

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JAY B. BOYLE</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 816164</b>
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, 1991 through	:	
May 31, 1994.	:	

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Petitioner, Jay B. Boyle, 38 Willets Lane, Plandome, New York 11030, 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, 1991 through May 31, 1994.

On April 1, 1998 and April 8, 1998, respectively, petitioner, appearing *pro se*, and the Division of Taxation by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 5, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner a Notice of Determination (Assessment L 013119149), dated January 31, 1997, assessing sales and use taxes under Articles 28 and 29 of the Tax Law in the amount of \$574,089.95, plus interest of \$390,476.20 and penalty of \$538,876.96 for a balance due of \$1,503,443.11.

2. On July 24, 1997, the Bureau of Conciliation and Mediation Services (“BCMS”) received a request for a conciliation conference on the foregoing assessment. Petitioner’s request was mailed by certified mail on July 22, 1997.

3. In response to petitioner’s request, BCMS issued a Conciliation Order, dated October 3, 1997, which stated the following:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on January 31, 1997, but the request was not mailed until July 22, 1997, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

4. Petitioner filed a petition challenging the conciliation order. The petition asserted, among other things, that petitioner was not a responsible officer of Mt. Hope Asphalt Corp. (“Mt. Hope”) during the period in issue. Petitioner also stated that he was out of New York State during the month of February 1977 and that he did not receive the Notice of Determination. According to petitioner, the Division had access to the corporation’s records which were in the possession of the Suffolk County District Attorney and the Internal Revenue Service. Nevertheless, the Division failed to conduct a proper audit. Petitioner also maintains that the Division owes a refund of \$17,000.00 plus interest for overpayments of sales tax during the period in issue. In response to the petition, the Division’s answer asserted that petitioner must

prove that his protest of the assessment was timely in order to have the merits of such assessment reviewed.

5. In support of its position, the Division submitted into evidence, among other things: the answer to the petition, affidavits of Geraldine Mahon, James Baisley and Ida Gorman, employees of the Division, a copy of the Division's certified mail record dated January 31, 1997, a copy of the Notice of Determination issued to Jay B. Boyle, a copy of the first two pages of petitioner's 1995 and 1996 resident income tax returns, a copy of the Request for Conciliation Conference, and a copy of the envelope which contained petitioner's Request for Conciliation Conference.

6. In her affidavit, Ms. Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. Ms. Mahon receives a computer printout referred to as the "certified mail record." Each of the notices is assigned a certified control number which is recorded on the certified mail record.

The certified mail record pertaining to the mailing on January 31, 1997 consisted of four fan-folded (connected) pages and included the Notice of Determination issued to Jay B. Boyle. Ms. Mahon described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected unless she requests otherwise. The document itself consists of 4 pages each with 11 entries with the exception of page 4 which has 2 entries. Having examined the document, Ms. Mahon certifies that it is a true and accurate copy of the certified mail record prepared by the Division on January 31, 1997 which includes Notice of Determination L 013119149 issued to Jay B. Boyle. In the upper left hand corner of the certified mail record, the date "1/22/97" appears and was changed manually to "1/31/97." The original date, January 22, 1997, was the date that the certified mail

record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's Mechanical Section. The handwritten change made to the date was made by personnel in the Division's Mail Processing center so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a postal service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this case, the postal representative signed page four of the certified mail record, placed a postmark on each page of the certified mail record ( two postmarks appear on page four), and circled the "TOTAL PIECES AND AMOUNTS LISTED" on page four of the certified mail record.

Ms. Mahon's affidavit states that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. Ms. Mahon concludes that the procedures followed and described were the normal and regular procedures of the CARTS control unit on January 31, 1997.

The Division offered a certified mailing record and a copy of the Notice of Determination issued to petitioner on January 31, 1997. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL." In the upper right-hand corner, the pages are numbered from one

to four. The upper left-hand corner of each page of the certified mail record contains the printed date of "1/22/97." On the first page, this date was crossed out and a new date of "1/31/97" was written above the original printed date. Each page contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Page two contains an entry which sets forth Jay B. Boyle's name and address, a notice number (L 013119149) and a certified control number (P 911 204 258). The notice number and the certified control number correspond with those found on the copy of the notice. On the final page, page 4, the "total pieces and amounts listed" is stated to be 35. Also, the number 35 is circled adjacent to the statement "total pieces received at the post office." The total number of pieces of certified mail recorded on the last page of the certified mail record corresponds with the total number of certified numbers. It also corresponds with the total postal fees recorded on the form of \$38.50 at a stated fee of \$1.10 per piece of mail. A stamp of January 31, 1997 from the Colonie Center Branch of the United States Postal Service appears on each page of the certified mailing record. A signature appears on the last page of the certified mailing record.

The copy of the Notice of Determination issued to Jay B. Boyle is addressed to 38 Willets Ln, Plandome, NY 11030-1023 and bears a date of January 31, 1997. This is the same address as appears on the certified mailing record. It also states that sales and use taxes are due under Articles 28 and 29 of the Tax Law in the amount of \$574,089.95 plus interest in the amount of \$390,476.20 and penalty in the amount of \$538,876.96 for a balance due of \$1,503,443.11.

7. The affidavit of James Baisley, Chief Mail Processing Clerk, whose duties include the overall supervision of the entire Mail Processing Center staff, stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of the staff weighs and seals each envelope and affixes postage and fee amounts thereto. A mail room clerk then compares

the first and last pieces of certified mail listed on the certified mail record with the information on the certified mail record. The clerk also performs a random comparison of the information on no more than 30 pieces of certified mail with the information on the certified mail record. Next, a member of the mail room staff delivers the sealed, stamped envelopes to one of the branches of the United States Postal Service in Albany, New York. The certified mail record is left overnight at the post office to enable a postal employee to have sufficient time to process the certified mail and to make appropriate notations on the certified mail record. In the ordinary course of business and pursuant to the practices and procedures of the mail and supply room, the certified mail record is picked up at the post office on the following day and is delivered to the originating office by a member of Mr. Baisley's staff. A U.S. Postal Service representative affixes his or her initials or signature and a U.S. Postal Service postmark to a page or pages of the certified mail record to indicate receipt of the mail listed on the certified mail record and the certified record itself. The Mail Processing Center has requested that the U. S. Postal Service either circle the number of pieces received or indicate the number of pieces received by writing the number of pieces on the mail record. In the present matter, the Postal Service representative signed page four of the certified mail record, placed a postmark on each page of the certified mail record, and circled the total number of pieces of certified mail received by the post office.

Mr. Baisley stated that he reviewed the affidavit of Geraldine Mahon as well as the certified mail record and the notice of determination and he could determine that, on January 31, 1997, an employee of the Mail Processing Center delivered a piece of mail addressed to Jay B. Boyle, 38 Willets Ln, Plandome, NY 11030-1023, to the Colonie Center Branch of the United States Postal Service in Albany, New York in a sealed postpaid envelope for delivery by certified mail. He could also determine that a member of the staff obtained a copy of the certified mail

record delivered to and accepted by the post office on January 31, 1997 for the records of the Division's CARTS Control Unit. Mr. Baisley's affidavit stated that the regular procedures comprising the ordinary course of business for the staff of the mail and supply room were followed on January 31, 1997 with respect to the Notice of Determination at issue herein.

8. The affidavit of Ida Gorman states that she is the supervisor of the NIXIE Unit in the Division's Data Services Bureau. Ms. Gorman explains that the NIXIE Unit receives certain categories of returned mail from the Mail Processing Center. According to its established procedures, the NIXIE Unit separates the mail by category and processes the mail. The notices of determination which are generated by the Division's CARTS system are forwarded to the DATA Entry Unit in order for a NIXIE Flag to be entered into the taxpayer's address record on the Division's Taxpayer Indicative Data system. The "NIXIE Flag" alerts a person reviewing an address record that a document mailed by the Division to a taxpayer at that address was undeliverable and was returned to the Division. Ms. Gorman reviewed the Division's address record for Jay B. Boyle and ascertained that there are no NIXIE flags or other indications that Notice of Determination L 013119149 was returned to the Division.

9. The New York State resident income tax returns of Jay B. and Elizabeth A. Boyle for the years 1995 and 1996 list petitioner's address as 38 Willets Lane, Plandome, New York 11030.

10. The envelope which was used to mail the Request for Conciliation Conference bears a United States Postal Service stamp dated July 22, 1997.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

11. In the course of the submission, petitioner offered a letter stating that the Division knew or should have known that he was not an officer, director, or shareholder or responsible

party during the audit period except for the last two months. Petitioner contends that it was only after a meeting with the Division in Hempstead, New York on April 30, 1997 that the Division sent a notice and demand. The meeting on April 30, 1997 was a result of petitioner's complaint to the Division regarding what petitioner considered to be the unacceptable conduct of the auditor. According to petitioner, the Division knew that a Paul Abrams was the responsible party during the audit period. As soon as he received the Notice and Demand, dated May 27, 1997, petitioner requested forms so that he could file a request for a conciliation conference.

12. In support of his position, Mr. Boyle submitted a number of exhibits. As exhibit one, petitioner offered a sworn statement by Mr. Cincotta, the attorney for Mt. Hope since its inception on December 10, 1982. Mr. Cincotta has been in possession of the corporate minute book and stock ledger except during the time when the corporate minute book was in the custody of certain governmental agencies under a subpoena. Mr. Cincotta states that petitioner became the secretary of the corporation on February 9, 1994 and that prior to this date, he was not an officer or director of Mt. Hope. Petitioner also offered a Sales Tax Examination Questionnaire which, in general, shows that an officer named Paul Abrams had responsibility for the financial affairs of the corporation. As exhibit three, petitioner presented a copy of the first page of a Notice and Demand, dated May 27, 1997. The notice stated that the total amount due from petitioner was \$1,559,677.81. Petitioner also included a copy of a Payment Document which explained petitioner's disagreement with the amount sought by the Division. Lastly, petitioner submitted a Request for a Conciliation Conference dated July 14, 1997.

13. The Division maintains that petitioner did not file a timely request for a conciliation conference or a petition for a hearing and, thus, is not entitled to have the merits of his case considered.

## ***CONCLUSIONS OF LAW***

### A. Tax Law § 1147(a)(1) provides as follows:

Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

Pursuant to Tax Law § 1138(a)(1), a notice of determination<sup>1</sup>:

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 (emphasis added).

B. Upon receipt of the notice of determination or deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the subject matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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<sup>1</sup> Tax Law § 1138(a)(3)(A), as amended by Laws of 1996 (ch 267) deleted the language in the former statutory provision which finally and irrevocably fixed the liability for payment of sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on or after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect to the periods at issue (see, McKinney's Cons Laws of NY, Book 1, Statutes § 51[b]).

C. Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (*see, Matter of T. J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. Through the evidence it has submitted, the Division has established that the notice of determination was, in fact, mailed to Jay B. Boyle on January 31, 1997. First, the Division has introduced adequate proof of its standard mailing procedures via the testimony and affidavits of Division employees involved in the notice generation and issuance process. In particular, the Baisley and Mahon affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the copy of the notice of determination sent to Jay B. Boyle on January 31, 1997 as certified number P 911 204 258 and assessment number L 013119149.

F. Second, the Division established that the general issuance procedures were followed on January 31, 1997. The certified mail record for January 31, 1997 is presented in its entirety and contains, on the final page, a total for the number of items received at the post office. This number has been circled to indicate that 35 pieces were received at the post office. The Mahon affidavit corroborates the fact that there are 35 certified control numbers in the mail record,

noting that, with the exception of page 4 which has 2 numbers, there are 11 such numbers per page on pages 1 through 3. Further, each of the 4 pages of the certified mail record submitted -- most notably, page 2 on which Jay B. Boyle's notice is listed -- is date stamped January 31, 1997 by the United States Postal Service.

G. In short, the testimony and affidavits which are consistent with the information listed on the face of the notice along with the certified mail record and notice in evidence, provide direct evidence confirming the January 31, 1997 date and mailing of the notice to Jay B. Boyle. Moreover, the presence of the Postal Service date stamp on the second page of the January 31, 1997 certified mail record (the page containing the information regarding the notice of determination issued to petitioner) directly supports the conclusion that the mailing of said notice occurred as claimed by the Division (*see, Matter of Katz, supra*).

H. Mr. Boyle argues that he did not receive the Notice of Determination because he was out of New York State the entire month of February 1977. However, through the production of the first pages of Mr. Boyle's 1995 and 1996 income tax returns, the Division has established that the Notice of Determination was mailed 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 notices were, in fact, mailed in accordance with the routine office practice (*Matter of T.J. Gulf, Inc. v. New York State Tax Commn., supra*). A taxpayer has the right to rebut this presumption, however the rebuttal must consist of more than a mere denial of receipt (*Matter of American Cars 'R' Us v. Chu*, 147 AD2d 797, 537 NYS2d 672; *Matter of T.J. Gulf, Inc. v. New York State Tax Commn., supra*).

Here, petitioner states that he did not receive the notice of determination but failed to present any evidence to rebut the presumption of receipt other than the denials contained in the

request for a conciliation conference and the petition. Under these circumstances, the denial is not sufficient to rebut the presumption of receipt. Petitioner's remaining arguments concern the merits of the petition which may not be addressed because a timely petition was not filed.

I. The petition of Jay B. Boyle is dismissed.

DATED: Troy, New York  
January 7, 1999

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE