

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SERVICE MERCHANDISE CO., INC.	:	DETERMINATION
	:	DTA NO. 815892
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, 1990	:	
through August 31, 1995.	:	

Petitioner, Service Merchandise Co., Inc., 7100 Service Merchandise Drive, Brentwood, Tennessee 37020, 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, 1990 through August 31, 1995.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated September 4, 1997 and received September 5, 1997 seeking summary determination in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Brann and Isaacson, Esqs. (Martin I. Eisenstein, Esq., of counsel), requested and received an extension of the time period within which to respond to the Division's motion. Petitioner thereafter responded to the Division's motion with a memorandum of law and affidavits in opposition. Petitioner's response, timely filed on October 15, 1997, commenced the 90-day period for the issuance of this determination pursuant to section 3000.5(d) of the Rules. Based upon the motion papers, affidavits and documents submitted therewith, petitioner's responding memorandum, affidavits and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. At issue on this motion is a Notice of Determination dated August 5, 1996 and addressed to petitioner, Service Merchandise Co., Inc., at P.O. Box 24600, Nashville, Tennessee 37202-4600. On its face, this notice bears assessment identification number L-012480106-3 and certified mail control number P 911 005 109. The notice assesses sales tax, penalty and interest in the amount of \$1,792,134.09, and pertains to the sales tax quarterly periods ended August 31, 1990 through August 31, 1995.

2. Petitioner filed a Request for a Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). This request, as well as the envelope in which it was sent via United Parcel Service "Next Day Service", is dated December 12, 1996. The envelope also bears a BCMS receipt stamp of December 13, 1996. This request was filed by petitioner in response to a Notice and Demand for Payment of Tax Due dated November 29, 1996.

3. By a Conciliation Order (CMS No. 158692) dated February 28, 1997, petitioner's request for a conciliation conference was denied on the basis that such request had been filed in excess of 90 days after the August 5, 1996 date set forth on the face of the notice.

4. Notices of determination, such as the notice at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a computer printout entitled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail", referred to as the Division's certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service ("USPS") through

return of the certified mail record to the CARTS Control Unit.

5. Each computer-generated notice of determination is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its computer printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case pages 1 and 33 of the CMR list an initial date of July 26, 1996, which has been manually changed on each of such pages to August 5, 1996. All of the other pages of the CMR list the initial printed date of July 26, 1996.

6. After a notice of determination is placed in the Division's Mail Processing Center ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to the Colonie Center Branch of the USPS in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the CMR.

7. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office within the Division.

8. The CMR in evidence in this case is a 33-page computer-generated document entitled "Certified Record for Zip + 4 Minimum Discount Mail". This CMR, attested to as a true and accurate copy of the Division's CMR for August 5, 1996, lists consecutive certified control numbers P 911 004 765 through P 911 005 122, inclusive. Each such certified control number is assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage

and fee amounts. The CMR herein lists 358 items of mail next to the category "Total Pieces and Amounts Listed", corresponding to the 358 certified control numbers listed on the CMR.¹

9. Information regarding the Notice of Determination pertaining to petitioner is contained on page 32 of the CMR. Specifically, corresponding to certified control number P 911 005 109 is Notice Number L 012480106, along with information listing petitioner's name and address.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated August 5, 1996. In addition to bearing a USPS postmark dated August 5, 1996, the last page of the CMR, page 33, includes the category "Total Pieces and Amounts Listed", after which appears the printed figure 358. This figure has been circled and beneath it is the signature "Howley". As noted previously, the certified control numbers on the CMR run consecutively, and there are no marks, indications or other evidence that any of the listed items have been deleted or "pulled" from the listing.

11. The affixation of the Postal Service postmark, the signature of the Postal Service employee, and the circling of the total pieces listed figure is to indicate that the 358 pieces of mail listed on the CMR were received at the post office.

12. The Division generally does not request, demand, or retain return receipts with regard to certified or registered mail.

13. The facts set forth above were established through affidavits dated August 1, 1997 made by Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination such as the one at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. Baisley's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS.

14. The fact that the Postal Service employee circled the total number of pieces received at post office on the CMR to indicate that this was the number of pieces received (see, Finding

¹The notice numbers, names and addresses of taxpayers other than petitioner have been redacted to assure confidentiality with respect to such taxpayers as required under the Tax Law.

of Fact "11") was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces or write in the number of pieces on the CMR to indicate the total number of pieces received.

15. In response to the Division's motion, petitioner submitted a memorandum in opposition and affidavits made by petitioner's representative and by Donna Adams, petitioner's former Director of Taxation. Petitioner's basic position is that it did not receive the Notice of Determination. More particularly, however, petitioner maintains that there exist a number of procedural irregularities described hereafter concerning the mailing of the Notice of Determination. Petitioner argues that such irregularities, at a minimum, generate factual issues leaving resolution by summary determination inappropriate and that, ultimately, such irregularities support a conclusion that the mailing of the notice cannot reasonably be assumed to have occurred.

16. The specific irregularities complained of by petitioner are as follows:

a) Petitioner points out that the certified control number on the face of the Notice of Determination is P 911 005 109, and that the Mahon affidavit asserts that the same certified control number appears on page 32 of the CMR for the entry thereon corresponding to Service Merchandise. However, petitioner maintains that in fact the certified control number on the CMR for such entry is 911 005 109, i.e., that the "P" preceeding the numbers is not present on the CMR. Examining the copy of page 32 of the CMR attached to petitioner's representative's affidavit reveals that a small portion of the leftmost column of the document is almost entirely obscured. That is, specifically and consistently, most of the first character of the entire leftmost column is not visible on petitioner's copy of page 32. However, such first character is clearly visible on all pages of the CMR included with the Division's motion papers, and that first character is, in fact, the letter "P", as set forth in the Mahon affidavit.

b) Petitioner also points out that the notice number set forth on page 32 of the CMR for the entry thereon corresponding to Service Merchandise is L-012480106, while the assessment

I.D. number appearing in the upper right-hand corner of the notice itself is L-012480106-3.

Petitioner goes on to note that the number appearing directly above petitioner's address on the face of the Notice is L-012480106-C001-1.² In sum, petitioner questions the fact that the notice number on the CMR does not include the various suffix numbers listed on the face of the Notice of Determination.

c) Petitioner also questions the date change on pages 1 and 33 of the CMR. These changes are explained by Ms. Mahon as being manual (hand) changes made to the computer printed date on which the CMR was generated, and that these changes were made to conform the date of computer printing of the CMR to the date of actual mailing of the notices listed thereon. Petitioner asserts that Ms. Mahon's statement that such changes are made by mailroom personnel is speculative since she does not work in the Division's mailroom. Petitioner argues that there is no explanation or basis stated for Ms. Mahon's knowledge of why the manual date change is made, and thus there is no basis of knowledge explaining a critical element of the Division's proof of mailing.

d) Petitioner argues that neither of the Division's affiants have provided substantiation concerning the identity of the USPS employee who affixed the postmarks to each page of the CMR, circled the "total number of pieces" and signed page 33 of the CMR. Petitioner further maintains that the Division's affiants provide inconsistent explanations as to the significance of the USPS postmarks on the CMR. Specifically, Ms. Mahon avers that the postmark signifies the notice was actually sent on August 5, 1996, whereas Mr. Baisley avers that the postmark signifies the USPS received the notices listed on the CMR on such date. Finally, petitioner argues that the affiants overstate the significance of the circling of the "total number of pieces," because there is no proof that the number of pieces of mail listed on the CMR were, without exception, the same pieces of mail listed on the CMR. Here, petitioner asserts that while the

²By way of comparison, the Notice and Demand dated November 29, 1996, to which petitioner responded by filing its Request for Conciliation Conference, lists the Assessment I.D. number L-012480106-3 in the upper right-hand corner of page 3 thereof, and lists the number L-012480106-C002-6 directly above petitioner's address on page 1 thereof.

Baisley affidavit explains that mail room personnel check the envelopes, names and numbers against such information on the CMR, there is no evidence that such cross-referencing is performed by a USPS employee as opposed to a mere counting of the number of envelopes by the USPS employee.

e) Petitioner also argues that the face of the notice indicates that the notice was issued from the Division's Des Plaines, Illinois office and not from the Division's Albany, New York office. Presumably, petitioner bases this statement on the fact that the Division's address in the upper left hand corner of the notice reads:

New York State Department of
Taxation and Finance
Audit Division-Chicago D.O.-Sales Tax
1011 E. Touhy Ave-Suite 475
Des Plaines, IL 60018-5808

Petitioner maintains that the Division's affiants offer evidence as to the mailing practices of the CARTS Control Unit and Mail Processing Center in Albany, New York, but do not explain why a notice originating from the Des Plaines office would have been processed in the Albany office and mailed from the Colonie Center branch of the United States Postal Service in Albany, New York. Petitioner asserts that this set of circumstances gives rise to factual issues regarding the mailing of the notice.

17. In addition to the foregoing, petitioner accepts that a properly completed USPS Form 3877 represents direct documentary evidence of the date and fact of mailing. However, petitioner notes that the Division has not produced such a form, and has produced no evidence that its CMR contains the same information as a USPS Form 3877 or that the CMR has been approved by the local postmaster as the equivalent of a Form 3877. Petitioner also maintains that the notice was not properly addressed in that the address used did not include the name Donna Adams, petitioner's former Director of Taxation. In this regard, petitioner asserts that during the course of the audit underlying the notice, the auditor met personally with Ms. Adams and was thus on notice that Ms. Adams was the corporate official responsible for petitioner's compliance with tax obligations and liabilities. Petitioner notes that the Division's letter

scheduling the audit, as well as the Division's Statement of Proposed Audit Adjustments (issued prior to the Notice of Determination), were both addressed as follows:

Ms. Donna Adams
Service Merchandise Co., Inc.
P.O. Box 24600
Nashville, Tennessee 37202

Petitioner maintains that because the Notice of Determination was not likewise addressed to the attention of Ms. Adams, the notice was not properly addressed. The Division, for its part, included with its motion papers copies of petitioner's 1995 Form CT-245 ("Annual Maintenance Fee and Activities Return of Foreign Corporations Disclaiming Tax Liability") and petitioner's 1994 Form CT-3 ("General Business Corporation Franchise Tax Return"). These forms are indated as received by the Division on March 13, 1996 and September 15, 1995, respectively, and both bear the same address as appears on the Notice of Determination, to wit, Service Merchandise Company, Inc. P.O. Box 24600, Nashville, Tennessee 37202.

18. Petitioner also maintains that the Division has furnished to petitioner inconsistent evidence with respect to the mailing of the Notice of Determination. In this regard, petitioner made a Freedom of Information Act ("FOIA") Request with respect to this case. Petitioner complains specifically that, in response to its request, the Division's Records Access Officer furnished only one page, page 32, of the CMR whereas the CMR attached to Ms. Mahon's affidavit consists of 33 pages. Petitioner again notes the alleged "marked discrepancy" between the two CMR documents, apparently meaning both a) the 1 page versus 33 page difference and b) the alleged missing "P" preceeding the certified control number on the one-page CMR furnished to petitioner (see, Finding of Fact "16-a").

19. Finally, petitioner argues that it did not receive the Notice of Determination, was therefor unable to meaningfully pursue a challenge against the notice, and thus has been deprived of its due process right to contest the tax, penalty and interest determined to be due. Petitioner maintains that because the Division has not overcome petitioner's allegation that it did not receive the notice, petitioner cannot be precluded from the opportunity to contest the notice on the merits.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such a determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. 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 a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (Id.)

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing (Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Katz, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the USPS (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Matter of Katz, *supra*). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of

demonstrating proper mailing rests with the Division (id.). The petitioner, in turn, has the right to rebut this presumption (Matter of Ruggerite, Inc. v. State Tax Commission, 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517).

D. The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (see, Matter of Accardo, Tax Appeals Tribunal, August 12, 1993). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of determination by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (see, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (see, Finding of Fact "13"). The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination identified in Finding of Fact "1" was properly issued to petitioner on August 5, 1996. Specifically, this 33-page document lists sequentially numbered certified control numbers with corresponding names and addresses, including the item for petitioner. None of the 358 entries on this document has been deleted. All 33 pages of the CMR bear a USPS postmark dated August 5, 1996. Additionally, the "total pieces" figure on page 33 is circled, immediately beneath which appears the signature "Howley," thus indicating receipt by the post office of 358 pieces of mail. This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on the date claimed.

F. In Matter of Roland (Tax Appeals Tribunal, February 22, 1996) the Tax Appeals Tribunal determined that the Division of Taxation failed to meet its burden of proof with respect to the mailing of a statutory notice. Because the proof of mailing presented by the

Division in Roland is similar in many respects to the proof presented by the Division in this case, an analysis of Roland is appropriate. Specifically, in Roland all pages of the CMR bore a Postal Service stamp and the last page was signed by a postal service representative.

Additionally, the entry next to the heading "Total Pieces Received at Post Office" was blank and the number indicating total number of pieces listed on the CMR was circled. The Tribunal determined that the CMR was flawed because it did not indicate how many of the pieces listed were actually received at the post office. The Tribunal rejected the Division's contention that the circling of the total number of pieces figure indicated that all such pieces were actually received at the post office. The Division's contention was based on an affidavit made by one Daniel G. LaFar which asserted that the circling indicated that this was the total number of pieces received. The Tribunal determined that the affidavit was speculative because it did not state the affiant's basis of knowledge for this assertion. The Tribunal concluded that "lacking this element", i.e., the affiant's basis of knowledge, the Division had not met its burden of proof on the mailing issue.

The proof presented by the Division in this case is similar to that offered in Roland. That is, all pages of the CMR bear a Postal Service stamp and the last page of the document has been signed by a Postal Service employee. Further, the space next to the heading "Total Number of Pieces" lists 358 as the total number of pieces and such listed figure has been circled. As in Roland, the affidavit (here made by Mr. Baisley) states that the circling of this figure indicates that this was the number of pieces received. Significantly, however, in this case the affidavit states Mr. Baisley's basis of knowledge for this proposition. That is, the affidavit states that Mr. Baisley's knowledge is based on the fact that the Division's Mail Processing Center specifically requested that postal employees either circle the number of pieces or indicate the total number of pieces received by writing the number on the CMR. This additional fact provides the element found to be lacking in Roland. Accordingly, consistent with the Tribunal's reasoning in Roland the Division has met its burden of proof on the question of mailing in this case.

G. In opposition to the Division's motion, petitioner has raised a number of alleged

inconsistencies which merit discussion. First, petitioner alleged that the certified control number on the CMR differs from such number on the face of the notice in that the "P" does not appear on the CMR (see, Finding of Fact "16-a"). However, review of the CMR submitted with the Division's motion papers, attested to in the Mahon affidavit as an accurate copy of the original CMR, shows that the "P" indeed is on the face of the CMR and that its absence from the petitioner's copy is clearly the result of photocopying error.

H. Petitioner has also pointed out that the notice number on the CMR (L-012480106) differs from the assessment I.D. number on the face of the notice (L-102480106-3 [upper right-hand corner] and L-102480106-C001-1 [above petitioner's address]). In Matter of International Installations, Inc., Tax Appeals Tribunal, September 15, 1994), the Tribunal remanded on a similar issue where, as here, the mailing evidence (CMR) listed a notice number without the suffix numbers which appeared on the face of the notice. Specifically, the Tribunal stated:

"we also direct the Administrative Law Judge to reconsider her decision with respect to the mailing of the notice at issue in this proceeding.

"The mailing evidence in the record relates only to a Notice of Deficiency L-00703512. The Notice of Deficiency submitted by petitioner bears the numbers L-007035132-5 and L-007035132-C002-7. The Administrative Law Judge did not explain how she reached the conclusion that the mailing evidence related to the Notice of Deficiency submitted by petitioner, nor do we see anything in the record that explains how the mailing evidence relates to this Notice of Deficiency. In the supplemental determination, we direct the Administrative Law Judge to explain her conclusion. The parties may submit evidence on this issue at the hearing to be scheduled."

The key reason for remanding in International Installations was that the Administrative Law Judge had not explained how the mailing evidence (the CMR) related to the notice in question. Here, as in International Installations, the notice number listed on the CMR does appear on the face of the notice itself in two areas (upper right hand corner and above the petitioner's address), but such CMR notice number does not include the additional or suffix numbers appearing on the face of the notice.

It is true that the affidavits in evidence do not explain the meaning or significance of the suffix numbers. Without more, this would be sufficient under International Installations to deny summary determination and require a hearing. However, unlike International Installations,

where the facts did not specify whether there was any other link between the CMR and the notice, the facts here provide such a link. That is, both the CMR and the face of the notice bear the same certified control number P 911 005 109. This clear link between the notice and the Division's evidence of mailing, together with the fact that the notice number on the face of the notice appears on the CMR, albeit simply without the suffix numbers, is sufficient to tie the mailing evidence to the notice, notwithstanding the absence of the suffix numbers on the CMR.

I. Petitioner has raised a number of other alleged inconsistencies including the manual change to the preprinted date on the computer-generated CMR. This change is explained as routine procedure by the Mahon affidavit--that is as a consistent change made to a CARTS generated document in the ordinary course of steps taken by the Division in mailing. Moreover, the date change is entirely consistent with the USPS postmark appearing on every page of the CMR. In the same manner, while petitioner complains that the USPS employee is not specifically identified, the presence of the USPS postmarks on the CMR is explained as part of what is specifically requested of the USPS by the Division in connection with mailing. The appearance of the postmarks is entirely consistent with the Division's regular mailing protocol, as explained in the affidavits, and the postmark date is consistent with the Division's claimed date of mailing. At best, it strains plausibility to accept that the USPS postmark stamp for the Colonie Center branch appearing on each page of the CMR would have been affixed by a party other than the USPS.

On this same issue, petitioner argues there is no proof that the USPS employee compared the pieces of mail to the information on the CMR, thus leaving a question of whether the same pieces of mail listed on the CMR were in fact those delivered to the USPS. However, as discussed at length in Matter of Jeffrey Brager (Tax Appeals Tribunal, May 23, 1996), the receiving USPS employee, in the case of certified mailings, is not to affix a USPS postmark unless the number of pieces of mail offered for mailing and the number of pieces listed (on the CMR) agree, the certified mail numbers agree, the mailings appear to be properly prepared and the appropriate postal charges have been prepaid. In Brager, the flaw in the CMR was the

failure of any indication thereon of the number of pieces of mail received and, in light of such failure, the lack of additional evidence sufficient to establish mailing of the particular notice in question. In Brager, the Tribunal stated that "the postal employee must do two things: affix the postmark to the certified mail record and indicate the receipt of the total number of pieces received." In this case, the CMR bears out that these two things have been done, specifically by the presence of the postmarks on the CMR and by the signing and circling of the number of pieces as specifically requested by the Division. Further contrary to petitioner's suggestion, the Division's affidavits are not inconsistent because one affidavit states that the USPS postmarks mean that the notice was "sent" on August 5, 1996 while the other affidavit states that the postmarks mean that the notice was "delivered" into the custody of the USPS on such date. It is well established that "mailing" or "sending" occurs upon delivery of the article of mail into the custody of the USPS (Matter of Air Flex Custom Furniture, supra; see, Matter of Jeffrey Brager, supra). Here, the tenor of both affidavits indicates that the notices listed on the CMR, including the notice addressed to petitioner, were delivered to the USPS on August 5, 1996 and the CMR, with its USPS postmark of August 5, 1996, bears out this assertion as fact.

J. Petitioner has also claimed that the Division's CMR does not represent direct documentary evidence of the date and fact of mailing because the Division has not established that the CMR contains the same information as a USPS Form 3877 or that its use has been approved by the local postmaster. There is no question that "a properly completed USPS Form 3877 or its counterpart 'represents direct documentary evidence of the date and the fact of mailing' of the assessment [citations omitted]. Exact compliance with the Form 3877 mailing procedure raises a presumption of official regularity in favor of the division [citations omitted]." (Matter of Jeffrey Brager, supra, Matter of Air Flex Custom Furniture, supra.) In Brager, the Tribunal pointed out that "[t]he 'certified mail record' used by the Division contains all of the same elements as the Postal Form 3877 and has been approved by the Postal Service for the Division for its certified mailings. The terms 'certified mail record' and Postal Form 3877' are interchangeable for purposes of this decision" (Matter of Brager, supra at 14, n.5; see also,

Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994). Petitioner's challenges to the CMR have not established that the CMR was not properly completed in this case or is otherwise flawed. Thus, the CMR can stand as direct documentary evidence of the date and fact of mailing of the notice in question.

K. Petitioner has claimed there is a significant irregularity in mailing because the notice was issued from the Des Plaines office while the mailing evidence centers on the Division's Albany offices. The Division, however, makes no claim that the notice was processed and issued from Des Plaines, but rather claims the notice was processed and issued out of the Division's Albany office. Without more, the Des Plaines office address on the notice would simply appear to be consistent with the fact that the underlying audit was conducted by personnel out of the Division's Des Plaines office.

Petitioner also claims that the notice was not properly addressed for lack of the name Donna Adams thereon. However, Donna Adams is not the taxpayer in question in this matter. In fact, the address on the notice is the same as the address on the described returns filed by petitioner. The Division is entitled to rely on the address used on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (Matter of Jeffrey Brager, *supra*, *citing*, Powell v. Commissioner, 958 F2d 53, 92-1 US Tax Cas ¶ 50, 147, *cert denied*, 506 US 965; Abeles v. Commissioner, 91 TC 1019). There is no claim or evidence here that petitioner informed the Division at any time that it wished to change its address of record. In fact, including the name Donna Adams on the first address line of the notice, as petitioner suggests should have been done, would have provided stronger grounds for an argument that the notice was not properly addressed in accordance with Tax Law § 1147(a)(1).

L. Petitioner's FOIA related arguments are also unavailing. As explained above, the page of the CMR furnished to petitioner (page 32) is consistent with the same page 32 of the CMR submitted by the Division save for the obvious photocopying error which eliminated (on petitioner's copy) nearly all of the "P" preceding the certified number. In addition, what was

requested by petitioner was information concerning mailing of the notice to petitioner, and petitioner received in response the specific page of the CMR pertaining to such mailing. This would appear to be reasonable compliance with the FOIA request, as opposed to sending the entire 33-page redacted CMR on which petitioner's name does not elsewhere appear.

M. Finally, petitioner's due process argument is predicated on nonreceipt of the notice. Here, the Division has established proper mailing. In turn, there is no evidence that the notice, sent by certified mail, was returned to the Division as undeliverable, rejected or unclaimed. Petitioner has essentially raised an argument of simple nonreceipt in response. It is well established that such denial of receipt, alone, does not overcome or rebut the presumption of receipt which attached upon the Division's demonstration of proper mailing of the subject notices of determination (see, T.J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98-99; Matter of American Cars-R-Us, Inc. v. State Tax Commn., 147 AD2d 795, 537 NYS2d 672). Thus, petitioner's due process argument is rejected.

N. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. Here, there are no material issues of fact. That is, the Division has tendered evidence establishing proper mailing of the notice, and there was no protest thereafter within 90 days as required, thus leaving no jurisdiction over such notice in this forum. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination with respect to such notice.

O. The Division's motion for summary determination is hereby granted and the petition of Service Merchandise Co., Inc. is dismissed.

DATED: Troy, New York
January 8, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE