

New York City Tax Appeals Tribunal

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In the Matter of : DECISION
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GOLDMAN & GOLDMAN, P.C. : TAT (E) 02-12 (CR)
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Petitioner. :
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Goldman & Goldman, P.C., ("Petitioner") filed an Exception to the Determination/Order of an Administrative Law Judge ("ALJ") dated September 17, 2003 granting a motion filed by the Commissioner of Finance of the City of New York (the "Commissioner" or "Respondent") (the "Motion") for summary determination and for an order dismissing the petition for hearing (the "Petition") filed by the Petitioner on the grounds that the New York City Tax Appeals Tribunal (the "Tribunal") lacks subject matter jurisdiction over the Petition because it was not timely filed within ninety days of the issuance of the Notice of Determination (the "Notice") being protested. The Determination/Order also denied the cross-motion filed by Petitioner requesting an order: (a) denying the Motion because genuine issues of material fact exist as to whether Petitioner ever received the Notice; and (b) in the alternative, directing that Respondent's mailroom supervisor or mailroom clerk appear for a deposition with respect to the facts and circumstances contained in their affidavits and setting the matter down for a fact finding hearing to determine whether Respondent followed proper protocol in mailing the Notice and whether Petitioner actually received the Notice (the "Cross Motion"). The Notice, issued by the New York City Department of Finance (the "Department") and dated June 14, 2000, asserted commercial rent tax ("CRT") deficiencies for the periods June 1, 1991 through May 31, 1999 (the "Tax Period") in the total principal amount of \$82,499.41 with interest of

\$39,721.61, computed to June 20, 2000, and penalty in the amount of \$52,501.08 for a total of \$174,722.10.

Petitioner appeared by Steven F. Goldman, Esq, one of its principals. The Commissioner appeared by Frances J. Henn, Esq., Senior Tax Counsel, New York City Law Department. Both parties filed briefs and oral argument was granted by the Tribunal.

Petitioner's office was located at 475 Fifth Avenue, New York, New York 10017.¹

Petitioner failed to file CRT returns for the period June 1, 1991 through May 31, 1992 and for all periods beginning June 1, 1993 through May 31, 1999. Petitioner's CRT liability was the subject of an audit by the Department (the "Audit").

The Department issued a Notice, dated June 14, 2000, to Petitioner asserting CRT deficiencies for the Tax Period² in the total principal amount of \$82,499.41 with interest of \$39,721.61, computed to June 20, 2000, and penalty in the amount of \$52,501.08 for a total of \$174,722.10.

The Notice was addressed to Petitioner at "475 Fifth Avenue, New York, NY 10017." On the face of the Notice, in the upper right hand corner next to the word "MAILED" was a stamp bearing the date "Jun 14 2000." Next to the words "CASE NO:" was the designation "003-04766-8S." Next to the words "ACCT TYPE" were the words "Commercial Rent."

¹The ALJ's factual findings, although paraphrased and amplified in part, have generally been adopted for purposes of this decision.

²For the period June 1, 1992 through May 31, 1993, Petitioner did file a CRT return but underpaid its CRT liability. The amount self-assessed by Petitioner is not at issue in this proceeding.

On July 2, 2001, Warrant Number 003047668 S was docketed as a judgment in the amount of \$186,073.68, representing the deficiencies asserted in the Notice with penalties and interest computed to June 25, 2001.

Respondent submitted the affidavit of John Ross, a senior investigator of the Tax Warrant Unit of the Department. Mr. Ross attested that on December 27, 2001, he spoke with Mr. Goldman over the phone. Mr. Goldman suggested that an installment agreement be arranged pursuant to which Petitioner would pay \$30,000 on or before February 15, 2002 and \$10,000 per month thereafter. Mr. Ross prepared such an agreement and sent it to Mr. Goldman. Mr. Ross telephoned Mr. Goldman on or about February 11, 2002 to remind him of the amount due. Mr. Goldman's secretary told Mr. Ross that the check would be forthcoming. Mr. Goldman telephoned Mr. Ross on or about February 11, 2002. Mr. Goldman told Mr. Ross that he would be in court on February 15th but that he would send a messenger to Mr. Ross's office with a check in the amount of \$30,000 in the afternoon. Mr. Ross did not receive such a check. Rather, on February 19, 2002, he received an Order to Show Cause in this matter.

Petitioner submitted the affidavit of Steven F. Goldman, Esq., one of its principals. Mr. Goldman attested that Petitioner's first notice of any kind regarding the results of the Audit was in late 2001 or early 2002 when he received a call from Mr. Ross who advised him that his firm owed money due to a CRT audit. Mr. Goldman attested that this was a verbal communication only. Mr. Goldman attested that shortly thereafter, his firm filed an order to show cause in Supreme Court to stay the enforcement of this determination which was heard by Justice Walter B. Tolub. Petitioner's action against the Department, which was filed in Supreme Court, New York County on February 14, 2002, was dismissed by Justice Tolub on March 11, 2002.

Petitioner filed a Petition with the Tribunal requesting a redetermination of the deficiencies asserted by the Department on various grounds including that Petitioner never received the Notice until February 22, 2002.

The Petition was postmarked February 27, 2002, well in excess of ninety days following the June 14, 2000 date stamped on the Notice. No conference before the Department's Conciliation Bureau had been requested by Petitioner.

As evidence of the mailing of the Notice, Respondent submitted a copy of the certified mail manifold (USPS Form 3877) relating to the mailing of the Notice (the "Mail Manifold"). The Mail Manifold listed four articles numbered 920781, 920782, 920783 and 920784. The Mail Manifold was redacted to delete information relating to Articles 920782 through 920784 which relate to other taxpayers. The Mail Manifold indicates that Article 920781 was sent to "Goldman & Goldman PC, 475 Fifth Avenue, New York, N.Y. 10017." On the same line as Article 920781, the Mail Manifold states "CRT 003-04766-85." Under the columns "Postage" and "Fee" the amounts of "33" [cents] and "140" [\$1.40] were recorded as the postage and mailing fee, respectively for this item. The Mail Manifold also bears the handwritten number "4" in both the box labeled "Total Number of Pieces Listed by Sender" and the box labeled "Total Number of Pieces Received at Post Office." A signature appears in the box labeled "Postmaster, Per (Name of receiving employee)." A round USPS stamp bearing the date "Jun 14 2000," and the words "Brooklyn Municipal Sta USPS" appears near the upper right hand corner of the Mail Manifold. A second stamp, that appears identical to the stamp on the upper right hand corner of the Notice, bearing only the date "Jun 14 2000," appears on the bottom line in the far right hand column of the Mail Manifold.

Respondent submitted the affidavits of two Department employees: Edna Owusu-

Sekyere, Principal Administrative Associate in the Department's Audit Control Unit, and Mark Grainger, supervisor of the Department's mailroom, both of whom are located at 345 Adams Street, Brooklyn, New York 11201. Both individuals were employed by the Department at their respective offices on June 14, 2000.

Ms. Owusu-Sekyere attested to the routine practice and procedure of the Department's Audit Control Unit, which were in effect on June 14, 2000, for preparing notices of determination resulting from field audits for mailing to taxpayers.

Ms. Owusu-Sekyere attested that the routine practice and procedure involved several steps. She obtained the notice of determination (the "NOD") and, at the same time, created a mail manifold, United States Postal Service ("USPS") Form 3877, on which a maximum of fifteen NODs can be listed for purposes of certified mailing and on which is recorded the taxpayer's name, address, the certified mail article number, and the audit number. She copied the name and address located on the NOD onto a blank copy of the mail manifold. She stamped the date onto the NOD next to where the word "mailed" is printed. She also stamped this same date in the bottom right side of the mail manifold. She printed the certified mail number in the corner of a certified mail window envelope and also printed the same number onto the mail manifold. She folded the NOD and placed it in the window envelope along with a copy of the Notice of Taxpayer Rights/Request for Conciliation Conference. She placed the envelope in the out box with the mail manifold. The original mail manifold was wrapped around the certified mail window envelopes to be mailed and secured with a rubber band. A copy of the mail manifold was kept for her records. A few days later, the mailroom returned to the Audit Control Unit the mail manifold which had been stamped by the USPS office. The original mail manifold was then filed in the appropriate file cabinet according to the date as part of the record keeping procedure. Ms. Owusu-Sekyere attested that the Notice was prepared in accordance with this procedure

for delivery to the USPS office on June 14, 2000.

Mr. Grainger attested to the routine office practice and procedure that was in effect on June 14, 2000 for mailing NODs to taxpayers. He would gather the bundles of mail left by the originating unit, in this case the Audit Control Unit, for certified mailing along with the appertaining mail manifolds and would enter the proper postage on each envelope. At some time in the late afternoon, he would take these bundles of certified mail envelopes to the USPS office located at the Brooklyn Municipal Building on Joralemon Street, Brooklyn, New York. There, he would give the bundles to a postal clerk who, in his presence, would unwrap each bundle and count the number of envelopes contained in each bundle to insure that it equaled the number listed on the mail manifold. The postal clerk would then check the calculation of the total postage on each mail manifold and, if everything was correct, would postmark each mail manifold with a round stamp indicating the date of receipt. The clerk would then return the postmarked mail manifolds to him and he would bring them back to the mailroom located at Adams Street. At some time within the next two days, he would send the postmarked mail manifolds to the originating unit (in this case the Audit Control Unit) via the interdepartmental mail service maintained by the Department. Mr. Grainger attested that the Mail Manifold was prepared in accordance with the above procedure and reflects that the Notice was prepared for delivery to the USPS office on June 14, 2000.

In Mr. Goldman's affidavit of January 20, 2003, he states that "I can state with a 100% degree of certainty that in the months of June and July of 2000, no notice of determination was received by our office or brought to my attention." His affidavit describes his office's procedure for handling incoming mail. The procedure included having the receptionist bring all tax notices, certified mail or official mail to the assistant office manager, Alma Vidovic immediately upon receipt. Ms. Vidovic would then sort the items

and bring those items directly to Mr. Goldman's attention. Any tax notices or official governmental notifications involving tax or financial matters were to be sent immediately to the firm's accountants, Lazar, Levine and Felix. No affidavit was submitted by Petitioner's accountants.

Petitioner submitted an affidavit by Alma Vidovic, who, in June and July 2000 was employed by Steven F. Goldman, Esq. as a senior law secretary and assistant office manager. Ms. Vidovic reiterated the procedure described by Mr. Goldman for handling incoming mail. She attested that "I can state with a reasonable degree of certainty that during the months of June and July, 2000 that the instant notice of determination dated June 14, 2000 was not received by Goldman & Goldman at 475 Fifth Avenue, Suite 1500, New York, New York."

In his affidavit dated January 20, 2003, Mr. Goldman swore that in June of 2000 his firm "was located at 475 Fifth Avenue, Suite 1500, New York, New York 10017." [Emphasis added.] In a subsequent affidavit dated March 27, 2003, Mr. Goldman swore that his firm's "business address during the calendar year 2000 was 475 Fifth Avenue, New York, New York. . . . Goldman & Goldman occupied Suite 1600 thereat." [Emphasis added.]³

The Petition lists Petitioner's address as "475 5th Ave., NYC, NY 10017" with no suite number. The Department submitted various documents from its files showing Petitioner's address with no suite number. These documents consisted of: (1) five different forms in which Petitioner consented to extending the period of limitations in connection with the Audit, which forms were executed by Mr. Goldman between 1996 and 1999; (2)

³At the oral argument, Mr. Goldman stated that Petitioner had offices on both the 15th and 16th floors. However, this is immaterial to our decision. See, discussion pp. 12-13.

Petitioner's Form NYC 3L, City General Corporation Tax ("GCT") Return for 1999, which was stamped by the Department "Jan 31, 2001;" (3) Petitioner's Form NYC 6, Application for Automatic Extension for its GCT liability for 2000, dated March 15, 2001; (4) an envelope used by Petitioner to mail something to the Department, which was date-stamped March 15, 2001 and which has Petitioner's return address pre-printed on the envelope without a suite number; and (5) a rent bill dated August 1, 1994 addressed to Petitioner from its managing agent.

Respondent submitted the affidavit of Jeffrey Talan dated February 28, 2003. From March 1985 up to and including the date of the affidavit, Mr. Talan was Chief of the Department's Audit Control Unit. He was responsible for generating NODs, overseeing the mailing of such NODs, and receiving and filing NODs which were returned to the Department from the USPS stamped with such notations as "refused," "unclaimed," "no forwarding address," and "return to sender." He maintained files in his office, based on date, of every NOD which was generated from his unit as a result of a field audit. When a NOD was returned from the USPS, he forwarded the NOD with the stamped envelope that contained it, to the field audit unit for verification that the address to which the NOD was sent was current and accurate. The field audit unit then responded to him with an interoffice memorandum indicating whether the address on the envelope and the NOD was in fact accurate and current. If the address to which the NOD was sent was in fact accurate and current, the field audit unit returned to Mr. Talan the envelope containing the NOD along with the memorandum indicating that the address was accurate and current. He then filed the envelope containing the NOD and the field audit unit's memorandum in a file cabinet located on the 7th floor of 345 Adams Street, Brooklyn, New York. This cabinet was used for the specific purpose of filing away returned NODs in chronological order. If the field audit unit determined that the address on the returned envelope and the NOD therein was incorrect or not current, the field audit unit indicated this fact in its memorandum to

Mr. Talan at which point his unit mailed another NOD to the taxpayer with the address indicated by the field audit unit in its memorandum. Mr. Talan stated that he had no recollection of mailing a second NOD to Petitioner for CRT for the Tax Period. Mr. Talan further attested that there is only one NOD issued to Petitioner for CRT for the Tax Period in the file kept in his office for NODs which are generated from his unit as a result of field audits. Mr. Talan attested that on February 14, 2002⁴ he made a thorough search of the file cabinet kept on the 7th floor at 345 Adams Street for returned NODs and did not find therein the Notice or the envelope which contained it.

The Commissioner asserted that she established that the Notice was properly mailed to Petitioner by certified mail on June 14, 2000. She claimed that since she proved proper and timely mailing, she is entitled to the presumption that Petitioner received the Notice, and that, therefore, the Petition is untimely.

Petitioner countered that it did not receive the Notice until February, 2002. Petitioner also contended that the Notice was not properly addressed in that the address did not include a suite number. The Commissioner countered that the Notice was properly addressed to Petitioner's address as set forth in various documents on file with the Department.

Petitioner further claimed that the affidavits of its principal and of its assistant office manager rebut the presumption of receipt. Petitioner also asserted that there are genuine issues of material fact as to whether it received the Notice in June or July of 2000. It requested that Respondent's employees appear for a deposition with respect to the facts contained in their affidavits and asked for a hearing with respect to the issue of whether the Commissioner followed proper protocol in mailing the Notice and whether Petitioner ever

⁴In as much as Mr. Talan's affidavit was dated February 28, 2003 this date appears to be a typographical error. It appears that Mr. Talan meant to write "February 14, 2003."

received it. Respondent countered that a bare allegation of non-receipt is insufficient to warrant a fact finding hearing.

The ALJ concluded that there were no unresolved issues of material fact and, thus, Respondent was entitled to summary determination that the Petition that was filed on February 27, 2002 was not timely filed. The ALJ granted Respondent's Motion and denied Petitioner's Cross Motion. The ALJ dismissed the Petition as it was not timely filed.

On appeal, Petitioner contends that the ALJ's Determination/Order should be reversed and the Respondent's Motion denied as genuine issues of material fact exist. In the alternative, Petitioner asserts that the mailroom supervisor and/or mailroom clerk should appear for depositions and the matter be set down for a fact finding hearing to determine whether Respondent followed proper procedures in mailing the Notice and whether Petitioner actually received said Notice. Petitioner also asserts, for the first time in this proceeding, that the mailing procedures as set forth in the New York City Administrative Code (the "Code") are unconstitutional and flawed and that procedures under the Code and applicable City statutes are arbitrary and capricious and deny Petitioner due process under the Federal and State Constitutions which could be remedied by the requirement of a certified mailing return receipt requested.

Respondent argues that the ALJ's Determination/Order should be affirmed as the ALJ properly granted Respondent's Motion and dismissed the Petition because it was untimely filed.

For the reasons set forth below, we affirm the ALJ's Determination/Order.

The Tribunal's Rules of Practice and Procedure (the "Tribunal's Rules") at 20 RCNY §1-05(d)(1) provide:

After issue has been joined, any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings, and by any other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact to be tried and that the facts mandate a determination in the moving party's favor. **The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact** [Emphasis added.]

Section 11-708 of the Code provides, in relevant part,:

If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient, the commissioner of finance shall determine the amount of tax due from such information as may be obtainable and, if necessary, may estimate the tax on the basis of external indices. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination . . . both (1) serves a petition upon the commissioner of finance and (2) files a petition with the tax appeals tribunal for a hearing

Section 11-717.a of the Code provides, in relevant part:

Any notice authorized or required under the provisions of this chapter may be given to the person for whom it is intended by mailing it in a postpaid envelope addressed to such person at the address given in the last return filed by such person pursuant to the provisions of this chapter or in any application made by such person or if no return has been filed or application made, then to such address as may be obtainable. The mailing of a notice as in this paragraph provided for 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 chapter by the giving of notice shall commence to run from the date of mailing of such notice as in this subdivision provided.

When, as in this matter, the timeliness of a petition is at issue, Respondent has the burden of proving proper addressing and mailing of the notice being protested. Matter of 2981 Third Avenue, Inc., TAT(E) 93-2092(RP), New York City Tax Appeals Tribunal (June 14, 1999); citing Matter of Novar TV & Air Conditioner Sales & Service, Inc., New York State Tax Appeals Tribunal (May 23, 1991); Matter of William and Gloria Katz, New York State Tax Appeals Tribunal (November 14, 1991).

Petitioner asserts that the Notice was not properly addressed because its suite number was not part of the address. Putting aside the issue of whether Petitioner's correct suite number is "1500" or "1600", the absence of Petitioner's suite number from its address was not material. Petitioner did not submit any document containing a suite number in its 475 Fifth Avenue address and there is no evidence that it ever used a suite number as part of that address. Moreover, the Petition filed with the Tribunal contains no suite number in Petitioner's address. Section 11-717.a of the Code permits Respondent to address a NOD

to either the address given in the last CRT return filed, or any application made by the Petitioner, or if no return was filed or application made to such address as may be obtainable. While, as the ALJ noted, the source of the address used on the Notice was not identified, various documents in the Department's files including Petitioner's General Corporation Tax ("GCT") Return, Form NYC 3L for 1999; Petitioner's Application for Automatic Extension for its GCT liability for 2000 (Form NYC 6), dated March 15, 2001; and a rent invoice (dated August 1, 1994) addressed to Petitioner from its managing agent; all showed Petitioner's 475 Fifth Avenue address without a suite number. Accordingly, we find, as did the ALJ, that the Notice was properly addressed.

The NOD is deemed to be mailed when it is delivered to the custody of the USPS for mailing. Matter of 2981 Third Avenue, *supra*; *citing* Matter of Novar, *supra*. Section 11-717.a of the Code does not require actual receipt by a taxpayer and specifically provides, in relevant part, that the "mailing of a notice as in this paragraph provided for shall be presumptive evidence of the receipt of the same by the person to whom addressed." However, "the presumption of delivery does not arise unless and until sufficient evidence of mailing has been proffered." Matter of Katz, *supra*. Thus, the Department must establish when it mailed the Notice by: "(1) offer[ing] proof of a standard procedure used for the issuance of [NODs] by one who has knowledge of the relevant procedure; and (2) offer[ing] proof that the standard procedure was followed in the case at issue." Matter of 2981 Third Avenue, *supra*.

We find as did the ALJ that, in the matter before us, Respondent met the two tests set forth above. The affidavits of Ms. Owusu-Sekyere and Mr. Grainger established the Department's procedures for preparing NODs for mailing and the Department's procedures for mailing those NODs. Both Ms. Owusu-Sekyere and Mr. Grainger attested that the Notice was prepared for delivery to the USPS for certified mailing in accordance with these

procedures. Those affidavits combined with the properly completed Mail Manifold constituted direct evidence that the Department's procedures were followed in this case. Matter of 2981 Third Avenue, *supra*.

A mail manifold "reflecting postal service receipt, represents direct documentary evidence of the date and the fact of mailing." Matter of Charla Bikman, TAT(E) 98-73(UB), New York City Tax Appeals Tribunal (August 16, 2001), *citing* Wheat v. Commissioner, 63 T.C.M. (CCH) 2955 (1992). In the matter before us, the type of tax and audit number which is on the Notice also appear on the Mail Manifold next to Petitioner's name and the amount of "Postage" and "Fee." Furthermore, the date stamped on the Notice (Jun 14, 2000) next to the word "MAILED" is the same as the date stamped on the lower right hand corner of the Mail Manifold and is also the date of the USPS postmark on the upper right hand corner of the Mail Manifold.

A properly completed mail manifold "raises a presumption of official regularity" in favor of the Department. Matter of Charla Bikman, *supra*; *citing* Wheat, *supra*; *citing* United States v. Zolla, 724 F.2d 808, 810 (9th Cir. 1984), *cert. denied*, 469 U.S. 830 (1984), *rehearing denied*, 469 U.S. 1067 (1984). As the ALJ found, the Mail Manifold was properly completed in that the boxes that both the Department's employees and the USPS's employee were required to complete were completed and the Mail Manifold contained a legible postmark stamp with the date "Jun 14 2000" and the words "Brooklyn Municipal Sta USPS."

Petitioner asserts that it has rebutted the presumption of receipt. However, as the ALJ found, Petitioner's evidence, consisting of the affidavit of Mr. Goldman who stated that his office did not receive the Notice and the affidavit of Ms. Vidovic who attested that she "can state with a reasonable degree of certainty" that Petitioner did not receive the Notice

was insufficient to rebut the presumption. Petitioner must do more than merely deny receipt in order to rebut the presumption of receipt. Matter of T.J. Gulf, Inc. v. New York State Tax Commission, 124 A.D.2d 314 (3rd Dept. 1986). Petitioner must show that the Department's "routine office practices were not followed or that those practices were performed so carelessly that it would be unreasonable to assume that the notice was mailed." Matter of T.J. Gulf, *supra*. Alternatively, Petitioner must show that the USPS failed to comply with its own requirements for delivery of certified mail. Matter of Ruggerite, Inc. v. State Tax Commission, 97 A.D.2d 634 (3rd Dept. 1983), *aff'd*, 64 N.Y.2d 688 (1984). Petitioner might also be able put forth other proof that would serve to rebut the presumption, however, merely denying receipt is not sufficient.

Petitioner relies on Ruggerite, *supra* as support for its contention that it has rebutted the presumption of receipt. However, in Ruggerite, *supra*,⁵ the Appellate Division found "uncontroverted proof that [taxpayer] did not receive the notice of tax deficiency" (the postal service returned it to the New York State Tax Department of Taxation and Finance and the returned envelope bore the marking "unclaimed"); and found a failure on the part of the postal service to comply with one of its own requirements for delivery of certified mail. Neither element is present at the case at bar where we have a mere denial of receipt and where no errors by the postal service have been demonstrated. In affirming, the Court of Appeals emphasized the taxpayer's "right to rebut the presumption" where, as here, the mailing of a notice merely leads to the presumption of receipt. Nevertheless, it cannot be said that the presumption of receipt is rebutted when the only evidence presented is the mere denial of receipt. Furthermore, Respondent submitted the affidavit of Jeffrey Talan setting forth the procedures for receiving and filing notices returned to the Department from the

⁵This is a case involving the New York State Sales Tax which at §1147(a)(1) contains a provision almost identical to that found in §11-717.a of the Code, *i.e.*, "[t]he mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed."

USPS stamped with such notations as "refused", "unclaimed", "no forwarding address", and "return to sender" and setting forth the procedures by which he established that there was no record of the Notice being returned by the USPS to the Department.

In addition, as did the ALJ, we deny Petitioner's request for the opportunity to have the Department's employees submit to depositions and to have a hearing with respect to the issue of whether the proper protocol was followed in mailing the Notice and whether Petitioner actually received said Notice. The affidavits of Ms. Owusu-Sekyere and Mr. Grainger constitute adequate proof of the procedures for preparing NODs for mailing and the procedures for actually mailing those NODs. The properly completed Mail Manifold shows that the Department's procedures as set forth in the affidavits were followed and establishes the date and fact of mailing. Department employees are not required to specifically remember processing a particular NOD; an impossible burden that is not a burden that the applicable statutes and case law require. Cataldo v. Commissioner, 60 T.C. 522 (1973), *aff'd*, 499 F.2d 550 (1974).

Were we to call into question the validity of this properly completed Mail Manifold, without some specific reason to do so, "we would be calling into question the very piece of evidence that is called for to establish mailing in a myriad of factual settings." Matter of 2981 Third Avenue, *supra*, *citing* Matter of 761 Hotel Associates, Grantor and Parc 51 Associates, Grantee, TAT(E) 93-1150(RP) and TAT(E) 93-400(RP), New York City Tax Appeals Tribunal (June 10, 1997).

Petitioner's reliance on the Matter of Samuel Heyman, TAT(E) 93-1577 (RP), New York City Tax Appeals Tribunal (August 1, 2001) and Matter of 2981 Third Avenue, *supra* as providing support for its contention that the issue of timeliness should be resolved by holding a fact finding hearing is misplaced. Neither case contains or supports such a

conclusion. The ALJ's Determination/Order in Matter of Samuel Heyman, TAT(H) 93-1577 (RP), New York City Administrative Law Judge Division (May 24, 2000) indicates that Respondent filed a motion to dismiss, pursuant to 20 RCNY §1-05(b)(1)(vii) of the Tribunal Rules, on the ground that the petition was not timely filed (and not a motion for summary determination). Pursuant to the Tribunal Rules at 20 RCNY §1-05(b)(2)(i), the ALJ may, on a motion to dismiss, "order an immediate hearing to determine facts relating to the grounds for the dismissal." According to the ALJ's Determination/Order, an evidentiary hearing was held to determine the facts relating to the issuance and mailing of the NOD for the purpose of determining whether the petition for hearing had been timely filed because "Respondent's motion papers did not clearly establish all the necessary facts relating to the mailing of the [NOD]." The ALJ's Determination/Order in Matter of 2981 Third Avenue, Inc., TAT(H) 93-2092(RP), New York City Administrative Law Judge Division (March 23, 1998) indicates that Respondent filed a motion to dismiss the petition, pursuant to 20 RCNY §1-05(b)(1)(vii) of the Tribunal Rules, on the ground that the petition was not timely filed (and not a motion for summary determination). Pursuant to the Tribunal Rules at 20 RCNY §1-05(b)(2)(i) the ALJ may, on a motion to dismiss, "order an immediate hearing to determine facts relating to the grounds for dismissal." In the matter before us, there were no remaining issues of unresolved material facts to be tried and, therefore, pursuant to 20 RCNY §1-05(d)(1) of the Tribunal Rules, the ALJ granted Respondent's Motion.

Petitioner has also raised on appeal the issue that the mailing procedure under the Code is unconstitutional and flawed as "essentially, there is no way for a [taxpayer] to ever test the procedure or to be able to cross-examine a mail manifold document." Petitioner further argues that the procedures used are arbitrary and capricious and deny a taxpayer due process under the Federal and State Constitution. However, Petitioner asserts that all that is needed is a requirement of a "certified mailing return receipt requested" and that then there would be "dispositive proof" as to whether a taxpayer received the NOD.

The jurisdiction of this Tribunal does not include the authority to determine whether a statute is unconstitutional on its face, since statutes are presumed to be constitutional at the administrative level. Matter of Fourth Day Enterprises, Inc., New York State Tax Appeals Tribunal (October 27, 1988). However, while this Tribunal cannot address the issue of the constitutionality of a statute on its face, it can address the issue of the constitutionality of a statute as applied to a particular set of facts. See Matter of David Hazan, Inc., New York State Tax Appeals Tribunal (April 21, 1988), *aff'd*, 152 A.D.2d 765 (3rd Dept. 1989), *aff'd*, 75 N.Y.2d 989 (1990). We find that both the CRT mailing provisions in the Code and the Department's practices and procedures for preparing NODs for mailing and for mailing those NODs as applied to Petitioner are proper. Section 11-717.a of the Code requires mailing and the Department used certified mailing and the Mail Manifold. Two of the affidavits provided by Respondent set forth the routine practice and procedures of the Department for preparing the NODs for mailing and for mailing the NODs. The properly prepared Mail Manifold proved both the fact and the date of the mailing of the Notice. The mailing statute is not unconstitutional as applied and the mailing practices and procedures are not arbitrary merely because Petitioner, under the facts before us, is unable to rebut the presumption of receipt.

Petitioner claims that "certified mailing return receipt requested" would be a better method of mailing. Whether or not such a procedure would be better is not relevant when the pertinent statute does not require that type of mailing. The issue the Tribunal must address here is whether Respondent has proven proper addressing and mailing of the NOD being protested as required by the statute.

Accordingly, as there are no unresolved issues of material fact that require a hearing, we sustain the ALJ's Determination/Order that Respondent is entitled to summary determination that the Petition filed on February 27, 2002 was not timely filed. Respondent's Motion is granted and Petitioner's Cross Motion is denied. The Petition is dismissed as it was not timely filed.

Dated: March 24, 2005
New York, New York

GLENN NEWMAN
Commissioner and President

ARTHUR A. STRAUSS
Commissioner

KALMAN FINKEL
Commissioner