued to the Petitioner on March 11, 1994 and the request for a conciliation conference was denied as untimely.
9. On November 7, 1994, the Department canceled the remaining three (3) assessments referred to in paragraph 1.
10. Petitioner [sic] never received any notice of determination or estimated determination of the subject assessment #L008523436-4 from the New York State Department of Taxation and Finance on or after March 11, 1994.

8. On December 6, 1994, petitioner's former representative, J. Timothy Shea, sent a letter to E. Carlsson of Collections which referenced Assessment Number(s): L-008523436-4 and L-008802052-8.² Mr. Shea wrote, in pertinent part:

²The letter was addressed to: "E. Carlsson, Collections, New York State Department of Taxation and Finance, Suffolk District Office, New York State Office Building, Veteran's Memorial Highway, Hauppauge, New York 11788."

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

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

Also enclosed is a copy of a collection notice dated December 1, 1994 addressed to McNamara [sic] Buick Pontiac, Inc., at PO Box 208, Port Jefferson, New York 11777-0204 for an assessment reflected on the attached consolidated statement of tax liabilities. Please be advised that McNamara Buick Pontiac, Inc. was one of many corporations forfeited to the Federal Government on May 18, 1992 by virtue of [sic] a Federal order of forfeiture which appointed Dominic DiNapoli of Price Waterhouse as Trustee of McNamara Buick Pontiac, Inc. All notices regarding McNamara Buick Pontiac, Inc. or other forfeited corporations should be directed to Dominic DiNapoli, Special Trustee, at Price Waterhouse, 1177 Avenue of the Americas, New York, New York 10036.

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

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

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

9. An answer, dated January 24, 1995, was served on petitioner by a transmittal letter also dated January 24, 1995. The Division, in its answer, stated that it lacked "knowledge of information sufficient to form a belief as to the allegations contained in item (6) of the petition."

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

10. On February 27, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1).³

³The Division’s representative, in paragraph 2 of her affidavit, incorrectly stated her second ground as “a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Conciliation Order.” However, paragraph 7 of her affidavit correctly stated that:

[s]ince the petitioner did not file a Request for Conciliation Conference or a Petition with the Division of Tax Appeals within the time period prescribed by Tax Law sections 170(3-a)(a) and 1138(a)(1), the late Request for Conciliation Conference was properly denied and the Petition before the Division of Tax Appeals should be dismissed, with prejudice for lack of jurisdiction.

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

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

13. In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency or determination prior to their shipment to the Division's mechanical section for mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record", and the corresponding notices of determination generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the certified mail record. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her initials or signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the certified mail record containing a list of the notices allegedly issued by the Division on March 11, 1994, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.⁴ Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Determination, addressed to petitioner, which bears assessment identification number L-008523436 and certified control number P 911 174 283.⁵ Page 20 of the certified mail record contains certified control number P 911 174 283, Notice of Determination number L008523436, addressed to petitioner, McNamara - John, 108 Van Brunt Manor Road, East Setauket, New York 11733-3901. The certification and notice numbers listed match those on the notice issued to petitioner.

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

⁴Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding. The Notice of Determination was sent to "McNamara - John."

⁵The Division's address listed on this Notice of Determination was:

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

sufficient time to review the notices by hand and to process the postage. She notes that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service. She also identified that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the United States Postal Service after mailing.⁶

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

14. Daniel B. LaFar is employed as a principal mail and supply clerk in the Division's mail and supply room. Mr. LaFar's duties include the supervision of mail and supply room staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on March 11, 1994.

Mr. LaFar stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail and supply room, a member of the staff weighs and seals each envelope, postage and fees are affixed with a postage meter stamp and the postage and fee amounts are recorded on the

⁶In paragraph 3 of her affidavit, Ms. Mahon described the certified mail record as follows: "The certified mail record for the block of Notices issued on *March 11, 1991* including the Notice of Determination issued to John McNamara consists of 24 fan folded (connected) pages" (emphasis added). There is a typographical error. The correct date is March 11, 1994. All remaining paragraphs of her affidavit recite the March 11, 1994 date.

certified mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. The postal employee also circles the total number of pieces listed to indicate that this was the total number of pieces received at the post office. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here, CARTS Control Unit).

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

New York State Department of
Taxation and Finance
Audit Division - Suffolk D.O. - Sales T
Veterans Memorial Highway
Hauppauge, NY 11788-5599.⁷

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

L-008523436-C001-2
MCNAMARA - JOHN
108 VAN BRUNT MANOR RD
EAST SETAUKET NY 11733__901.⁸

To the right of the return address window box is what appears to be a window box which has the

⁷A portion of the return address is not visible in the alleged window box.

⁸There is a thick black scribble line through a portion of the address. It has obscured part of the zip code.

word "CERTIFIED" directly above the alleged window box and the word "MAIL" directly beneath the window box. The following numbers appeared in the window box: "P 911 174 28."⁹

The post-paid meter stamp bears "Albany, NY," the date "Mar 11 '94" and U.S. postage of \$1.29. There is a stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contained "RETURNED TO SENDER" and the sleeve contained "REFUSED." There is some extraneous handwriting on the envelope. The envelope also contained a "received" date stamp of March 16, 1994 by the Division's Suffolk District Office Sales Tax Section.

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

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

First, he pointed out the inconsistency between the date on the Notice of Determination allegedly issued to petitioner and the postmark date on the copy of the envelope which allegedly

⁹A portion of the certified control number is not visible in the alleged window box.

was used to mail the Notice of Determination. Mr. Fischer averred that the former had a date of March 11, 1994, while the latter had a metered mail postmark date of March 11, 1991 which was consistent with the date referenced in paragraph 3 of Ms. Mahon's affidavit. He further stated that:

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

Second, he stated that the certified control number on the envelope in which the Notice of Determination was allegedly mailed differed from the certified control number included in the affidavits of Christina L. Seifert and Geraldine Mahon and page 20 of the certified mail record.¹⁰

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

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

Mr. Fischer further stated that:

The affidavit of Daniel Lafar [sic] (Division's Exh. 2) in paragraph 6 states unequivocally, apparently but not specifically referring to page 24 of the certified mail record, that the postal employee signed (not initialed) the certified mail record and circled the number of pieces listed to indicate that this was the number

¹⁰Mr. Fischer referenced paragraphs 3 and 5 of Ms. Seifert's affidavit and paragraphs 8 and 11 of Ms. Mahon's affidavit.

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

* * *

Ms. Mahon indicates in paragraph 7 of her affidavit that 'the Postal Service representative placed his/her initials on page 24 of the certified mail record'. However, while there are certain markings on page 24 of the certified mail record, it is impossible to determine if they are initials of any person, and there is no substantiation of the identity of any Postal Service employee who initialed page 24. This is further indication that either this mailing was not handled 'in the regular course of business' and as a common office practice, or that the mailing procedures used in the regular course of business by the Department are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are deficient, and the affidavits of Ms. Mahon and Mr. Lafar [sic] are insufficient to support the proof of mailing of the subject Notice.

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

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

Fourth, Mr. Fischer notes that the return address on the envelope in which the Notice of Determination was allegedly mailed was the Division's office in Hauppauge, New York. He

further notes that there was a stamp on the envelope which indicated that the envelope was received by the Division's Hauppauge, New York office on March 16, 1994. He averred that:

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

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

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

Sixth, Mr. Fischer asserted that:

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

Seventh, he contended that the best evidence of mailing and the receipt or reason for

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

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

2. Prior to the filing of a Request for Conciliation Conference by my attorney, J. Timothy Shea, on July 15, 1994, in connection with the above-indicated matter, I did not receive, nor did I refuse to receive, nor did I have any knowledge of, any Notice of Determination, or Notice of Deficiency, concerning Sales and Use Tax assessments issued to me personally as a responsible Officer of McNamara Buick-Pontiac, Inc. for the periods 12/01/89-2/28/91, and in particular, I did not receive, or refuse to take delivery of, or have any knowledge of, Assessment Number L-008523436 prior to July 15, 1994.

19. On February 27, 1995, the Division filed a motion for summary determination on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination as required by Tax Law § 1138(a)(1). After due consideration of the motion papers, affidavits and all pleadings and documents submitted, the Administrative Law Judge determined, on September 7, 1995, that the Division established that, on March 11, 1994, the Notice of Determination was properly mailed to petitioner at his last known address, and because petitioner's request for a conciliation conference was mailed on July 16, 1994, the request was not timely and the Division of Tax Appeals did not have jurisdiction to entertain the merits of petitioner's case. The Administrative Law Judge granted the Division's motion for summary

determination and dismissed the petition filed by petitioner in this case.

20. On exception, petitioner argued that the postage-paid meter stamp on the envelope which contained the Notice of Determination issued to him had a date of March 11, 1991 and not a date of March 11, 1994, as determined by the Administrative Law Judge. Petitioner also questioned certain aspects of the envelope used to mail the Notice of Determination to him such as the return address on the envelope indicating that it originated from the Hauppauge District Office and not the Albany office and the fact that, since the last number of the certified mail number was obscured on the face of the envelope, the certified mail number did not match the certified mail number listed in the CMR. With respect to the CMR, petitioner asserted that, on page 24, the marking near the number 255 was illegible which would lead to the conclusion that such marking had no significance and, since, the summary line for number of pieces of mail received by the United States Postal Service was blank, there existed a material flaw in the CMR. Lastly, petitioner argued that the affidavits submitted by the Division were inadequate to establish that standard procedures for mailing the Notice of Determination were followed in this case. Therefore, petitioner asserted that the Division failed to sustain its burden of proof in this case.

21. The Tax Appeals Tribunal reversed the determination of the Administrative Law Judge granting summary determination. The Tribunal found that given the difference in certified control numbers, the various extraneous comments written on the envelope of unknown origin, the extraneous markings, the confusion raised by the postage meter stamp affixed by the Division and the overall poor quality of the photocopy, several issues were raised concerning the fact and date of mailing which were not resolved on the motion. The Tribunal directed that the matter be placed on the hearing calendar of the Division of Tax Appeals as soon as possible.

22. On April 30, 1997, a hearing was held on the issue of jurisdiction only. At that hearing, both parties' presentations consisted of the submission of documentary evidence only.

23. In support of its proof of mailing of the Notice of Determination dated March 11, 1994, the Division submitted the affidavit dated April 22, 1997 of Geraldine Mahon, with an attached photocopy of a 24-page certified mail record ("CMR"), the affidavit dated April 23, 1997 of James Baisley and the affidavit dated April 25, 1997 of Gary Glubiak, with an attached window envelope. Ms. Mahon and Messrs. Baisley and Glubiak are all Division employees.

24. Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, and has been since 1989.

25. In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency and notices of determination ("notices") "prior to shipment to the Department's Mechanical Section for mailing." As part of her duties, she receives a computer printout, entitled Assessments Receivable, Certified Record for Presort Qualified Mail, referred to as a "certified mail record," and the corresponding notices. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number," which is recorded on the CMR. The name and address of the person to whom the notice is to be mailed on a particular day is also recorded on the CMR.

26. Attached to Ms. Mahon's affidavit as Exhibit "A" are the 24 pages of the CMR containing a list of the notices allegedly issued by the Division on March 11, 1994 which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of the original CMR.¹¹ Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of the first side of

¹¹Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not parties to this proceeding.

the Notice of Determination addressed to petitioner, McNamara-John, 108 Van Brunt Manor Rd, East Setauket, NY 11733-3901, bearing assessment identification number L-008523436-4 and certified control number P 911 174 283. Page 20 of the CMR shows an article of certified mail, certified control number P 911 174 283, notice number L 008523436, addressed to petitioner, MCNAMARA-JOHN, 108 VAN BRUNT MANOR RD, EAST SETAUKET, NY 11733-3901. The certification and notice numbers on the CMR correspond with those found on the copy of first side of the notice.

On this copy of the CMR, the certified control numbers run consecutively from P 911 174 073 on page 1 to P 911 174 327 on page 24, with 11 entries per page except page 24, which contains 2 entries, as well as the total figures for the CMR. All 24 pages of the CMR bear the print date of March 2, 1994, changed manually on the first and last pages only to March 11, 1994. Each of the 24 pages is date stamped March 11, 1994 by the Roesseville Branch of the U.S. Postal Service ("USPS") in Albany, New York. Ms. Mahon states in her affidavit that

[i]n the upper left hand corner of the certified mail record, page 1, the date 03/02/94 was manually changed to 3/11/91. The original date, 03/02/94, 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 03/02/94 to 3/11/94 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.

She also states that the original document consisted of 24 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the USPS; and that the pages remain connected when the postmarked document is returned to Ms. Mahon's office after mailing. She further explained that each notice is placed in an envelope by Division

personnel and then delivered into the possession of a USPS representative, who then affixes his or her initials or signature and/or a USPS postmark to a page or pages of the CMR. Ms. Mahon states that the USPS postmark appearing on each page of the CMR on which the notice at issue appears, confirms that such notice was sent on March 11, 1994. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

It is noted that while the CMR contains on page 24, the total number of pieces listed, 255, it does not contain a total number of pieces received at the post office. On page 24, the number 255 is semicircled on the line entitled "TOTAL PIECES AND AMOUNTS LISTED" and directly beneath the semicircled number 255 are presumably the initials or signature of the postal representative.

27. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom") and has held that "position since 1994."

28. In his affidavit, Mr. Baisley attests to the regular procedures followed by the mailroom staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. After a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of Mr. Baisley's staff counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one. A member of the mailroom staff delivers the CMR and envelopes to the Roessleville Branch of the USPS. Mr. Baisley states that the CMR is the Department of Taxation and Finance's record of receipt by the Roessleville Branch of the USPS for pieces of certified mail. The postal employee who received the CMR affixed a USPS postmark to every page of the CMR, circled the total number of pieces and

initialed the CMR to indicate the number of pieces received from the Division. After the CMR has been signed and/or stamped by the USPS, it is returned the following day to the originating office within the Division (here CARTS Control Unit). Mr. Baisley avers that his

knowledge that the postal employee circled the “total number of pieces” for the purposes of indicating that 255 pieces were received at the Post Office is based on the fact that the Department’s Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

On the basis of the procedures enumerated and the information contained in Ms. Mahon’s affidavit, Mr. Baisley concluded that on March 11, 1994, an employee of the mailroom delivered a sealed, post-paid envelope for delivery addressed to John McNamara, 108 Van Brunt Manor RD, East Setauket, NY 11733-3901 to the Roessleville Branch of the U.S. Postal Service in Albany, New York. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the CMR, with the postmarks, delivered to and accepted by the Postal Service on March 11, 1994, for the records maintained by the CARTS Control Unit of the Division. He affirms that the staff’s regular procedures were followed in mailing the pieces of certified mail in question to petitioner.

29. Gary Glubiak is a Tax Auditor II in the Division’s Audit Division, Suffolk District Office, Sales Tax Unit and has been employed by the Division for 28 years. Mr. Glubiak’s duties include supervising sales tax auditors in the Suffolk District Office, including Gregg Owsenek. In his affidavit, Mr. Glubiak states, in pertinent part:

3. Attached hereto as Exhibit A is the envelope that contains Notice of Determination L008523436 which was sent by certified mail to John McNamara, 108 Van Brunt Manor RD, East Setauket, NY 11733-3901 and which was refused. The Notice of Determination, L008523436, was generated by the Department in Albany and was mailed from Albany. It is the policy of the Department to use the address of the District Office where the auditor is located as

the return address for the Notice.

4. It is the policy of this office that when mail comes into this office, it is in dated by the clerical staff with the date the piece of mail is received. The envelope containing Notice of Determination L008523436 was in dated by this office on March 16, 1994. The in date stamp is located under the metered postmark of March 11, 1994. The clerical staff then looked up which auditor was assigned to this matter and wrote the auditor's name, "Owsenek", in the upper left corner of the envelope. The envelope was then placed in the auditor's message folder for the auditor to retrieve when he returned from the field.

5. On November 21, 1994, I had a meeting with Mr. McNamara's attorney at the attorney's office. It is the usual policy of this office not to open refused Notices of Determination. However, at the attorney's office I opened the envelope containing Notice of Determination L008523436 and the attorney made a copy of the Notice. I then noted on the back of the envelope that I resealed the envelope at the attorney's office, as noted by my initials G.G., and I dated it. I then placed tape over the side of the envelope to reseat it, the tape covered my writing.

6. The only notations made on the envelope by employees of this office, including myself, were the March 16, 1994 in date state [sic] on the front of the envelope, the name Owsenek written on the front of the envelope and my notations written on the back of the envelope concerning the envelope's opening.

30. Attached to Mr. Glubiak's affidavit as Exhibit "A" is an original window envelope along with its contents. This envelope measures 4½" by 10 6/16" and contains three window boxes. Located in the envelope's upper left-hand corner, printed in green ink, is "DTF-998.1 (6/87)." Directly beneath the Division's envelope style number is "owsenek' handwritten in blue ink. The window box in the upper left-hand side of the envelope contains the following return address:

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

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

“L-008523436-C001-2
MCNAMARA-JOHN
108 VAN BRUNT MANOR RD
EAST SETAUKET, NY 11733-3901.”¹²

To the right of the return address window box is a green edged window box which has the word “CERTIFIED” printed in white directly above the window box and the word “MAIL” printed in white directly beneath the window box. The following numbers appear in the window box:

“P 911 174 283.”

The red ink post-paid meter stamp bears “ALBANY NY”, the date “MAR 11’94” and U.S. postage of \$1.29. There is a red stamped hand and sleeve pointing to the upper left-hand return address window box. The hand contains “RETURNED TO SENDER” and the sleeve contains “REFUSED.” Just above the word “REFUSED” are handwritten words “PO Box 824”, as well as the letter “L”, an illegible letter and the number 3/14. A thin black line runs through the two letters and the number. The envelope also contains a “received” date stamp of March 16, 1994 by the Division’s Suffolk District Office Sales Tax Section. The left side of the envelope has two punch holes, while the right edge has been slit and taped closed with transparent tape. The following notation appears on the back left-side of the envelope: “Resealed, @ Atty, office, GG, 11/21/94.”¹³

31. At the conclusion of the hearing, the Administrative Law Judge opened the envelope and gave a photocopy of the Notice of Determination to petitioner’s representative.

32. The window envelope contains four folded sheets of paper and a folded window envelope (style “DTG-999.9 [7/91]”). The first sheet is a two-sided Notice of Determination

¹²There is a thick black marker scribble line over a portion of the address window box. However, the black line does not obscure any portion of the zip code.

¹³These words, handwritten in blue ink, are in column form with the tape covering them.

addressed to petitioner as follows: “L-008523436-C001-2, MCNAMARA-JOHN, 108 VAN BRUNT MANOR RD, EAST SETAUKET, NY 11733-3901”, bearing the number “P 911 174 283” printed on the top right side of page 1, dated “3/11/94” and having the Assessment ID number “L-008523436-4.” The second sheet is a single-sided document entitled “PAYMENT DOCUMENT,” while the third sheet is a single-sided document entitled “REQUEST FOR CONCILIATION CONFERENCE.” Both documents are addressed to petitioner at the Van Brunt Manor Road address. The last sheet is a single-sided document entitled “NOTICE OF TAXPAYER RIGHTS.”

33. The Division submitted two affidavits of James Miller in support of its position that the Notice of Determination was issued to petitioner’s last known address. Mr. Miller is an assistant director in the Personal Income Tax Returns Processing Bureau. Part of Mr. Miller’s regular duties include overseeing the analysis and testing of computer systems which process tax return information. In his first affidavit, dated April 29, 1997, Mr. Miller attests to how these computer systems store information derived from various sources and generate printed documents, as well as printouts of purged information, which are sent to taxpayers. According to Mr. Miller, information is “captured” from the taxpayer’s return or an application for an extension to file a return onto the Personal Income Tax Return Processing System (“Returns Processing Database”). If the header label information on the current return is different from the corresponding prior year information, the header data is passed to the Taxpayer Indicative Data (“TID”) System. The TID database search is based on an exact match of the taxpayer’s social security number. A further check is performed comparing the last name and the first three characters of the first name. If there is an exact match, the remaining header data is then compared on a character-to-character match. The system also compares the date the taxpayer’s

header information is reported to the Division against the notification date associated with the taxpayer's existing TID information. The system will not replace a taxpayer's header information with less current return data information. TID receives update files from two sources: 1) the return data capture records and 2) the master file header change program. Updates are performed daily and weekly, respectively. According to Mr. Miller, assessments are issued to the most current TID address at the time of issuance.

Information from the taxpayer's return or application for an extension to file a return is keyed onto the Returns Processing Database, where it is stored in a record format. The records on the Return Processing Database are extracted and stored on Computer Optical Laser Disk. According to Mr. Miller, the documents attached to his affidavit are true and accurate printouts of the information contained on the hard copies of petitioner's applications for extensions of time to file a Personal Income Tax Return for the tax year 1992. In this case, the taxpayer's address represented on the printout was information used to process the taxpayer's return or the application for an extension to file. Refunds or assessments resulting from initial processing of the return are sent to this address.

Attached to Mr. Miller's affidavit as Exhibit "A" are copies of two printouts entitled NYS DEPT OF TAXATION AND FINANCE - PERSONAL INCOME TAX INQUIRY which contain information concerning the type of return filed by petitioner for tax year 1992. According to the printouts, petitioner filed an application for an extension of time to file (Form IT-370) on April 15, 1993, as well as an application for additional extension of time to file (Form IT-372). Petitioner's address is listed as "108 - VANBRUNT MANOR RD, EAST SETAUKET NY 11733-3901" on each of these printouts.

34. Mr. Miller's second affidavit, dated April 29, 1997, again detailed how the Division's

computer systems process and store tax return information on the Returns Processing Database. Mr. Miller also identified the exhibit attached to his affidavit as a transcript of the stored record of the information from petitioner's Personal Income Tax Return for the tax year 1992. The exhibit consists of a computer printout entitled NYS DEPT OF TAXATION AND FINANCE - PERSONAL INCOME TAX INQUIRY bearing a print date of 4/28/97. According to the printout, petitioner filed his 1992 Form IT-201 Resident Income Tax Return on November 15, 1994 and listed his address as "PO BOX 824, East Setauket, NY 11733-0634".

35. On October 20, 1994, the Division granted petitioner's application for an additional extension of time to file his 1993 personal income tax return until January 16, 1995. This application was filed on petitioner's behalf by his accountant. The address listed on the application was "108 Van Brunt Manor Road, East Setauket, New York 11733."

36. In October 1995, petitioner filed his 1993 New York State personal income tax return (Form IT-201). Petitioner's address, as listed on the return, was "P.O. Box 824, East Setauket, NY 11733."

37. At the hearing, petitioner's representative requested that the hearing be continued because he intended to file an Offer in Compromise and because he wished to review the Division's exhibits and return for oral argument at another time. In addition, petitioner's representative requested that the affiants whose affidavits had been submitted into evidence by the Division be subpoenaed to testify in person or, in the alternative, that the affidavits be precluded from evidence. These requests were denied by the administrative law judge.

38. During the hearing, petitioner's representative's request to amend the petition to include the issue of whether the Notice of Determination was sent to petitioner's last known address was granted. Petitioner's representative requested additional time post-hearing to submit

documentary evidence on the issues of mailing and last known address. His request was granted.

39. On June 6, 1997, petitioner submitted a copy of the front side of petitioner's 1992 New York State personal income tax return (Form IT-201) on which petitioner's address was listed as "P.O. Box 824, East Setauket, NY 11733." In his cover letter, Mr. Fischer stated that the return "was filed in October or November of 1993." The record in this matter was closed at that time.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(former[1]), as in effect during the period in question, a notice of 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, or unless the commissioner of taxation and finance of his own motion shall redetermine the same.

As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). 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 (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall 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." This section further provides that the mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed."

C. 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).

D. In this matter, the Division argues that, through the affidavits of Ms. Mahon and Messrs. Baisley, Glubiak and Miller, as well as other documentary evidence, it has proven that it properly mailed the Notice of Determination to petitioner at his last known address. Petitioner argues that the Division has failed to prove that it ever mailed a Notice of Determination to petitioner, or that he received, or refused to receive any assessment. In support of his position, petitioner points to the inconsistencies and gaps in the affidavits of Ms. Mahon and Messrs. Baisley and Glubiak. In addition, petitioner refers to his affidavit in which he denied ever receiving, refusing to receive, or having any knowledge of any Notice of Determination prior to July 15, 1994.

E. As noted in Conclusion of Law “C”, 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 affidavits of Ms. Mahon and Messrs. Baisley and Glubiak; and a copy of the March 11, 1994 CMR to prove the fact and date of mailing. I find the evidence submitted to be defective in many respects.

The mailing procedure described in the Mahon, Baisley and Glubiak affidavits does not demonstrate a chain of custody of the CMR and the corresponding notices. Mr. Glubiak in his affidavit states that the notice in issue “was generated by the Department in Albany and was mailed from Albany.” Ms. Mahon states in her affidavit that she supervises the processing of notices of determination “prior to shipment to the Department’s Mechanical Section for mailing.” The role played by the CARTS Control Unit in processing the notices and CMRs is not articulated in the Division’s proof. It appears that the CARTS Control Unit generates the CMRs and corresponding notices and passes them on to the Mechanical Section. The Mahon affidavit does not describe the specific type of envelope used by the Division when mailing statutory notices, nor does it identify which unit’s personnel actually places each notice in an envelope. Furthermore, the Mahon affidavit does not describe the manner in which the CMRs are sent or delivered to the Mechanical Section or any controls that might exist to ensure that a CMR and the corresponding notices listed on the CMR are associated when the CARTS Control Unit receives them and remain associated when they are forwarded to the Mechanical Section. Mr. Baisley’s affidavit states that the notices and the CMR are placed in the “Outgoing Certified Mail” basket in the mailroom. There is no explanation of how a CMR and the corresponding notices get from the CARTS Control Unit to the mailroom’s outgoing certified mail basket.

The explanation of the alteration of the March 11 CMR constitutes a second defect in the Division’s proof. The Division failed to offer evidence from anyone with personal knowledge of

the alteration of the date on page 1 of the CMR. The only explanation of the alteration is contained in Ms. Mahon's affidavit. As petitioner correctly notes, Ms. Mahon's responsibilities encompass the processing of notices prior to shipment to the Department's Mechanical Section for mailing, not the actual mailing of said notices. Notwithstanding Ms. Mahon's long tenure in the department, she is not qualified to testify to matters outside the scope of her duties and responsibilities absent specific information regarding the basis for her knowledge. If the date change was the responsibility of Mr. Baisley's mailroom staff, then he, rather than Ms. Mahon, was the proper person to describe that practice and procedure. Moreover, the paragraph in which Ms. Mahon explains the alteration of the March 11 CMR contains inconsistent dates. At the beginning of that paragraph she states that "in the upper left hand corner of the CMR, page 1, the date 03/02/94 was manually changed to 3/11/91." Later in the paragraph, she states that "the handwritten change of the date from 03/02/94 to 3/11/94 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." It is also unclear whether the date was changed by Division personnel, before or after the CMR was delivered to the Postal Service.

I find that the CMR is flawed in that it does not indicate how many of the 255 pieces were actually received at the post office (*see, Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Roland, supra*; *Matter of Huang*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). The Division submitted the Baisley affidavit to articulate the standard procedure for obtaining the signature of a postal employee, as well as verification of the number of pieces received by the Postal Service. Mr. Baisley also identified the initials on page

24 of the CMR as those of the postal representative who had circled the total number of pieces listed to indicate that this was the total number of pieces received by the Postal Service. While Mr. Baisley has been the supervisor in the Mail Processing Center “since 1994,” it is impossible to know the exact date on which he became supervisor. The vagueness of the date makes it impossible to determine whether or not Mr. Baisley had first-hand knowledge of procedures in place on March 11, 1994 and whether they were actually followed on that date. Furthermore, the “TOTAL PIECES RECEIVED AT POST OFFICE” line on page 24 of the CMR is blank. Therefore, the CMR does not give rise to a presumption of regularity inasmuch as the document is not complete.

F. Where the presumption of official regularity does not arise, the Division may present proof of actual mailing of the notice, including circumstantial evidence (*see, Matter of Synder*, Tax Appeals Tribunal, December 11, 1997; *see also, Coleman v. Commr.*, 94 TC 82). To prove actual mailing of the document, the Division introduced into evidence the original window envelope and its contents. As noted in Finding of Fact “29”, the window envelope had three windows, one of which contained the “Certified Mail” number of P 911 174 283, a U. S. Postal Service post-paid meter stamped date of March 11, 1994, a stamp-mark indicating that the mail was refused and the Division’s Suffolk District Office’s received in-date stamp of March 16, 1994. The contents of the window envelope included the original Notice of Determination dated March 11, 1994 bearing certified number P 911 174 283 (*see*, Finding of Fact “32”). The Division also submitted the affidavit of Gary Glubiak to explain how and when the envelope and its contents were returned to the Division and also the particulars surrounding the opening of the returned notice. The Glubiak affidavit identifies the Suffolk District Office’s standard procedure for handling incoming mail and how it was followed in this case. Mr. Glubiak’s affidavit also

states his office's policy of not opening refused notices of determination and why and when he slit open the envelope containing the Notice of Determination.

The original Notice of Determination contained in the original window envelope, along with the Division's own faulty record is sufficient to prove mailing on March 11, 1994 (*see, Massie v. Commissioner*, 69 TCM 2417, *affd* 82 F3d 423).

G. As noted in Conclusion of Law "B", Tax Law § 1147 (a)(1) requires that the notice must be mailed to the taxpayer "at the address given in the last return filed by him pursuant to the provisions of [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 Notice of Determination issued to petitioner in this matter was addressed as follows: "MCNAMARA-JOHN, 108 VAN BRUNT MANOR RD, EAST SETAUKET, NY 11733-3901." Petitioner argues that the affidavits of Mr. Miller should not be given any weight because Mr. Miller fails to explain why the tax returns filed with the Division are not available. Furthermore, petitioner contends that the original tax returns would be the best evidence in this matter concerning his address on same when filed.

Petitioner's argument is without merit. The Miller affidavits set forth the methods which the Division's computer systems, in particular the Returns Processing Database, use to store information derived from various sources and generate printed documents which are sent to taxpayers as well as printouts of purged information. Mr. Miller also explains how the TID database containing taxpayer's address is updated to reflect a taxpayer's most current address. Review of the Returns Processing Database printouts reveals that the last returns filed by petitioner prior to the issuance of the March 11, 1994 Notice of Determination were applications for extensions of time to file petitioner's 1992 personal income tax return which contained the

108 Van Brunt Manor Road, East Setauket, New York address. Furthermore, the Division submitted petitioner's 1993 Form IT-372 filed in October 1994 which reflects the same Van Brunt Manor Road address. The Division did not receive notice of petitioner's address change to P.O. Box 824, East Setauket, New York until November 15, 1994 when petitioner filed his 1992 New York State personal income tax return (Form IT-201).

The Division has proven that it mailed the Notice of Determination to petitioner's last known address.

H. Where it has been found that the Notice of Determination was properly addressed to petitioner's last known address, the presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notices and that the notice was in fact properly addressed and mailed (*see, Matter of T.J. Gulf. Inc. v. State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97). The taxpayer has the right to rebut the presumption, but the rebuttal must consist of more than a mere denial of receipt (*id.*, *Matter of American-R-U.S, Inc. v. State Tax Commn.*, 147 AD2d 795, 537 NYS2d 672). Petitioner in his affidavit states that he did not receive, refuse to receive or have any knowledge of any Notice of Determination. Petitioner's assertions alone would not be enough to overcome the presumption of receipt. The Division has submitted the original envelope with "RETURN TO SENDER REFUSED" stamped on it in support of its position that the Notice of Determination was properly mailed but was refused. Petitioner also contends that the Division has failed to produce the best evidence of the mailing, the refusal and its return, the delivery receipt which would contain the signature or notation as to who refused same.

Petitioner's argument is without merit. The Division is required to prove mailing which it has in this case. Petitioner's mere denial that he refused the mailing is not enough. Petitioner

bears the burden of proving, through the use of probative evidence, that the U.S. Postal Service did not perform its official duties in a proper manner (*see, Matter of American Cars-R-Us, Inc., v. State Tax Commn., supra*). He failed to do so.

The Division has established that on March 11, 1994, the Notice of Determination was properly mailed to petitioner at his last known address.

I. The Division has presented sufficient evidence to establish that it mailed a Notice of Determination to petitioner at his last known address on March 11, 1994. Consequently, pursuant to Tax Law § 1138(a)(former [1]) petitioner was required to apply for a hearing by June 9, 1994. Petitioner's request for a conciliation conference was not mailed until July 16, 1994. Unfortunately, this request was filed beyond 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. Petitioner contends that his due process rights were violated by the Administrative Law Judge's failure to grant a continuance of the hearing to afford his representative the opportunity to review the Division's documentary evidence and to rebut same through documentary evidence and oral argument. Petitioner's argument is without merit. Although petitioner's representative's request for a continuance to present oral arguments on another day was denied, the record did remain open to afford petitioner the opportunity to submit additional documentary evidence on the issues of last known address and general mailing itself (*see, Findings of Fact "37" and "38"*). Petitioner's representative submitted post-hearing one document, a photocopy of the front side of petitioner's 1992 New York State personal income tax return (Form IT-201). The record closed at that time. (*See, Finding of Fact "39"*.) 20 NYCRR 3000.15(d)(6) provides that "[a]fter the parties have completed the submission of the evidence, they may orally argue the

applicability of the law to the facts. If the parties also wish to submit briefs, they may do so, within the time restrictions fixed by the administrative law judge.” Petitioner’s representative submitted two detailed briefs in this matter which fully articulated petitioner’s position in this matter. Furthermore, petitioner has cited no authority for the proposition that due process is denied if one is forced to present one’s arguments in written form.

K. Lastly, petitioner argues that he was denied due process by the Administrative Law Judge’s denial, at the hearing, of his representative’s request that the Administrative Law Judge issue subpoenas to all of the Division’s affiants. 20 NYCRR 3000.7 authorizes administrative law judges to issue subpoenas to require the attendance of witnesses. In addition, it provides that an attorney representing any party in a proceeding before the Division of Tax Appeals may issue a subpoena pursuant to section 2302 of the CPLR. 20 NYCRR 3000.7(b) requires that requests for subpoenas be submitted in writing at least 20 days in advance of the hearing. If an administrative law judge has not been assigned to the case, requests may be made to the supervising administrative law judge. Petitioner’s request was made at the hearing; therefore, it was untimely.

L. The petition of John McNamara is hereby dismissed.

DATED: Troy, New York
December 24, 1998

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE