STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALBERTO F. OTERO	:	DECISION DTA NO. 816520
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1992 through November 30, 1992, March 1, 1993 through August 31, 1993 and September 1, 1994 through August 31, 1996.	:	

Petitioner Alberto F. Otero, c/o Nadine Kissel, P.O. Box 104, 7 Halsey Lane, Remsenburg, New York 11960, filed an exception to the determination of the Administrative Law Judge issued on January 13, 2000. Petitioner appeared by Cyril M. Bezkorowajny, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed his request for a conciliation conference with the Bureau of Conciliation and Mediation Services after the issuance of notices of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "7" and "9" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

The Division of Taxation ("Division") issued to petitioner, Alberto F. Otero, four notices of determination dated May 12, 1995 which were addressed to petitioner at "PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104." The notices stated that petitioner was being assessed as an officer or responsible person of Al Pesto, Inc. in accordance with Tax Law §§ 1138(a)(1), 1131(1) and 1133. The periods at issue, assessment identification numbers and the amounts due after the crediting of certain payments made are as follows:

Quarter Ended	Assessment ID #	Amount Due
8/31/92	L-010344771-5	$6,174.00
11/30/92	L-010344770-6	$2,430.34
5/31/93	L-010344768-7	$1,817.80
8/31/93	L-010344767-8	$4,347.98

Penalties and interest were assessed on each of the notices of determination issued to petitioner.

The Division issued to petitioner eight additional notices of determination dated May 19, 1997 which were addressed to petitioner at "PO BOX 104 HALSEY LN, REMSENBURG, NY 11960-0104." The notices stated that petitioner was being assessed as an officer or responsible person of Navona East, Inc. in accordance with Tax Law §§ 1138(a)(1), 1131(1) and 1133. The periods at issue, assessment identification numbers and the amounts due after the crediting of certain payments made are as follows:

Quarter Ended	Assessment ID #	Amount of Tax Due
11/30/94	L-013535225-9	$10,586.11
2/28/95	L-013535224-1	$1,282.20
5/31/95	L-013535223-2	$1,817.62
8/31/95	L-013535222-3	$15,206.08
11/30/95	L-013535221-4	$7,059.80
2/29/96	L-013535220-5	$10,321.11
5/31/96	L-013535219-5	$7,821.62
8/31/96	L-013535218-6	$7,151.79

Penalties and interest were assessed on each of the notices of determination issued to petitioner.

Petitioner filed a request for a conciliation conference seeking review of the notices of determination of sales and use taxes dated May 12, 1995 and May 19, 1997. The request appears to bear the signature of petitioner and is dated December 15, 1997. The request and attached documents were delivered to the United States Postal Service on December 15, 1997 and were received by the Bureau of Conciliation and Mediation Services ("BCMS") on December 16, 1997.

On February 13, 1998, BCMS issued to petitioner a conciliation order denying his request for a conciliation conference. The conciliation order reasoned, in part, that "[t]he Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on May 12, 1997 [sic] [and] May 19, 1997. . ., but the request was not received until December 16, 1997, or in excess of 90 days, the request is late filed."

In support of its position, the Division submitted affidavits from three Division employees, Geraldine Mahon, James Baisley and Leonard Finke, explaining the Division's

mailing procedures with respect to notices of determination; copies of certified mail records ("CMR"); copies of the notices of determination which were sent to petitioner; a copy of a computer printout summarizing petitioner's 1994 personal income tax return; a copy of petitioner's 1995 New York State Resident Income Tax Return; and a copy of a computer printout summarizing petitioner's 1996 Application for Automatic Extension of Time to File for Individuals.

Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavits, Ms. Mahon described the Division's general procedure for processing notices of determination prior to shipment to the Division's mechanical unit for mailing.

She explained how she receives a computer printout or CMR and the corresponding statutory notices, each predated with the anticipated date of mailing and each assigned a certified control number. The CMR for the block of notices issued on May 16, 1995, including the notices issued to petitioner bearing the date of May 12, 1995, consisted of 37 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service ("USPS"). The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on May 16, 1995, including the notices issued to petitioner bearing the date of May 12, 1995, bears certified control numbers which run consecutively (P 911 002 292 through P 911 002 690). Each page contains 11 entries, with the exception of the last page which contains 3 entries, for a total of 399 entries.

In the upper left corner of page 1 of the CMR, the date "5/03/95" was manually changed to "5-16-95." The original date of "5/03/95" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "5/03/95" to "5-16-95" was made by personnel in the Division's Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed or initialed pages 1, 2 and 37 of the CMR, affixed a postmark to each page of the CMR and circled "399" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 21 of the CMR indicates that notices of determination, with notice numbers L-010344767, L-010344768, L-010344770 and L-010344771 were sent to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104," by certified mail using control numbers P 911 002 518, P 911 002 519, P 911 002 521 and P 911 002 522. A U.S. postmark on each page of the CMR confirms that the notices of determination were sent on May 16, 1995.

A review of the notices of determination dated May 12, 1995 and mailed to petitioner on May 16, 1995 indicates that the documents bear assessment identification numbers of L-010344767, L-010344768, L-010344770 and L-010344772 and the certified control numbers P 911 002 518, P 911 002 519, P 911 002 521 and P 911 002 522. The foregoing numbers are identical to the assessment identification and certified control numbers that appear next to the entries for "OTERO-ALBERTO F" on the May 16, 1995 CMR.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> Ms. Mahon further explained in a second affidavit that the CMR for the block of notices issued on May 19, 1997, including the notices issued to petitioner, consisted of 18 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service ("USPS"). The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.
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> The CMR for the statutory notices mailed by certified mail on May 19, 1997, including the notices issued to petitioner and petitioner's representative, Cyril Bezkorowajny, bears certified control numbers which run consecutively (P 911 204 992 through P 911 205 183). Each page contains 11 entries, with the exception of the last page which contains 5 entries, for a total of 192 entries.
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> In the upper left corner of page 1 of the CMR, the date "5/08/97" was manually changed to "5/19/97." The original date of "5/08/97" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "5/08/97" to "5/19/97" was made by personnel in the Division's Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the

actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed or initialed pages 1, 2 and 18 of the CMR, affixed a postmark to each page of the CMR and circled "192" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Pages 7 and 8 of the CMR indicate that notices of determination, with notice numbers L-013535218, L-013535219, L-013535220, L-013535221, L-013535222, L-013535223, L-013535224 and L-013535225 were sent to "CYRIL BEZKOROWAJNY, 20 GIBSON ST, BAY SHORE, NY 11706," by certified mail using control numbers P 911 205 068, P 911 205 069, P 911 205 070, P 911 205 071, P 911 205 072, P 911 205 073, P 911 205 074 and P 911 205 075. A U.S. postmark on each page of the CMR confirms that the notices of determination were sent on May 19, 1997.

A review of the notices of determination dated May 19, 1997 and mailed to Cyril Bezkorowajny on May 19, 1997 indicates that the documents bear assessment identification numbers of L-013535218, L-013535219, L-013535220, L-013535221, L-013535222, L-013535223, L-013535224 and L-013535225 and the certified control numbers P 911 205 068, P 911 205 069, P 911 205 070, P 911 205 071, P 911 205 072, P 911 205 073, P 911 205 074 and P 911 205 075. The foregoing numbers are identical to the assessment identification and certified control numbers that appear next to the entries for "CYRIL BEZKOROWAJNY" on the May 19, 1997 CMR.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in

> Ms. Mahon's affidavits were the normal and regular procedures of the CARTS Control Unit on May 16, 1995 and May 19, 1997.[1]

James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire mail processing staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the CMR. The CMR is then

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[1]We have modified finding of fact "7" of the Administrative Law Judge's determination in order to more accurately reflect the record.

picked up at the USPS on the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch of the USPS by the Mail Processing Center staff on May 16, 1995. A review of the CMR indicates that a USPS employee signed or initialed pages 1, 2 and 37 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 399 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit (copies of the May 16, 1995 CMR and notices of determination dated May 12, 1995), and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered four pieces of certified mail addressed to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104" to the Colonie Center branch of the USPS in Albany, New York in sealed, postpaid windowed envelopes for delivery by certified mail. Mr. Baisley states that the name of Alberto F. Otero and the respective address, as set forth on the statutory notices, would have been displayed in the windows.

Based upon his review of the CMR, Mr. Baisley could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on May 16, 1995 for the records of the Division's CARTS Control Unit. He stated that the procedures in his affidavit are

the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and he also stated that these procedures were followed on May 16, 1995.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Mr. Baisley further reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch of the USPS by the Mail Processing Center staff on May 19, 1997. A review of the CMR indicates that a USPS employee signed or initialed pages 1, 2 and 18 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 192 pieces were delivered to the USPS.
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> Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit (copies of the May 19, 1997 CMR and notices of determination dated May 19, 1997), and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered eight pieces of certified mail addressed to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURG, NY 11960-0104" to the Colonie Center branch of the USPS in Albany, New York in sealed, postpaid windowed envelopes for delivery by certified mail. Mr. Baisley states that the name of Alberto F. Otero and the respective address, as set forth on the statutory notices, would have been displayed in the windows. In addition, an employee of the Mail Processing Center also delivered eight pieces of certified mail addressed to "CYRIL BEZKOROWAJNY, 20 GIBSON ST, BAYSHORE, NY 11706" to the Colonie Center branch of the USPS in Albany, New York in sealed postpaid window envelopes for delivery by certified mail. The name of Cyril Bezkorowajny and his address, as set forth on the covering letter to the statutory notices, would have been displayed in the window of each envelope.

> Based upon his review of the CMR, Mr. Baisley could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on May 19, 1997 for the records of the Division's CARTS Control Unit. He stated that the procedures in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and he also stated that these procedures were followed on May 19, 1997.[2]

Leonard Finke is the Director in the Personal Income Tax Returns Processing Bureau in the New York State Department of Taxation and Finance and has been employed by the Department for 27 years.

As part of his regular duties, Mr. Finke oversees the analysis and testing of computer systems which process tax return information. These systems store information derived from various sources and generate printed documents which are sent to taxpayers as well as printouts of purged information.

After the taxpayer's information is captured from the taxpayer's return or application for an extension to file a return onto the Returns Processing Database, it is stored in a record format. The taxpayer's address represented on the printout is the information used to process the taxpayer's return or application for an extension to file.

Based on his review of the computer printout of the tax return of petitioner for the year 1994, Mr. Finke could determine that petitioner's address as listed on such return was PO Box 104-Halsey Ln, Remsenburg, NY 11960-0104. In addition, based on his review of the computer printout of petitioner's Application for Automatic Extension of Time to File for Individuals for

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[2]We modified finding of fact "9" of the Administrative Law Judge's determination in order to more accurately reflect the record.

the year 1996, Mr. Finke determined that the address on such application was PO Box 104-Halsey Ln, Remsenburg, NY 11960-0104.

The address appearing on petitioner's 1995 New York State Resident Income Tax Return, dated April 11, 1996, is "Halsey Lane P.O. Box 104, Remsenburg, NY 11960."

In its answer, the Division conceded that Notice of Determination L-013716810 has been canceled and Notice of Determination L-010344769 has been paid in full and closed in the Division's records. In addition, Notice of Determination L-013535217 has been canceled.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a Notice of Determination issued pursuant to Tax Law § 1138(a)(1) "shall finally and irrevocably fix the tax" asserted due in such determination unless the person against whom it is assessed either requests a conciliation conference with BCMS or files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals. The Administrative Law Judge stated that when the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice. In this case, the Division submitted the affidavits of its employees in support of its position that the notices of determination were issued to petitioner on May 16, 1995 and May 19, 1997, respectively. The Administrative Law Judge concluded that these affidavits contained sufficient proof to establish the standard procedure of the Division for issuing notices of determination. Further, the Administrative Law Judge concluded that the Division had established that its standard procedure was followed on May 16,

1995 and May 19, 1997 in the generation and mailing of petitioner's notices of determination dated May 12, 1995 and May 19, 1997, respectively. The Division also established through documentary evidence that it mailed the notices on May 16, 1995 and May 19, 1997 to petitioner at his last known address. As the BCMS conference request was not filed within 90 days of either of the mailing dates as required by Tax Law § 1138(a)(1), the request was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of the notices of determination mailed on either May 16, 1995 or May 19, 1997.

The Administrative Law Judge rejected petitioner's argument that Tax Law § 1138(a)(1) as applied in this case deprived him of his right to due process, concluding that Tax Law § 1138(a)(1) clearly provides sufficient procedural protections to satisfy constitutional due process requirements.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge failed to address whether claims for refund filed by petitioner for all assessment periods at issue were timely. Petitioner asserts that although claims for refund were filed with the Division, no response to said claims were made. Petitioner claims that for all tax periods ending on and after November 30, 1994, payment of sales and use tax was made to the Division on December 6, 1997 and, on December 13, 1997, petitioner filed a claim for refund for each such period with the Division. Petitioner maintains that the Division illegally and negligently failed to respond to petitioner with respect to said claims as required to do so pursuant to Tax Law § 1139(b). Thus, argues petitioner, his claim was timely filed within three years after the date when such taxes were payable.

With respect to tax periods ending prior to November 30, 1994, petitioner allegedly made payments of these tax amounts and filed refund claims as aforesaid. Since there is no provision in the Tax Law allowing a taxpayer to make payment after three years of when the tax is payable, file for a refund and have an opportunity to be heard in the administrative process, petitioner argues that he has been denied due process of law with respect to these earlier tax periods. Petitioner asserts that Tax Law § 1139(b) is discriminatory because it requires an undertaking to be filed prior to obtaining judicial review unlike Tax Law § 1138. Petitioner further claims that he was deprived of due process by the failure of the Division to follow the procedures of the Tax Law in relation to claims of refund.

Petitioner maintains that the notices of determination were not "issued" on May 12, 1995 and May 19, 1997 to petitioner nor were they "issued" on May 19, 1997 to petitioner's representative in that such notices were not mailed in accordance with United States Postal Regulations for mailing by certified mail because the Division did not use United States Postal Form 3800 and such notices addressed to petitioner's representative failed to include the full nine digit zip code of such representative. Further, petitioner argues that the Division failed to comply with Tax Law § 1147 by failing to mail a notice of determination "promptly" as required by that statute.

Petitioner also presents arguments concerning his liability for the amount of tax asserted due by the Division in the notices at issue. Petitioner claims that there was no basis for issuing the notices of determination because there were no unfiled, incorrect or insufficient sales tax returns filed by petitioner. Therefore, argues petitioner, the notices of determination are illegal.

Petitioner also asserts that he is not liable for the assessment for the period August 1, 1996 through August 31, 1996.

OPINION

Tax Law former § 1138(a)(1) authorized the Division to issue a notice of determination to a person liable for the collection or payment of the tax if a return required under Article 28 was not filed or if a return, when filed, was incorrect or insufficient. Such a notice finally and irrevocably fixed the amount of tax due unless the person to whom it was assessed either requested a conciliation conference with BCMS or filed a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. The timely filing of a request for a conference or a petition is a jurisdictional prerequisite for review of the notice (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

A notice of determination is mailed when it is delivered into the custody of the postal service for mailing (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***see***, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (***see, Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111).

Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division must produce evidence of its standard procedures for the issuance of notices of determination by one with knowledge of such procedures, corroborated by direct

testimony or documentary evidence that this procedure was followed in the particular case at hand (***see, Matter of Novar TV & Air Conditioner Sales & Serv., supra***).

The Administrative Law Judge concluded that the Division met its burden to demonstrate its procedure for mailing notices of determination and that, on May 16, 1995 and May 19, 1997, respectively, it mailed the notices at issue to petitioner and to petitioner's representative. Petitioner did not deny receiving such notices. Further, petitioner introduced no evidence to refute the Division's evidence of proper mailing or rebut the presumption of delivery (***Matter of Service Merchandise Co.***, Tax Appeals Tribunal, January 14, 1999). Therefore, the Administrative Law Judge correctly concluded that the Division has met its burden to prove actual mailing of the notices of determination on May 16, 1995 and May 19, 1997, respectively. Since petitioner failed to file a timely challenge to any of such notices either by timely requesting a conference with BCMS or filing a petition for a hearing with the Division of Tax Appeals, the notices of determination "finally and irrevocably" fixed the amount of tax due (Tax Law former § 1138[a][1]). As a result, the Administrative Law Judge correctly determined that the Division of Tax Appeals had no jurisdiction to entertain petitioner's challenge to the merits of the notices of determination issued to him.

Petitioner argues that on December 6, 1997, he remitted payments to the Division for each of the periods involved in the notices at issue in this proceeding. On December 13, 1997, two days prior to filing his request for a BCMS conference, petitioner asserts that he filed refund claims with the Division for the amount of the assessments at issue herein plus the payments made on December 6, 1997. Petitioner alleges in his petition that the Division failed to respond to these refund claims. The Division, in its Answer, stated that it lacked knowledge or

information sufficient to form a belief as to petitioner's allegations concerning the filing of refund claims and the Division's failure to act thereon. Petitioner now argues that these refund claims are now properly before the Division of Tax Appeals for review. Petitioner is incorrect.

First, we note that petitioner's allegations concerning the filing of refund claims with the Division remain unsubstantiated. The allegations were deemed denied by the Division in its Answer and petitioner bore the burden of proving that refund claims were filed as alleged (Siegel, NY Prac § 221, at 348 [3d ed]). Therefore, the Administrative Law Judge was correct in failing to find as a fact that such claims had been filed with the Division. Even if such claims had been filed as petitioner alleges, however, the Division did not make a determination granting or denying such applications in whole or in part as it is authorized to do by Tax Law former § 1139(b). It is only such a determination by the Division that is subject to review by the Division of Tax Appeals (Tax Law former § 1139[b]). Since there is no determination to be reviewed by the Division of Tax Appeals, petitioner's refund claims are not properly before us in this proceeding.

Further, even if such claims for refund were the subject of our review, they would necessarily be denied. Pursuant to Tax Law former § 1139(c), "a person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination." At the time that petitioner filed his claims for refund, all opportunities for administrative and judicial review of the tax, interest and penalty asserted by

the notices of determination had been exhausted because no timely protest had been filed with either BCMS or the Division of Tax Appeals.

Petitioner seeks to raise for the first time on exception certain alleged irregularities in the manner in which the Division mailed the notices to him and to his representative. Whether the Division complied with certain United States Postal Regulations as argued by petitioner is a factual issue. We have consistently held that new legal issues may be raised on exception (***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993). However, the raising of factual issues after the closing of the record is not allowed as it "deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence" (***Matter of Howard Enters.***, Tax Appeals Tribunal, August 4, 1994). As a result, petitioner cannot raise this issue for the first time on exception before the Tax Appeals Tribunal.

Thus, we affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alberto F. Otero is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Alberto F. Otero is granted to the extent indicated in the Administrative Law Judge's determination but, in all other respects, is dismissed; and

4. The notices of determination dated May 12, 1995 and May 19, 1997 are sustained.

DATED: Troy, New York
September 21, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner