

Mark Grainger; the affidavit of Edna Owusu-Sekyere; and the affidavit of Leonard Nemer); the December 12, 2004 affirmation in opposition to the motion by Mr. Wilkins; the additional affirmation in support of motion by Ms. Henn, dated January 12, 2005, and the exhibits submitted therewith (including the affidavit of Janie Harris); and the March 28, 2005 affirmation in further opposition; the following order is issued.

ISSUE

Whether the Petitions, which were dated August 27, 1999, timely protested Notices of Determination dated April 7, 1999.

FINDINGS OF FACTS

1. Petitioner, Associated Business Telephone Systems Corporation, was located at 432 Kelley Drive, Berlin, New Jersey 08091 during the periods April 1, 1993 through December 31, 1995 (the "First Audit Period") and January 1, 1996 through October 31, 1996 (the "Second Audit Period") (collectively, the "Audit Periods").

2. Petitioner did not file City Utility Tax ("UT") returns for the Audit Periods.

3. Prior to the Audit Periods, Respondent performed a field audit examination of Petitioner's books and records with respect to UT for the period November 1, 1988 through September 30, 1991, a period not in issue herein. On August 5, 1992, Respondent issued a Notice of Determination of UT due for that prior period (the

"Earlier Notice"). On August 21, 1992, Petitioner timely filed a petition with the City's former Hearings Bureau protesting the Earlier Notice (the "Earlier Petition"). Pursuant to the provisions of Sections 168 through 172 of the City Charter, as amended by act of the New York State Legislature on June 28, 1992, Laws 1992, ch. 808, section 140, the Earlier Petition, which was pending before Respondent's former Hearings Bureau on October 1, 1992, was transferred to the Tax Appeals Tribunal for determination, and was assigned the Tax Appeals Tribunal case number TAT(H) 93-1053(UT).

4. In 1996, an auditor with the City Department of Finance (the "Department") began a review of Petitioner's UT liability for the First Audit Period (the "First Audit"). The First Audit was assigned the case identification number 005239331-S. As a continuation of the First Audit, an auditor with the Department commenced a separate review of Petitioner's UT liability for the Second Audit Period, assigning the case identification number 005239329-S (the "Second Audit") (collectively, the "Audits").

5. On February 28, 1996, Petitioner informed the Administrative Audit Manager of the Audit Division of the Department in writing that its address was 432 Kelley Drive, Berlin, New Jersey 08009.

6. On April 1, 1998, Dominic A. Dalia, Petitioner's President, executed a Department Power of Attorney, appointing Stuart A. Wilkins, Esq., as Petitioner's representative with respect to UT for the period 1988 through 1995. On the Power of Attorney, Petitioner stated its address as 432 Kelley Drive, West

Berlin, NJ 08091, and stated Mr. Wilkins's address as Law Offices of Stuart A. Wilkins, 432 Kelley Drive, West Berlin, NJ 08091.

7. By letter dated March 23, 1999, Mr. Wilkins wrote the Department's auditor that Petitioner disagreed with the audit findings with respect to UT due for the period "4/1/93-10/31/96," a period which included the Audit Periods (the "March 23, 1999 Correspondence").

8. Following the Audits, the Department issued two (2) Notices of Determination to Petitioner asserting City UT deficiencies for the Audit Periods. The Notice of Determination for the First Audit Period was issued in the base UT amount of \$73,471.10, with interest and penalties computed thereon (the "First Notice"). The First Notice was dated April 7, 1999, was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, and referenced an audit case number 005239331 S. The Notice of Determination for the Second Audit Period was issued in the base UT amount of \$21,312.55, with interest and penalties computed thereon (the "Second Notice"). The Second Notice was dated April 7, 1999, was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, and referenced audit case number 005239329-S (collectively, the "Notices").

9. On August 31, 1999, Dominic Dalia, Petitioner's President, executed a Tax Appeals Tribunal Power of Attorney, appointing Mr. Wilkins as its representative with respect to UT for the period 1993 through 1996, a period which included the Audit Periods. Petitioner's address was listed on this Power of Attorney as 432 Kelley Drive, c/o Law Offices of Stuart A. Wilkins, Esq., W. Berlin, NJ 08091, and Mr. Wilkins' address was listed as Law

Offices of Stuart A. Wilkins, 432 Kelley Drive, West Berlin, NJ 08091.

10. The Tax Appeals Tribunal received a Petition for Hearing from Petitioner which protested the First Notice (the "First Petition"). The First Petition, dated August 27, 1999, was sent by regular United States Postal Service ("USPS") mail, with the envelope in which it was delivered bearing a USPS postmark of September 1, 1999. The First Petition was received by the Tax Appeals Tribunal on September 3, 1999. Petitioner's address was listed on the Petition as c/o Law Offices of Stuart A. Wilkins, 432 Kelley Drive, W. Berlin, NJ 08091. The First Petition referenced a Department Audit/Case Number 005239331-S and a Notice of Determination dated "4/7/99."

11. The First Petition protested the First Notice on a variety of bases. Appended to that petition were a copy of the March 23, 1999 Correspondence and a copy of correspondence dated August 27, 1999 from Mr. Wilkins to Respondent's representative which referenced a telephone conference held before the Administrative Law Judge originally assigned to hear this matter (the "August 27, 1999 Correspondence"). The August 27, 1999 Correspondence stated that the First Petition should be heard and the First Notice be cancelled because the "City was aware, for at least one year, that Petitioner was disputing any utility tax assessment for all periods of time referenced" in the First Petition.

12. On September 15, 1999, the Tax Appeals Tribunal issued an Acknowledgment which designated the First Petition as TAT(H)99-

65(UT) (the "First Acknowledgment"), and inquired whether this matter should be consolidated with another apparently related matter that was designated TAT(H)99-66(UT). By letter dated October 15, 1999, Respondent's representative objected to the consolidation.

13. On October 15, 1999, Respondent's representative, Assistant Corporation Counsel Kevin E.F. O'Sullivan, Esq., filed an Answer to the First Petition (the "First Answer"). In the ninth paragraph of the First Answer, Respondent's representative raised the affirmative defense that the Petition was untimely filed since it was filed in excess of ninety (90) days of the issuing of the First Notice, the time period prescribed by City Administrative Code ("Code") §11-1106 for filing Petitions for Hearing with the Tax Appeals Tribunal.

14. The Tax Appeals Tribunal received a Petition for Hearing from Petitioner which protested the Second Notice (the "Second Petition"). The Second Petition was dated August 27, 1999, and was sent by regular USPS mail, with the envelope in which it was delivered bearing a USPS postmark of September 1, 1999. The Second petition was received by the Tax Appeals Tribunal on September 3, 1999. Petitioner's address was listed on the Second Petition as c/o Law Offices of Stuart A. Wilkins, 432 Kelley Drive, W. Berlin, NJ 08091. The Second Petition referenced an audit case Number 005239329-S and a Notice of Determination dated "4/7/99."

15. The Second Petition protested the Second Notice on a variety of bases. Appended to the Second Petition were copies of

the March 23, 1999 Correspondence and the August 27, 1999 Correspondence.

16. On September 15, 1999, the Tax Appeals Tribunal issued an Acknowledgment (the "Second Acknowledgment") which designated the Second Petition as TAT(H)99-66(UT) and inquired whether this matter should be consolidated with the First Petition that was designated TAT(H) 99-65(UT). By letter dated October 15, 1999, Respondent's representative objected to the consolidation.

17. On October 15, 1999, Mr. O'Sullivan filed an Answer to the Second Petition ("Second Answer"). In the ninth paragraph of the Second Answer Respondent's representative raised the affirmative defense that the Second Petition was untimely filed, since it was filed in excess of ninety (90) days of the issuing of the Notice: i.e., the time period prescribed by Code §11-1106.

18. On February 23, 2000, Mr. O'Sullivan and Assistant Corporation Counsel Gail S. Miller, Esq., Respondent's representatives, filed a Notice of Motion to Dismiss the First Petition (the "First Motion") and a Notice of Motion to Dismiss the Second Petition (the "Second Motion") (collectively, "the Motions to Dismiss"). Respondent moved to dismiss the Petitions on the basis that they were untimely filed pursuant to Section 170 of the City Charter and Code §11-1106, and requested an Order granting such dismissal pursuant to Tribunal Rules §1-05.

19. In their Affirmations in Support of the Motions to Dismiss, Respondent's representatives affirmed that on April 7,

1999, the First and Second Notices were "sent" by certified mail to Petitioner at 432 Kelly Drive, Berlin, NJ 08091.

20. Appended to each of the Motions to Dismiss were the following papers: a copy of correspondence from Petitioner to the Department's Audit Division, dated February 28, 1996; a copy of the April 1, 1998 Power of Attorney; and a copy of the relevant notice, petition, acknowledgment, and answer.

21. Also included in the motion papers were copies of a single completed USPS Form 3877 (the "Mail Manifold.") The Mail Manifold recites that on April 7, 1999, Respondent's Bureau of Tax Collections sent two (2) articles of mail to Petitioner and two (2) articles of mail to Mr. Wilkins. The first line of the Mail Manifold references Article No. 920856, that it was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, indicates postage and fees computed and bears the notation "UTX 005239331 S." The fifth line of the Mail Manifold references Article No. 920857 that it was addressed to Law Office of Stuart Wilkins at 432 Kelly Drive, West Berlin, NJ 08091, to the attention of Stuart Wilkins, Esq., indicates postage and fees computed, and bears the notation "UTX 005239331 S." The ninth line of the Mail Manifold references Article No. 920858, that it was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, indicates postage and fees computed, and bears the notation "UTX 005239329-S." The twelfth line of the Mail Manifold references Article No. 920859, that it was addressed to Law Office of Stuart Wilkins at 432 Kelly Drive, West Berlin, NJ 08091, to the attention of Stuart Wilkins, Esq., indicates postage and fees computed, and bears the notation "UTX 005239329-S." There are no other mailing entries on the Mail Manifold. The Mail

Manifold bears a stamped date of April 7, 1999 and identifies the sender's address to be 345 Adams Street, Brooklyn, NY 11201. It also bears a hand-written notation: "A/C." A box located at the top of the form, captioned "Certified," is marked by an "x."

22. The Mail Manifold bears a round USPS postmark which is not completely legible, but which indicates the following: "[illegible] NY Municipal Sta USPS April 7, 1999." The Mail Manifold is signed by an individual identified as the Postmaster/Receiving Employee. To the left of that individual's signature is a box encaptioned "Total Number of Pieces Listed by Sender," which bears the handwritten number 4, and a box encaptioned "Total Number of Pieces Received at Post Office," which also bears the handwritten number 4.

23. The Motions to Dismiss did not include evidence or affirmations with respect to either: (a) the Department's standard procedures for preparation and mailing of Notices of Determination of UT due, or (b) the Department's compliance with those standard procedures in the actual mailing of the First Notice or the Second Notice.

24. Mr. Wilkins filed Affirmations in Opposition to the Motions to Dismiss on May 2, 2002, opposing the motions on several bases. Appended to each Affirmation were a copy of the Earlier Notice, a copy of the Earlier Petition, and a copy of a May 7, 1996 Tribunal Notice regarding the Earlier Petition. Petitioner opposed the Motions to Dismiss on the basis that they were untimely made pursuant to Tribunal Rules §1-05(a).

25. In his Affirmations in Opposition, Mr. Wilkins stated that the Petitions were filed on September 3, 1999.¹ Petitioner did not allege that the Notices were not mailed on April 7, 1999, or that the Notices were improperly addressed, or that it had not received the Notices.

26. On May 21, 2002, Assistant Corporation Counsel Millette Shanon, Esq., Respondent's representative, filed a reply affirmation, reasserting the request that the Petitions be dismissed on the basis that they were untimely filed. Ms. Shanon further requested that the undersigned exercise the discretion granted by Tribunal Rules §1-05(b)(2)(ii) to treat the Motions to Dismiss as Motions for Summary Determination or, alternatively, pursuant to the provisions of Tribunal Rules §1-05(c)(3), to sua sponte dismiss the Petitions on the ground that the Tribunal lacks jurisdiction because the Petitions were not timely filed.

27. On September 4, 2002, Mr. Wilkins filed sur-reply affirmations, appended to which were copies of: correspondence dated August 12, 1998 from Petitioner's representative to Assistant Corporation Counsel Marc J. Gurell, Esq., one of Respondent's representatives, with respect to the Earlier Petition; a faxed correspondence from Mr. O'Sullivan, dated August 26, 1999 which included a copy of a letter of the same date; the Notices; and, correspondence dated October 11, 1999 from Mr. Wilkins to Mr. O'Sullivan. Petitioner continued to oppose the Motions to Dismiss

¹ The parties have consistently referred to the filing date of the Petitions as September 3, 1999, although pursuant to Code §11-1106, the appropriate date would be the date of the USPS mailing, September 1, 1999. In either event, the Petition was filed more than 90 days after April 7, 1999, the date on the Notice.

as untimely made, and opposed as unfair and prejudicial Respondent's request for conversion of the Motions to Dismiss to motions for summary determination, and her alternate request for sua sponte dismissal pursuant to Tribunal Rules §1-05(c)(3). In the alternative, Petitioner requested that the motions be held in abeyance pending the issuance of a determination with respect to the Earlier Petition.

28. By correspondence dated January 2, 2003, pursuant to Tribunal Rules §1-05, the undersigned informed the then representatives that each Motion would be treated as a motion for summary determination.

29. On January 29, 2003, the undersigned issued Orders dismissing each of the Motions for Summary Determination on the basis that there remained triable issues of material fact with respect to the proper mailing of the Notices. In the Orders, the undersigned specifically noted that to prevail "Respondent must establish the Department's standard procedure for mailing notices of determination of UT due and that the Department complied with those standard procedures . . ."

30. On October 15, 2004, Respondent's representative filed the motion herein (the "Motion"),² renewing her request for summary determination in favor of Respondent and for dismissal of the

² The Notice of Motion requests a finding of summary judgment in favor of Respondent. It is being treated as a motion for summary determination, pursuant to Rules §1-05(c)(3) of this Tribunal.

Petitions.³ The ground for the request is that since the Petitions were not timely filed pursuant to Section 170 of the City Charter and Code §11-1106, the Tribunal lacks subject matter jurisdiction to hear the Petitions.

31. In support of the Motion, Respondent's representative submitted the affidavits of the following individuals: Edna Owusu-Sekyere, Principal Administrative Associate with the Department; Mark Grainger, Office Machine Aide with the Department; and Leonard Nemer, Supervisor United States Postal Service, Cadman Plaza Post Office. Respondent's representative also submitted copies of documents with the Motion, including but not limited to copies of affidavits and exhibits submitted by her prior representatives, certain correspondence; the Notices, Petitions, Acknowledgments and Answers; and a copy of the Mail Manifold.

32. The affidavit of Ms. Owusu-Sekyere sets forth the general procedure of the Department's Audit and Control Unit for the preparation for mailing of notices of determination which was in effect on April 7, 1999. The affidavit of Mr. Grainger sets forth the routine activities of Respondent's Mail Room employees with respect to the mailing of notices of determination on or about April 7, 1999. The affidavit of Mr. Nemer sets forth certain facts with respect to the Mail Manifold, and regarding the activities of USPS employees at the USPS Municipal Station Post Office located at 210 Joralemon Street, Brooklyn Municipal Building, Brooklyn, New York, on April 7, 1999.

³ As both Petitions, TAT(H) 99-65(UT) and TAT(H) 99-66(UT), were noticed in the single Motion and in all subsequent papers, it was therefore deemed that Respondent no longer objected to hearing these petitions together.

33. It is the practice of Respondent's employees who work in the Audit Control Unit to prepare USPS Forms 3877 (also referred to as "mail manifolds") when they receive notices of determination. The USPS Forms 3877 contain lines to permit the recording of fifteen (15) pieces of mail. The Department employee who completes the specific mail manifold copies the name and address of the taxpayer from each Notice of Determination onto the mail manifold. That individual also records the certified mail article number, and the specific audit number on the mail manifold which pertains to each Notice of Determination listed. The employee date stamps the Notice of Determination and stamps the same date at the bottom right side of the mail manifold. A window envelope is prepared and the employee prints the same certified mail article number on that envelope. The employee folds the Notice and places it in the prepared envelope, which is placed in a box for outgoing mail with other prepared envelopes, and the original mail manifold is wrapped around the corresponding envelopes that are to be mailed. A copy of the mail manifold is retained by the Unit. After the original mail manifold is stamped by the USPS, it is returned to the Mail Room which then transmits it to the Audit and Control Unit, where it is filed in the Unit's filing cabinet, according to the Department's record-keeping procedures.

34. Ms. Owusu-Sekyere affirmed that, as Principal Administrative Associate of the Department's Audit Control Unit, on April 7, 1999 she performed the aforementioned routine procedures for preparation of the Notices listed on the Mail Manifold for

certified mailing, and further that these Notices were prepared for certified mailing according to these procedures on that date.⁴

35. Department Mail Room employees are responsible for mailing all official correspondence from Department units located at Adams Street, Brooklyn, New York. It is the practice of these employees to gather bundles of outgoing certified mail envelopes and appertaining mail manifolds prepared by the Audit and Control Unit for mailing. When the employee receives the envelopes for mailing, he or she enters the proper postage on each envelope. The employee then takes the prepared bundles of certified mail envelopes to the USPS office located at the Brooklyn Municipal Building, 210 Joralemon Street, Brooklyn, New York, and gives the bundles to a USPS postal clerk. Mail Room employees take only certified mail envelopes to the USPS office at the Brooklyn Municipal Building, delivering them to the USPS postal clerk. The USPS employee returns the stamped mail manifold to the Department employee, and the employee returns the mail manifold to the Adams Street mail room.

36. Within two days of returning a mail manifold to the mail room, a Department Mail Room employee sends the stamped manifold to the originating unit through the interdepartmental mail system.

⁴ Throughout her affidavit, Ms. Owusu-Sekyere refers to a single notice of determination. However attached to (and identified in paragraph 5) of that affidavit is a copy of the Mail Manifold which reflects mailing of four items, two pertaining to each audit. Based on a review of the Mail Manifold in light of her affirmation, it is accepted that she refers to mailing of the two Notices of Determination to Petitioner and a copy of each to its representative.

37. Mr. Grainger affirmed that, as Acting Mail Room Supervisor, on April 7, 1999, he performed the above procedures for preparation of envelopes and mail manifolds for mailing and delivery to the USPS, and specifically that the Notices listed on the Mail Manifold were delivered to the USPS on April 7, 1999.

38. The affidavit of Mr. Nemer sets forth certain facts with respect to the Mail Manifold. He affirmed that the USPS date stamp on the Mail Manifold indicates that it was processed at the USPS Municipal Station Post Office located at 210 Jorelemon Street, Brooklyn Municipal Building, Brooklyn, on April 7, 1999. Further, he attested that he recognized the signature of the "receiving employee" on the Manifold as that of Janie Harris, whom he identified as a USPS employee working at the Municipal Station Post Office in April of 1999.

39. Mr. Wilkins filed an Affirmation in Opposition to the Motion on December 14, 2004. He renewed the arguments made in opposition to the Motions to Dismiss. Further, he asserted that Respondent offered no explanation with respect to why she had not previously provided affidavits attesting to the practice and procedure for mailing the Notices, or of Respondent's employees' compliance with that procedure, and that no explanation had been offered with respect to the reasons for the delay in providing this information. Finally, he specifically asserted that the affidavit of Leonard Nemer was deficient in several technical respects.

40. On January 12, 2005, Respondent's representative, Assistant Corporation Counsel Frances J. Henn, Esq., filed another Affirmation In Support of Motion, affirming that the inadequacies

in the Motions to Dismiss (principally the failure to include "required affidavits") were the result of the facts that: (1) several attorneys had been assigned to these matters; (2) these attorneys were no longer with the Office of Corporation Counsel; (3) certain of Respondent's employees had been transferred within the Department; and (4) her efforts to determine why the affidavits had not been previously submitted were fruitless. In addition, the affidavit of Janie Harris was appended to Respondent's Affirmation, as was a copy of the Mail Manifold.

41. It is the practice of USPS employees at the facility located at the Brooklyn Municipal Building at 210 Joralemon Street, to receive and process the certified mail bundles which Department employees bring to that facility. In the presence of the Department employees, the USPS employees receive the bundles, unwrap and count the pieces of mail contained in the bundles, and check the calculations of postage recorded on the mail manifolds. If these calculations are correct, the USPS employee postmarks each manifold with the round USPS stamp indicating the specific USPS office and the date of receipt. The USPS employee then signs the bottom of the manifold. The manifolds are returned to the Department employee.

42. Janie Harris is a sales associate for the USPS, and she works at the USPS facility located at the Brooklyn Municipal building at 210 Joralemon Street. Ms. Harris affirmed in her affidavit that she followed the routine office procedure in effect at that USPS facility on April 7, 1999, with respect to receiving, postmarking and acknowledging bundles of mail, including mail manifolds, delivered to the USPS by the Department. She identified

the Mail Manifold as bearing a USPS Municipal Station Post Office, Brooklyn Municipal Building, Brooklyn, New York stamp and identified as her signature that of "Postmaster, Per (Name of Receiving Employee)."

43. On March 25, 2005, Petitioner's representative filed an Affirmation in Further Opposition to Respondent Commissioner's Motion for Summary Judgment.

POSITIONS OF THE PARTIES

Respondent asserts that the Notices were issued on April 7, 1999, in accord with the Department's practice and procedure for mailing such documents and, therefore, that the Petitions mailed on September 1, 1999 were untimely as they were filed in excess of the statutory ninety-day period. It is Respondent's position, therefore, that the Tribunal does not have jurisdiction to hear the Petitions. Petitioner asserts that the Motion was either untimely, or deficient as it failed to explain Respondent's delay in establishing prior compliance with the Department's practice and procedure for mailing the Notices. Petitioner further asserts that Respondent was not entitled to renew its motion for summary determination as the evidence contained in the affidavits submitted was not new facts and Respondent did not adequately explain her delay in providing this evidence.

DISCUSSION AND ANALYSIS

Respondent initially filed separate Motions to Dismiss the Petitions, pursuant to Tribunal Rules §1-05(b), on the basis that

the Petitions were not timely filed. Pursuant to Tribunal Rules §1-05(b)(2)(ii), the undersigned determined that the motions to dismiss would be treated as motions for summary determination. Tribunal Rules §1-05(d) provides, as a limitation on filing a motion for summary determination, that the motion be made after issue has been joined. As noted in the Findings, *infra*, issue in these matters is clearly joined as the Petitions and Answers have been filed.

On January 29, 2003, I issued Orders denying the converted motions for summary determination. I found that Respondent had failed to offer any proof regarding: (1) the Department's procedure and practices for mailing notices of determination of UT due; and (2) the Department's compliance with such procedures in mailing the Notices to Petitioner. In conclusion, I stated: "Respondent must establish the Department's standard procedure for mailing notices of determination of UT due and that the Department complied with those standard procedures" Since Orders by Tribunal Administrative Law Judges which deny motions for summary determination are not subject to review by the Tribunal Commissioners (*see*, Tribunal Rules §1-05(d)(3)), the Orders could not be appealed and the matters were scheduled for hearing.

The present Motion requests renewal of the prior motions for summary determination in favor of Respondent on the same jurisdictional basis, *i.e.*, that the Petitions were not timely filed.

At both the beginning and the close of formal hearings on the Petitions, the undersigned asked Ms. Henn whether she would be

renewing the Motions to Dismiss.⁵ While Mr. Wilkins did not respond to Ms. Henn's potential renewal motion during the course of the proceedings, he requested, and was granted, an acknowledgment of a general objection,⁶ and was reassured that he would be given an opportunity to respond to any renewed motion.

Tribunal Rules §1-05 provides for motion practice before the Tribunal, including motions to dismiss and motions for summary determination. The Tribunal Rules also permit a party to make a motion for "an order that is appropriate in a proceeding governed by the CPLR." Tribunal Rules §1-05(a). Although the Tribunal Rules do not specifically permit parties to renew or reargue motions, pursuant to Tribunal Rules §1-05(a), it is appropriate to look to the specific CPLR provisions which govern motions affecting prior orders.

Respondent did not denominate her October 15, 2004 motion as a motion to renew. However, in paragraph 3 of the Motion, she stated that it was made pursuant to the terms of the prior Order (which, as noted, indicated that Respondent had failed to submit evidence demonstrating the Department's mailing practice and

⁵ At the beginning of the hearing, I indicated to the parties my understanding that Ms. Henn was going to "renew [the] motion based on my determination" in the prior matter. Ms. Henn indicated that she intended to renew the Motions. T. 9. As Ms. Henn did not present any further documentary evidence, or make any arguments in support of a renewed motion during the hearing proceeding, prior to the close of the hearing, I noted that I would entertain a renewed motion since I was disinclined to "deny the City an opportunity to renew their motion if they can cure the defects of their prior representation." T. 139.

⁶ Prior to the close of the hearing Mr. Wilkens stated: "I'd like to say on the record that I remain silent with respect to the motion that Ms. Henn indicated she's going to renew and just let the record reflect that my silence shouldn't be considered that I have no objection to it." T. 138.

procedure, and compliance with that practice), and that the Motion was a renewal of the prior motion for summary determination. Therefore, pursuant to Rule §1-05(a), the Motion is considered a motion affecting a prior order in the nature of a motion to renew made pursuant to CPLR 2221, and the viability of the Motion therefore will be considered in the context of that CPLR provision and the cases interpreting it.

CPLR 2221 establishes requirements for making motions which "affect" prior orders, and specifically permits a party to move for "leave to renew or reargue a prior motion" CPLR 2221(a).⁷ While the Rule originally only addressed the mechanics of making a motion affecting a prior order,⁸ recent amendments have clarified the separate parameters of motions to renew and motions to reargue.⁹ CPLR 2221(3).

⁷ CPLR 2221 distinguishes motions to renew from motions to reargue. A motion to renew is generally based on new evidence (or at least newly-presented evidence not offered on the prior motion). See, *Mejia v. Nanni*, 307 A.D.2d 870 (1st Dept. 2003). On the other hand, a motion to reargue is a request to represent a litigant's position. See, *Bankers Trust Co. of California v. Payne*, 188 Misc.2d 726 (Sup. Ct. Kings Cty. 2001). Motions to reargue are subject to firm time limits and, if denied may not be appealed; motions to renew are not so limited. See, e.g., CPLR 2221(d)(3). Moreover, even if a motion is denominated as a motion to reargue, courts will consider it a motion to renew if it is based on new proof. See, e.g., *Ulster Sav. Bank v. Goldman*, 183 Misc2d 893 (Sup. Ct. Rensselaer Cty. 2000).

⁸ Originally, CPLR 2221 provided generally for motions which would "affect" prior orders, and only specifically addressed the procedural question of to which judge should such a motion be made. See, e.g., CPLR 2221 prior to 1999, which was derived from C.P.A. 1920, §§118 and 131 and which was amended in 1986.

⁹ L.1999, c.281, §1, eff. July 20, 1999.

Subsection (e) of CPLR 2221, as amended in 1999, provides that a motion for leave to renew:

2. Shall be based upon **new facts not offered on the prior motion that would change the prior determination** or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. Shall contain **reasonable justification** for the failure to present such facts on the prior motion. [Emphasis supplied].

The prior Order denying summary determination in Respondent's favor did not represent a final determination in these cases. See, Tribunal Rules §1-05(d)(3). Similarly, denying a summary determination request predicated on a jurisdictional issue is not in itself a finding of jurisdiction. The Order simply denied the relief requested and found that Respondent was not entitled to summary determination on the facts presented therein. Clearly, jurisdictional issues may still be raised. See, e.g., Tribunal Rules §§1-05(b)(ii); (b)(ix); and (d)(1). Therefore, it was appropriate for Respondent to effectively make a motion to renew.

Under prior caselaw, any explanation was sufficient to permit a motion affecting a prior order. See, e.g., *Pinto v Pinto*, 120 AD2d 337 (1st Dept. 1986). The 1999 amendment, however, defines such motions with a degree of specificity, and requires that the motion to renew meet the two conditions of 'new matter' and 'justification.' See, CPLR 2221(e).

Essentially, 'new matter' is that which 'would have changed the prior determination.' *Yarde v. New York City Transit Authority*

4 A.D. 3d 352 (2nd Dept. 2004). However, as the Appellate Division noted in *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2nd Dept. 2001), the "trial court has discretion to grant renewal even upon facts known to the movant at that time." *Id.* at 436 (citing *U.S. Reins. Corp. v. Humphreys*, 205 A.D. 2d 187 (1st Dept. 1994); *Matter of Kennedy v. Coughlin*, 172 A.D. 2d 666 (2nd Dept. 1991)). Similarly, the second criteria, "reasonable justification," is most often expressed in broad terms. See, e.g., *B.B.Y. Diamond Corp. v. Five Star Designs, Inc.*, 6 A.D.3d 263 (1st Dept.) ("Defendant's failure [to submit affidavit in admissible form] was demonstrably inadvertent and plaintiff has failed to show any prejudice").

Although both these conditions are required (*Cippitelli v. County of Schenectady*, 307 A.D.2d 658 (3rd Dept. 2003)), consistent with pre-amendment case law, the First Department reads these requirements broadly and does not automatically reject motions to renew where the two conditions are not strictly met. This is frequently articulated as a relaxation of the requirements "in the interest of justice." *Mejia, supra.* See, also, *Trinidad v. Lantigua*, 2 A.D.3d 163 (1st Dept. 2003) (where the Court found that a plaintiff could submit a previously available document which was sufficient to raise a triable issue of fact and defeat a summary judgement motion); *Garner v. Latimer*, 306 A.D.2d 209 (1st Dept. 2003) (where a plaintiff in a personal injury case was permitted to correct his prior failure to submit an affidavit from a physician with respect to the seriousness of his injury).

The affidavits submitted with the Motion and the January 12, 2005 Affirmation in Support, contain "new facts" with respect to the issue of Respondent's practices and procedures for mailing Notices

of determination of UT due. As these facts are undisputed and establish the date of Respondent's mailing of the Notices, there remain no triable issues of fact and a determination granting summary determination can be made.

Petitioner does not specifically oppose the Motion on the grounds that the information contained therein was not "new facts," or that Respondent did not "justify" her failure to include the affidavits and other information. However, Petitioner does note the length of time taken between motions and further objects to the Motion on the bases that Ms. Henn did not adequately explain Respondent's failure to provide the necessary affidavits (the "new facts") with the prior motions, did not clarify certain alleged deficiencies in the Nemer affidavit, and did not present a basis for her delay in offering the "new facts." Therefore, Petitioner's objection to the motion to renew is *de facto* based on the argument that Respondent failed to demonstrate that the information in the affidavits represents "new facts" and that Respondent did not establish a "reasonable justification" for renewal.

Respondent has established a justifiable excuse, supported by documentary evidence, for her prior failure to present the salient facts. As Ms. Henn has indicated, the assignment of this case to successive Assistant Corporation Counsels contributed to the fact that affidavits of custom and compliance were not included. *Sementilli v. Ruscigno*, 286 A.D.2d 242 (1st Dept. 2001); *Seifts v. Markle*, 211 A.D.2d 848 (3rd Dept. 1995). Moreover, as jurisdiction cannot be waived and during the hearing, I indicated that Respondent would be given a post-hearing opportunity to cure the defects of the prior motions. New and relevant information was subsequently

provided with the new motion. Finally, there is no "absence of prejudice" to Petitioner if the subsequent motion to renew is granted. *Garner, supra*. The motion to renew therefore is allowed.

Turning to the timeliness of the Petitions, the central issue is whether Respondent has established that the Notices were properly mailed to Petitioner on April 7, 1999, requiring a determination that, pursuant to statute, the August 27, 1999 Petitions were late-filed.¹⁰

Code §11-1115(a) provides that Respondent may issue a notice of determination of additional UT due 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 such person . . . or in any application made by him or her, or if no return has been filed or application made, then to such address as may be obtainable.

The Code does not require that the taxpayer actually receive the notice, provided proper mailing is established. Code §11-1115(a) states that proper mailing is "presumptive evidence of the receipt of the same by the person to whom addressed." However, there is no presumption of receipt unless and until proper mailing has been established by Respondent's proof of the date and fact of mailing.

¹⁰ Petitioner argues here, as it did on the prior motions, that the parties informally extended and/or agreed to suspend the statute of limitations for filing the Petition. This argument was specifically rejected in the prior Order, p. 12, and accordingly will not be addressed. Moreover, Petitioner disputes neither the date on the Petitions (August 27, 1999) nor the date of their mailing (September 1, 1999).

Matter of Goldman & Goldman, TAT(E)02-12(CR) (City Tax Appeals Tribunal, March 24, 2005); *Matter of Samuel Heyman*, TAT(E) 93-1577 (RP) (City Tax Appeals Tribunal, August 1, 2001); *Matter of Charla Bikman*, TAT(E) 98-73(UB) (City Tax Appeals Tribunal, August 16, 2001); *Matter of Perk*, DTA No. 817123, 2001-1 NYTC T-359 (New York State Tax Appeals Tribunal, December 13, 2001). Section 11-1115 further provides that: "[A]ny 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."

Code §11-1106 requires that petitions protesting notices of determination of UT be filed within ninety days "after the [Department's] giving of notice of such determination," and states:

Such determination shall finally and irrevocably fix such 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.

Where 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 Goldman & Goldman, P.C., supra*; *Matter of 2981 Third Avenue, Inc.*, TAT(E) 93-2092 (RP) (City Tax Appeals Tribunal, June 14, 1999), *citing*, *Matter of Novar TV & Air Conditioner Sales & Service, Inc.*, DTA No. 806675, 91-2 NYTC T-621 (New York State Tax Appeals Tribunal, May 23, 1991); *Matter of William and Gloria Katz*, DTA No. 805768, 91-2 NYTC T-1307 (New York State Tax Appeals Tribunal, November 14, 1991).

Proper mailing of a notice of determination is established when Respondent offers proof that the notice was timely mailed in accordance with the Department's standard practice and procedures.¹¹ To accomplish this, Respondent must prove both the date and the fact of mailing of the statutory notice. *Matter of Goldman & Goldman, supra; Matter of 2981 Third Avenue, supra; Matter of Novar, supra; Matter of Katz, supra.*

A notice is mailed when it is delivered into the custody of the United States Postal Service. *Matter of Goldman & Goldman, supra, citing Matter of 2981 Third Ave., supra.* 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." *Matter of Goldman, supra.*

The proof of proper mailing of the Notice which is required of Respondent is two-fold. First, there must be proof of Respondent's standard procedure for issuing notices of determination of UT due, provided by individuals with knowledge of those procedures. Second, there must be proof that the standard procedure was followed in mailing the Notice in issue. *Matter of Goldman & Goldman, supra; see, also, Matter of 2981 Third Avenue, Inc., supra.* This proof is generally offered to this forum in the form of affidavits from the Department's employees.

¹¹ As noted in the Orders, it is not jurisdictionally significant that some of the papers reflect inconsistent street addresses and USPS zip codes. Petitioner has not averred that it did not receive the Notices. Moreover, a minor clerical error is not considered fatal to a determination of timely assessment and is considered insubstantial if the item is actually delivered by certified mail. *Matter of Karolite*, DTA No. 802708, 92-2 NYTC T-951 (New York State Tax Appeals Tribunal, July 30, 1992); *Matter of Richard Accardo*, DTA No. 809079, 93-2 NYTC T-766 (New York State Tax Appeals Tribunal, August 12, 1993). See, also, *Boothe v. Commissioner*, T.C. Memo 1986-361, 52 T.C.M. 135 (1986).

In most instances, a properly completed USPS Form 3877 (often referred to as a 'mail manifold') is considered sufficient evidence to corroborate that the Department's employee(s) followed the standard procedures and actual practices which are established through employee affidavits. *Matter of Bikman, supra, citing Wheat v. Commissioner*, 63 T.C.M. (CCH) 2955 (1992). However, standing alone a mail manifold is insufficient to establish that a notice of determination was properly mailed. *Matter of 2981 Third Avenue, Inc., supra*.

The copy of the Mail Manifold submitted by Respondent can be connected with the Notices as it indicates that four items were mailed to Petitioner and Petitioner's representative from Respondent's Bureau of Tax Collection, and the audit numbers referenced on the Mail Manifold with respect to two of the listed items reflect the audit numbers stated on the Notices. However, the submitted copy of the Mail Manifold does not clearly establish at which Municipal Post Office the Notices were mailed.

Where an agency is able to present a mail manifold which clearly indicates the date of mailing of a notice of determination and affidavits of habit in support of the agency's employees' compliance with standard procedure for mailing, proper mailing is established. *Goldman & Goldman, supra*. Where the agency provides an incomplete mail manifold, mailing of a notice of determination nevertheless may be established through evidence "otherwise sufficient to prove mailing." See, *Matter of Bikman, supra, citing, Coleman v. Commissioner*, 94 T.C. 82 (1990); *Wheat v. Commissioner, supra*.

In this instance, the Mail Manifold is incomplete because there is an unclear USPS stamp and no unequivocal identification of a postal mailing location. Nevertheless, Respondent has successfully established, through affidavits of USPS employees, that the notices were mailed from the USPS facility located at 210 Joralemon Street, Brooklyn Municipal Building, Brooklyn, New York. These affidavits constitute evidence otherwise sufficient to prove that the Notices were mailed on April 7, 1999.

The affidavits of Ms. Owusu-Sekyere and Mr. Grainger provide adequate proof of Respondent's standard procedures for mailing notices of determination by certified mail and attest to the authenticity of the Mail Manifold. Further, they establish that the standard procedures were followed with respect to preparing the Notices for mailing by certified mail, and delivering those Notices to the USPS. Petitioner's and Petitioner's representative's names, addresses and the respective audit numbers appear on the Manifold. There are only four items noted on the Manifold which correspond directly to the four certified mailings.

Finally, the affidavits of Mr. Nember and Ms. Harris support the fact that the otherwise apparently incomplete Mail Manifold (i.e. with an inconclusive stamp) establishes that the Notices of Determination were delivered to the USPS facility at 210 Joralemon Steet on April 7, 1999.

Respondent has established the Department's standard procedure for mailing notices of determination of UT due and that the Department's employees complied with those standard procedures in this matter. Respondent has also established that the items were

placed with the United State postal Service for mailing on April 7, 1999. The Petitions, dated August 27, 1999, bore the postmark September 1, 1999. As the Petitions, were filed in excess of ninety days from the date of the mailing of the Notices, they were untimely filed.

ACCORDINGLY, the renewed motion for summary determination is granted. The Petitions were mailed on September 1, 1999, in excess of ninety days from the April 7, 1999 mailing of the Notices of Determination, and thus are untimely filed as a matter of law. The Petitions therefore are hereby dismissed as this Tribunal lacks jurisdiction to hear them.

IT IS SO ORDERED.

Dated: May 31, 2005
New York, New York

ANNE W. MURPHY
Administrative Law Judge