

New York City Tax Appeals Tribunal

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In the Matter of :
:
ASSOCIATED BUSINESS TELEPHONE :
SYSTEMS CORPORATION :
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Petitioner :
:
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DECISION

TAT (E) 99-65 (UT)

TAT (E) 99-66 (UT)

Associated Business Telephone Systems Corporation ("Petitioner") filed an Exception to the Determination/Order of an Administrative Law Judge ("ALJ") dated May 31, 2005 (the "ALJ Determination/Order"). The ALJ Determination/Order granted the renewed motion for summary determination filed by the Commissioner of Finance of the City of New York (the "Commissioner" or "Respondent") on the grounds that the Petitions for Hearing ("Petitions") filed by Petitioner regarding the Notices of Determination issued by the New York City Department of Finance (the "Department") assessing New York City Utility Tax ("UT") deficiencies for 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") were not timely filed. The Petitioner appeared by Stuart A. Wilkins, Esq., of the Law Offices of Stuart A. Wilkins, P.C., and the Commissioner appeared by Frances J. Henn, Esq., Senior Counsel, New York City Law Department. The Parties filed briefs and oral argument was held before the Tribunal. Commissioner Robert J. Firestone did not participate in this Decision.

Petitioner did not file UT returns for the Audit Periods.¹ Prior to the Audit Periods, the Department 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 (the "Earlier Audit Period"). Respondent issued a Notice of Determination dated August 5, 1992 assessing a UT deficiency for the Earlier Audit Period (the "Earlier Notice"). Petitioner timely filed a Petition for Hearing dated August 21, 1992 with the Department protesting the Earlier Notice (the "Earlier Petition").²

In 1996, the Department began separate reviews of Petitioner's UT liability for the First Audit Period and the Second Audit Period. By letter dated February 28, 1996, Michael Dalia, Petitioner's Executive Vice President, informed the Department's Audit Division that Petitioner's street address was "432 Kelley Drive" (the "February 28, 1996 Correspondence"). Petitioner's letterhead indicated that Petitioner's address was "432 Kelley Drive, Berlin, New Jersey 08009."

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 (the "1998 Power of Attorney"). On the 1998 Power of Attorney, Petitioner stated its address as 432 Kelley Drive, West Berlin, N.J. 08091, and stated Mr. Wilkin's address as Law Offices of Stuart A. Wilkins, 432 Kelley Drive, West Berlin, NJ. 08091.

Mr. Wilkins informed the Department's Auditor, by letter dated March 23, 1999, that Petitioner disagreed with the Department's Audit Findings with respect to UT for the Audit

¹The ALJ's Findings of Fact although amplified and paraphrased in part, generally are adopted for purposes of this Decision except as noted below. Certain Findings of Fact not necessary to this Decision have not been restated and can be found in the ALJ Determination/Order. Neither Party took exception to any of the ALJ's Findings of Fact.

²Pursuant to the provisions of 1992 N.Y. Sess. Laws, ch. 808, §140 (McKinney), the Earlier Petition, was transferred to the Tribunal for determination. A separate Determination, dated July 21, 2005, was issued by the ALJ regarding the Earlier Petition and a separate Exception was filed regarding that Determination. Although both matters were heard at the same oral argument, separate Decisions are being issued by the Tribunal.

Periods (the "March 23, 1999 Correspondence").

The Department issued two Notices of Determination to Petitioner assessing UT deficiencies for the Audit Periods. The Notice of Determination for the First Audit Period was in the principal amount of \$73,471.10 with interest calculated to May 31, 1999 and penalties (the "First Notice"). The First Notice was dated April 7, 1999, was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, and referenced Case No: 005239331 S. The Notice of Determination for the Second Audit Period was in the principal amount of \$21,312.55 and included interest calculated to May 31, 1999 and penalties (the "Second Notice"). The Second Notice was dated April 7, 1999, was addressed to Petitioner at 432 Kelly Drive, Berlin, NJ 08091, and referenced Case No: 005239329-S. The First Notice and the Second Notice are collectively referred to as the "Notices."

Petitioner filed a Petition for Hearing protesting the First Notice (the "First Petition"). The First Petition, dated August 27, 1999, was received by regular United States Postal Service ("USPS") mail, in an envelope bearing a USPS postmark of September 1, 1999. The First Petition was received by the Tribunal on September 3, 1999. Petitioner's address was listed on the First Petition as "c/o Law Offices of Stuart A. Wilkins, 432 Kelley Drive W. Berlin, NJ 08091". Attached to the First Petition were a copy of the First Notice; a statement of the reasons Petitioner disagrees with the First Notice; a copy of the March 23, 1999 Correspondence and a copy of correspondence dated August 27, 1999 from Mr. Wilkins to Respondent's then representative referencing a telephone conference held before an ALJ regarding the Earlier Petition (the "August 27, 1999 Correspondence"). The August 27, 1999 Correspondence stated that "it is Petitioners [sic] position that 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 attached Petitions."

Petitioner filed a Petition for Hearing protesting the Second Notice (the "Second Petition"). The Second Petition, dated August 27, 1999, was received by regular USPS mail, in an envelope bearing a USPS postmark of September 1, 1999. The Second

Petition was received by the 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". Attached to the Second Petition were a copy of the Second Notice; a statement of the reasons Petitioner disagrees with the Second Notice; a copy of the March 23, 1999 Correspondence and a copy of the August 27, 1999 Correspondence.

The ALJ Division of the Tribunal issued separate Acknowledgements, each dated September 15, 1999, regarding the First Petition and the Second Petition. Respondent filed separate Answers, each dated October 15, 1999, to the First Petition (the "First Answer") and the Second Petition (the "Second Answer"). In the ninth paragraph of the First Answer, Respondent stated:

.....

Petitioner failed to timely respond to the Notice of Determination, in accordance with Admin. Code §11-1106, by not filing a Petition within 90 days of the issuance of the Notice of Determination. By such failure, Petitioner has failed to properly bring the matter before the Tribunal and, as such the Tribunal has no jurisdiction over this matter. Accordingly, the Petition should be dismissed.

In the ninth paragraph of the Second Answer, Respondent stated:

.....

Petitioner failed to timely respond to the Notice of Determination, in accordance with Rules §1-04(a)(ii). By such failure, Petitioner has failed to properly bring the matter before the Tribunal and, as such the Tribunal has no jurisdiction over this matter. Accordingly, the Petition should be dismissed.

Respondent filed a Notice of Motion to Dismiss the First Petition dated February 23, 2000 and a Notice of Motion to Dismiss the Second Petition dated February 23, 2000 (collectively, the "Motions to Dismiss"). Respondent moved to dismiss the Petitions on the

basis that they were untimely filed pursuant to §170 of the Charter and §11-1106 of the New York City Administrative Code (the "Code") and requested that the ALJ issue orders pursuant to 20 RCNY §1-05(b)(1)(vii) of the Tribunal's Rules of Practice and Procedure (the "Tribunal's Rules") dismissing the Petitions. Attached to each of the Motions to Dismiss were an Affirmation in Support of Motion to Dismiss; a copy of the February 28, 1996 Correspondence; a copy of the 1998 Power of Attorney; and a copy of the relevant notice, petition, acknowledgement and answer.

Also included as an exhibit to each of the Motions to Dismiss was a copy of a USPS Form 3877 (the "Mail Manifold").³ The Mail Manifold indicates that on April 7, 1999 the Bureau of Tax Collection sent two articles of mail to Petitioner and two articles of mail to Mr. Wilkins. The first line of the Mail Manifold references "Article Number 920856", addressed to Petitioner at "432 Kelly Drive, Berlin NJ 08091"; and bears the notation "UTX 005239331 S." The fifth line of the Mail Manifold references "Article Number 920857", addressed to "Law Office of Stuart Wilkins 432 Kelly Drive, West Berlin, N.J. 08091, Attn: Mr. Stuart Wilkins, Esquire", and bears the notation "" " " " " "" under the notation "UTX 005239331 S" appearing on the first line. The ninth line of the Mail Manifold references "Article Number 920858", addressed to Petitioner at "432 Kelly Drive, Berlin, NJ 08091" and bears the notation "UTX 005239329-S". The twelfth line of the Mail Manifold references "Article Number 920859", addressed to "Law Office of Stuart Wilkins, 432 Kelly Drive, West Berlin, NJ 08091, Attn: Stuart Wilkins, Esquire" and bears the notation "" " " " " "" under the notation "UTX 005239329-S" appearing on the ninth line.

There are no other mailing entries on the Mail Manifold. The Mail Manifold bears a stamped date of "APR 07 1999" and identifies the "Name and Address of Sender" as "Bureau of Tax Collection, 345 Adams Street, Brooklyn, NY 11201. The Mail Manifold also bears a hand-written notation "A/C" in the upper left portion next to the "Name and Address of Sender". A box located at the top of the Mail Manifold captioned "Certified",

³Motion to Dismiss the First Petition, Exh. D; Motion to Dismiss the Second Petition, Exh. C.

is marked by an "X".

The Mail Manifold bears a round USPS postmark, which is not completely legible, but which indicates the following: "[illegible] NY MUNICIPAL STA USPS APR 7 1999."⁴ The Mail Manifold is signed by an individual identified as "Postmaster, Per (Name of Receiving Employee)". To the left of that individual's signature is a box labeled "Total Number of Pieces Listed by Sender" which contains the handwritten number "4" and a box labeled "Total Number of Pieces Received at Post Office, which also contains the handwritten number "4".

The Motions to Dismiss did not include evidence or affidavits with respect to: (a) the Department's standard procedures for preparation and mailing of notices of determination, and (b) the Department's compliance with those standard procedures in the actual mailing of the First Notice and the Second Notice.

By letter dated January 2, 2003, the ALJ informed the Parties that pursuant to Respondent's request, the Motions to Dismiss would be treated as motions for summary determination (the "Motions for Summary Determination") pursuant to 20 RCNY §1-05(b)(2)(ii) of the Tribunal Rules.⁵

The ALJ issued Orders dated January 29, 2003 (the "ALJ Orders") dismissing each of the Motions for Summary Determination on the basis that there remained triable issues of material fact to be determined regarding the proper mailing of the Notices. The ALJ specifically stated, in each Order, that "Respondent must establish the Department's standard procedure for mailing notices of determination of UT due and that the Department

⁴The original of the Mail Manifold is not in the Record. Thus, all references to the legibility of portions of the document are based on the copies that are in the Record.

⁵The Tribunal Rules at 20 RCNY §1-05(b)(2)(ii) provide that an ALJ, on a motion to dismiss, may "treat the motion as a motion for summary determination and, on notice to the parties, proceed pursuant to subdivision (d) of this section." The Tribunal Rules at 20 RCNY §1-05(d) set forth the Tribunal's practices and procedures regarding motions for summary determination.

complied with those standard procedures in this matter." ALJ Order for First Petition at 17. ALJ Order for Second Petition at 16-17.

At the August 3, 2004 hearing (the "City Hearing"), the ALJ stated that most of the proceedings would pertain to the Earlier Audit Period. In addition, the ALJ stated that it was her understanding that Respondent wanted to renew the Motions for Summary Determination. Respondent affirmed that the Motions for Summary Determination would be renewed.⁶ In addition, the ALJ also stated that she would entertain a renewed motion because she was disinclined to deny Respondent the opportunity to renew her motion if she can "cure the defects of [her] prior representative."⁷

Respondent filed a Notice of Motion dated October 15, 2004, (the "Renewed Motion") renewing her request for an Order pursuant to 20 RCNY §1-05(d) of the Tribunal Rules granting summary judgment and dismissing the Petitions on the grounds that they were not timely filed.⁸ Attached to the Renewed Motion was an Affirmation in Support of Motion (the "2004 Affirmation in Support of Renewed Motion").

In support of the Renewed Motion, Respondent submitted the affidavits of Edna Owusu-Sekyere, Principal Administrative Associate with the Department; Mark Grainger, Office Machine Aide with the Department and Leonard Nemer, Supervisor, USPS, Cadman Plaza Post Office. In addition, Respondent also submitted copies of the Motions for Summary Determination and other exhibits to the Renewed Motion.

⁶Tr. 9 and 137.

⁷Tr. 139.

⁸In a letter, dated October 15, 1999, submitted with Respondent's Answers to each of the Petitions, Respondent requested that the First Petition and the Second Petition not be consolidated. Because Respondent filed only one Renewed Motion seeking summary judgment and dismissal of both the First Petition and the Second Petition, the ALJ deemed that Respondent no longer objected to the First Petition and the Second Petition being consolidated for hearing. ALJ Determination/Order at n.3.

The affidavit of Ms. Owusu-Sekyere sets forth the procedure of the Department's Audit Control Unit for the preparation for mailing of notices of determination in effect on April 7, 1999. According to that affidavit, it is the practice of Respondent's employees who work in the Audit Control Unit to prepare USPS Form 3877 ("Form 3877") when they receive notices of determination. Form 3877 contains lines to permit the recording of a maximum of fifteen pieces of mail. The Department employee who completes the specific Form 3877 copies the name and address of the taxpayer from each notice of determination onto the Form 3877. That individual also records the certified mail article number, and the specific audit number pertaining to each notice of determination on the Form 3877. The employee date stamps the notice of determination and stamps the same date on the bottom right side of the Form 3877. A window envelope is prepared and the employee prints the same certified mail article number shown on the Form 3877 on the window envelope. The employee folds the notice and places it in the prepared envelope along with a copy of the Notice of Taxpayer Rights/Request for Conciliation Conference. The envelope is then placed in a box for outgoing mail with other prepared envelopes, and the original Form 3877 is wrapped around the corresponding envelopes that are to be mailed. A copy of the Form 3877 is retained by the Audit Control Unit. After the original Form 3877 is stamped by the USPS, it is returned to the Mail Room which then transmits it to the Audit Control Unit, where it is filed in the Audit Control Unit's filing cabinet as part of the Department's recordkeeping procedures.

Ms. Owusu-Sekyere attested that she had personal knowledge of the procedures used on April 7, 1999 for the preparation of mailing of notices of determination to taxpayers and that, as a Principal Administrative Associate in the Department's Audit Control Unit on April 7, 1999, she followed the routine office practice and procedure when preparing notices of determination for mailing on April 7, 1999. Finally, Ms. Owusu-Sekyere stated that the Mail Manifold was prepared in accordance with the procedures of the Audit Control Unit and that the Mail Manifold reflects that the notice of determination was prepared for delivery to the post office on April 7, 1999 for certified mailing to Petitioner and its

representative.⁹

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 April 7, 1999. 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 Forms 3877 prepared by the Audit 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. The USPS postal clerk unwraps each bundle and counts the number of envelopes contained in each bundle to ensure that it equals the number listed on the Form 3877. The USPS postal clerk checks the calculation of the total postage on each Form 3877 and, if everything is correct postmarks each Form 3877. The USPS employee returns the stamped Form 3877 to the Department employee, and the employee returns the Form 3877 to the Adams Street Mail Room. Within two days of returning a Form 3877 to the Mail Room, a Department Mail Room employee sends the stamped Form 3877 to the originating unit through the interdepartmental mail system.

Mr. Grainger attested that, as Acting Mail Room Supervisor on April 7, 1999, he had personal knowledge of the procedure for mailing of notices of determination to taxpayers; that he performed the above procedures for mailing of notices of determination to taxpayers on April 7, 1999; and that the stamped Mail Manifold prepared in accordance with the above procedures reflected that the notice of determination was prepared for

⁹In her affidavit, Ms. Owusu-Sekyere refers to a single notice of determination. However, attached to (and identified in paragraph five) of that affidavit is a copy of the Mail Manifold which reflects the mailing of four items, two pertaining to each audit. In addition, Ms Owusu-Sekyere incorrectly identifies Petitioner's representative as Mr. Stuart Williams instead of Mr. Stuart Wilkins. Based on a review of the Mail Manifold and in light of her affidavit, the ALJ accepted that Ms. Owusu-Sekyere refers to the mailing of the Notices (ALJ's Finding of Fact 34). We see no reason to amend the ALJ's Finding of Fact and, furthermore, Petitioner has not taken exception to such finding.

delivery to the post office on April 7, 1999 for certified mailing to Petitioner and its representative.¹⁰

The affidavit of Mr. Nemer sets forth certain facts with respect to the Mail Manifold. Mr. Nemer attested that the Mail Manifold was processed on April 7, 1999 by the Municipal Station Post Office located at 210 Joralemon Street, Brooklyn, New York. Further, he attested that he recognized the signature of the "receiving employee" on the Mail Manifold as that of Janie Harris, whom he identified as a USPS employee working at the Municipal Station Post Office in April of 1999.

In addition, Respondent submitted the affidavit of Janie Harris with the Affirmation in Support of the Motion dated January 12, 2005 (the "2005 Affirmation in Support of Renewed Motion"). According to Ms. Harris' affidavit, she is currently employed as a sales associate for the USPS located at 210 Joralemon Street, Brooklyn, New York. As a sales associate, she is responsible for processing certified Forms 3877. Furthermore on April 7, 1999, the date of the Mail Manifold, she was employed as a sales associate for the USPS located at 210 Joralemon Street, Brooklyn, New York and that she signed the Mail Manifold as "Postmaster, Per (Name of Receiving Employee)".

Ms. Harris' affidavit states that the routine office practice and procedure that she followed when processing Forms 3877 is that she would receive a bundle of mail along with a Form 3877. In the presence of the person who delivered the bundle, she would unwrap each bundle and count the number of envelopes contained in each bundle to ensure that it equaled the number listed on the Form 3877. She would also verify that each name and address on the Form 3877 had a corresponding envelope with the same

¹⁰In his affidavit, Mr. Grainger refers to a single notice of determination. However, attached to (and identified in paragraph five) of that affidavit is a copy of the Mail Manifold which reflects the mailing of four items, two pertaining to each audit. In addition, Mr. Grainger's affidavit incorrectly identifies Mr. Stuart Williams as Petitioner's representative instead of Mr. Stuart Wilkins. The ALJ accepted that Mr. Grainger was referring to the mailing of the two Notices (ALJ's Finding of Fact 37). We see no reason to amend the ALJ's Finding of Fact and, furthermore, Petitioner has not taken exception to such finding.

name and address. She would then check the calculation of the total postage on each Form 3877 and, if everything was correct, would postmark each Form 3877 with a round stamp indicating the date of receipt and sign the bottom of the Form 3877. She would then return the postmarked Forms 3877 to the person who delivered them to her and would place the mail in a USPS bucket to be picked up by the mail carrier.

Ms. Harris stated in her affidavit that she performed this routine office practice and procedure on April 7, 1999 and that the Mail Manifold was processed in accordance with that same procedure.

On May 31, 2005, the ALJ granted Respondent's Renewed Motion. The ALJ concluded that "the Petitions were mailed on September 1, 1999, in excess of ninety days from the April 7, 1999 mailing of the [Notices] and thus are untimely filed as a matter of law." ALJ Determination/Order at 29. The First and Second Petitions were therefore dismissed because the Tribunal lacked jurisdiction to hear them.

Petitioner, on appeal, asserts that the ALJ erred in granting the Renewed Motion and dismissing the Petitions on the grounds that the Tribunal did not have jurisdiction. Petitioner asserts that Respondent previously moved for identical relief and the ALJ correctly denied the Respondent's Motions for Summary Determination. Petitioner argues that while the Renewed Motion might have cured some of the deficiencies in the original Motions for Summary Determination, it did not cure all the deficiencies.

Respondent contends that the ALJ correctly held that the affidavits supplied by Department and USPS employees adequately supplemented the Mail Manifold and clearly established the fact and the date of mailing. Thus, Respondent asserts that the ALJ's conclusion that the First and Second Petitions were not timely filed and must be dismissed, is correct.

Initially, we must decide the propriety of the Renewed Motion filed by Respondent. The Tribunal Rules at 20 RCNY §1-05 provide for motion practice before the Tribunal including motions to dismiss and motions for summary determination. In addition, the Tribunal Rules allow a party to make a motion "for an order that is appropriate in a proceeding governed by the [Civil Practice Law and Rules (the "CPLR")." 20 RCNY §1-05(a). Thus, it is appropriate to look to the provisions of the CPLR in order to resolve our initial inquiry.

Subsection (e) of CPLR Rule 2221 provides that a motion for leave to renew:

1. shall be identified specifically as such;
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 added.]

The ALJ Orders denying Respondent's Motions for Summary Determination were not in themselves an affirmative finding that the Petitions were timely filed. The ALJ Orders merely denied the relief requested and found that Respondent was not entitled to summary determination on the facts presented because "[t]here clearly remain triable issues of material fact to be determined with respect to the proper mailing" of the Notices.¹¹

Although the Renewed Motion was not specifically denominated as a motion to renew, the motion was identified as such in the 2004 Affirmation in Support of Renewed Motion. In Paragraph three of the 2004 Affirmation in Support of Renewed Motion, Respondent's representative states that "the Commissioner is presently renewing her motion for summary determination." Furthermore, the Notice of Motion for the Renewed

¹¹ALJ Order for First Petition at 17; ALJ Order for Second Petition at 16.

Motion refers to the "grounds set forth in the previous Motions to Dismiss dated February 23, 2000." In addition, at the Hearing, Respondent confirmed the ALJ's understanding that Respondent wanted to renew the Motions for Summary Determination.¹²

The other requirements in CPLR Rule 2221 are that the motion for leave to renew shall be "based upon new facts" and shall "contain reasonable justification" for not presenting such facts in the prior motion. In Mejia v. Nanni, 307 A.D.2d 870, 871 (1st Dept. 2003), (where evidence supporting a renewal of a motion to change venue was not submitted with the initial motion and no excuse was offered for the failure to submit the evidence in the prior motion) the Appellate Division stated that:

Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion . . . , courts have discretion to relax this requirement and to grant such a motion in the interest of justice. [Citations omitted.]

In, Garner v. Latimer, 306 A.D.2d 209, 210 (1st Dept. 2003) the Appellate Division found that:

. . . plaintiff's failure to submit a physician's affidavit was inadvertent and, coupled with the fact that defendant has failed to establish any prejudice as a result of the delay we find that renewal should have been granted

See *also*, Trinidad v. Lantigua, 2 A.D.3d 163, 163 (1st Dept. 2003) (where the Appellate Division found that an affidavit that "plaintiff's prior counsel inexplicably failed to submit" was sufficient to raise a triable issue of fact regarding a motion for summary determination); and B.B.Y. Diamonds Corp. v. Five Star Designs, Inc., 6 A.D.3d 263, 264 (1st Dept. 2004) ("Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure.")

¹²Tr. 9 and 137.

Based on the above authorities, we conclude that in the interest of justice, the ALJ had the discretion to treat as "new facts" facts that were not newly discovered and that could have been offered on the prior motion. The four affidavits contain "new facts" in that they set forth the Department's practices and procedures for mailing notices of determination; attest that those procedures were followed regarding these Notices; identify the USPS employee whose signature is on the Mail Manifold; set forth the procedures of USPS employees regarding certified mail manifolds; and identify the USPS location from which the Notices were mailed. Such information was not presented with the prior Motions for Summary Determination. With respect to the issue of why the affidavits were not included in the prior Motions for Summary Determination, Respondent's representative states that "[t]he attorneys who handled the previous motion have left the City's employ and there are no notes in the file which explain why the affidavits were not submitted with the original motion."¹³ Furthermore, Petitioner is not prejudiced by allowing the Renewed Motion. The ALJ Orders denied Respondent's prior Motions for Summary Determination but they did not decide the issue of the timeliness of the Petitions. The ALJ Orders merely determined that there were material facts that had to be established. The fact that Respondent is able to establish such facts in a motion for summary determination without the necessity for a hearing does not prejudice Petitioner. Thus, we agree with the ALJ's finding that the Renewed Motion should be permitted.

The granting of a motion for summary determination "has been frequently called a 'drastic remedy' to be cautiously invoked and used sparingly after a careful consideration of the case reveals that the requirements have clearly been met" for granting the motion. Matter of Emigrant Savings Bank, TAT(E) 94-130(BT) New York City Tax Appeals Tribunal (September 18, 1998) (*citing Espinoza v. Commissioner of Internal Revenue*, 78 T.C. 412, 416 (1982)). Thus, Respondent, in order to prevail on her Renewed Motion, must "make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York

¹³2005 Affirmation in Support of Renewed Motion at 2.

University Medical Center, 64 N.Y.2d 851, 853 (1985). Respondent's failure to make a *prima facie* showing "requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad, *supra*, at 853.

Therefore, having established that the Renewed Motion was properly allowed, we must now decide whether Respondent has established that the Notices were properly mailed to Petitioner on April 7, 1999. If it is established that the Notices were mailed to Petitioner on April 7, 1999, the Petitions dated August 27, 1999 and mailed September 1, 1999 were untimely and must be dismissed.

Section 11-1106 of the Code provides that:

In case the return required by this chapter shall be insufficient or unsatisfactory or if such return is not filed, the [Commissioner] shall determine the amount of the tax due from such information as is obtainable. . . . Notice of such determination shall be given to the person liable for the payment of the tax.

Section 11-1115.a of the Code provides that:

Any notice authorized or required under the provisions of this chapter 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 such person pursuant to the provisions of this chapter 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 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 chapter by the giving of notice shall commence to run from the date of mailing of such notice.

Section 11-1106 of the Code states that:

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

When the timeliness of a petition is at issue, "the Department 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)). *See also*, Matter of Samuel Heyman, TAT(E)93-1577(RP), New York City Tax Appeals Tribunal (August 1, 2001); Matter of Charla Bikman, TAT(E) 98-73(UB), New York City Tax Appeals Tribunal, (August 16, 2001); Matter of Goldman & Goldman, P.C., (TAT)(E)02-12(CR), New York City Tax Appeals Tribunal, (March 24, 2005).

A review of the Record does not indicate where the Department obtained the address used for Petitioner on the Notices. The address used by the Department was "432 Kelly Drive, Berlin, N.J. 08091." This address contains a different spelling of "Kelley Drive" from that used on Petitioner's letterhead and the zip code for "West Berlin" instead of "Berlin." However, Petitioner has never alleged that it did not receive the Notices. Furthermore, a copy of the relevant Notice is attached to the First Petition and the Second Petition and each copy of the Notice is stamped with the word "RECEIVED" and with the date "APR 19 1999." In addition, Petitioner has not challenged the validity of the Notices based on errors in addressing those Notices. Thus, we find that neither the different spelling of the street name nor the use of an incorrect zip code invalidated the Notices at issue.

"A notice is deemed to be mailed when it is delivered to the custody of the USPS for mailing." 2981 Third Avenue, *supra* (*citing* Novar, *supra*); Samuel Heyman, *supra*;

Charla Bikman, supra; Goldman & Goldman, P.C., supra. Section 11-1115.a of the Code does not require actual receipt of the notice by the taxpayer and specifically provides that the mailing of a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." The presumption of delivery, however, does not arise "unless and until sufficient evidence of mailing has been proffered." Katz, supra. Thus, Respondent must establish when the Notices were mailed by: "(1) offer[ing] proof of a standard procedure used for the issuance of notices 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." 2981 Third Avenue, supra.

"A Form 3877 reflecting postal service receipt, represents direct documentary evidence of the date and the fact of mailing." Wheat v. Commissioner, 63 T.C.M. (CCH) 2955 (1992). A properly completed mail manifold "raises a presumption of official regularity" in favor of the Department. *Id.* The Mail Manifold contains the same tax type and case identification numbers as appear on the Notices. In addition, the date stamped on the Notices (APR 07 1999) 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 Mail Manifold. The postmark on the Mail Manifold does not clearly indicate the post office at which the Notices were postmarked. However, "while an incomplete mail manifold alone is insufficient to prove mailing, it may form part of the evidence needed to prove mailing, and the Commissioner will prevail 'if the evidence adduced is otherwise sufficient to prove mailing.'" Charla Bikman, supra, citing, Wheat, supra. Respondent has established through the affidavits of USPS employees that the Notices were mailed from the USPS facility at 210 Joralemon Street, Brooklyn Municipal Building, Brooklyn, New York.

Thus, we find that Respondent has clearly met both tests set forth above. The affidavits of Ms. Owusu-Sekyere and Mr. Grainger clearly set forth the procedures used by the Department's Audit Control Unit for the preparation of the mailing of notices of determination that were in effect on April 7, 1999 and the activities of the Department's Mail Room employees with respect to the mailing of notices of determination on April 7, 1999 and establish that such procedures were followed with respect to the Notices. Each individual affirmed that they had personal knowledge of the relevant procedures or activities and that they performed those procedures or activities on April 7, 1999. In addition, Mr. Nemer's affidavit identified the Mail Manifold as one processed on April 7, 1999 by the Municipal Station Post Office located at 210 Joralemon Street, Brooklyn Municipal Building, Brooklyn, New York and identified the signature of the USPS employee who signed the Mail Manifold. Ms. Harris' affidavit stated that on April 7, 1999 she was employed by the USPS at 210 Joralemon Street, Brooklyn, New York; set forth the routine practice and procedures followed by USPS employees when processing certified Forms 3877, stated that she followed those procedures on April 7, 1999 and identified her signature on the Mail Manifold. Those affidavits combined with the Mail Manifold constituted direct evidence of the Department's practices and procedures and that they were followed in this case.

Petitioner asserts that the ALJ should have treated the March 23, 1999 Correspondence as either a *de facto* Petition for Hearing or a timely request for a Conciliation Conference. However, the March 23, 1999 Correspondence, informing the Department's Auditor that Petitioner disagreed with the audit findings was sent before the Notices were issued. The time period for contesting a notice of determination begins after the notice is issued. See, Matter of West Mountain Corporation v. State of New York Department of Taxation and Finance, 105 A.D.2d 989 (3rd Dept. 1984); *aff'd.*, 64 N.Y.2d 991 (1985); Matter of Hagop Yeghukian, New York State Tax Appeals Tribunal (March 22, 1990). Petitioner also argues that the First Petition and the Second Petition should be treated as duplicative Petitions because the Earlier Petition (covering a different audit period but involving the same issue) put the Department on notice that Petitioner disagreed

with any notice of determination that would be issued asserting a deficiency with respect to the same issue. In this matter, the First Petition and Second Petition are not duplicative because Petitioner has not filed prior timely petitions for hearing regarding the Notices.¹⁴ See, West Mountain Corporation, *supra*; Hagop Yegnukian, *supra*.

Finally, Petitioner contends on appeal that the fact that the Respondent has failed to submit the certified mailings proof of service raises an issue as to whether the Notices were mailed on April 7, 1999. In the first instance, we note that §11-1115.a of the Code does not require that the Department mail notices of determination for UT by certified mail. In any event, Respondent mailed the Notices by certified mail using the Mail Manifold. At the top of the Mail Manifold there is an "X" in the box next to "Certified." Thus, the Mail Manifold itself serves as Respondent's certified mailings proof of service and there are not separate proofs of service.

¹⁴The cases cited by Petitioner are ALJ Determinations that are not precedential. In any event, the ALJ Determinations do not support Petitioner's position. In Matter of Jondell Enterprises, Inc., TAT(H) 94-126(CR), New York City Tax Appeals Tribunal, Administrative Law Judge Division (June 30, 1995) where taxpayer was found to have filed an untimely petition for hearing but a timely request for a Conciliation Conference, the written request for a Conciliation Conference was sent after the date the notice of determination was issued but within ninety days after the issuance of the notice of determination. In Matter of Larry Fuller, TAT(H) 95-140(UB), New York City Tax Appeals Tribunal, Administrative Law Judge Division (January 30, 1996) a petition for hearing was dismissed as being duplicative of a petition for hearing that was filed earlier for the same matter. Unlike the situation in that case, the Earlier Petition is not the same matter as the First and Second Petitions because the Earlier Petition relates to a different audit period.

Respondent has established the Department's procedures for mailing notices of determination, the fact that the Department's employees complied with those procedures with respect to the Notices, and the fact that the Notices were mailed on April 7, 1999. Thus, we agree with the ALJ that the Petitions are untimely as they were mailed on September 1, 1999 more than ninety days from the date the Notices were mailed.¹⁵ The ALJ's Determination/Order is affirmed and the Renewed Motion is granted.¹⁶

Dated: April 12, 2007
New York, New York

GLENN NEWMAN
President and Commissioner

ELLEN E. HOFFMAN
Commissioner

¹⁵We note that the Petitions also were not filed within 90 days after April 19, 1999, the date the Notices were stamped as having been received.

¹⁶We have considered all other arguments raised by the Parties and deem them unpersuasive.