

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**THOMAS RUSSELL** :  
for Revision of a Determination or for Refund of : DETERMINATION  
Tax on Petroleum Businesses Under Article 13-A : DTA NOS. 821378  
of the Tax Law for the Period March 1, 2002 : AND 821379  
through February 28, 2005, and for Revision of a :  
Determination or for Refund of Sales and Use :  
Taxes Under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 2002 through February 28, :  
2005. :  
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Petitioner, Thomas Russell, 67 NBCC Road, North Branch, New York 12766, filed petitions for revision of a determination or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period March 1, 2002 through February 28, 2005, and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2002 through February 28, 2005.

The Division of Taxation, by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion, filed January 23, 2007, seeking summary determination in the above-referenced matters pursuant to 20 NYCRR 3000.5(b); 3000.9(b). Petitioner, appearing *pro se*, had 30 days, or until February 22, 2007, to respond to the motion. Petitioner did not file a response to the motion, and thus the 90-day period for issuance of this determination commenced on February 22, 2007. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a timely petition for a hearing before the Division of Tax Appeals following the issuance of certain notices of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Thomas Russell, two notices of determination, each dated April 17, 2006. The Notice of Determination bearing assessment identification number L-0267632827 was addressed to “Thomas Russell, 74 Dyker Rd., N. Branch, NY 12766-5303,” and the Notice of Determination bearing assessment identification number L-026758754 was addressed to “Thomas Russell, Prompt Oil, 74 Dyker Rd., North Branch, NY 12766-5303.” The notice numbered L-026763827 assessed additional tax on petroleum businesses under Tax Law Article 13-A for the quarterly periods ended May 31, 2002 through February 28, 2005, excepting only the quarterly period ended August 31, 2004, in the amount of \$86,967.77, plus penalty and interest. The notice numbered L-026758754 assessed additional sales and use taxes due under Tax Law Articles 28 and 29 for the same quarterly periods, again excepting only the quarterly period ended August 31, 2004, in the amount of \$49,939.38, plus penalty and interest.

2. Petitioner filed a Request for Conciliation Conference (Form CMS-1) with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) challenging the foregoing notices and requesting a conciliation conference with respect thereto. The request is signed by petitioner and is hand-dated July 18, 2006. The envelope in which the request was mailed carried a United States Postal Service (“USPS”) postmark dated July 19, 2006 and was stamped as received by BCMS on July 24, 2006.

3. On August 4, 2006, BCMS issued to petitioner two conciliation orders dismissing request. Each order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on April 17, 2006, but the request was not mailed until July 19, 2006, or in excess of 90 days, the request is late filed.

4. Notices of determination, such as the ones at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other (fan-folded) before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of determination is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the columnar heading "Certified No." The next columnar heading, entitled "Reference No.," lists the assessment number assigned to each notice listed on the CMR. The third columnar heading, entitled "Name of Addressee, Street and P.O. Address," lists the names and addresses of the taxpayers to whom the notices are being issued. The remaining columns list the postage and fee amounts for the notices being mailed. The CMR also lists an initial date (the date of its printing) in its upper left corner, set forth in numbers listing the particular year, ordinal day of the year, and military time of day when such CMR is produced which, in this case, was "20060971700" for each of the notices. The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMRs in this case was

manually changed at the time of mailing by Division personnel to April 17, 2006, in order to conform to the actual date of mailing.

6. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page "Mailing Cover Sheet" (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division. The reverse side of each such Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

7. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes "postage" and "fee" amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and also performs a random review of up to 30 pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

9. In the instant case, the two notices appear on separate CMRs. Each CMR is, as generated in this instance, a 24-page, fan-folded (connected) computer-generated document entitled "Certified Record for Non-Presort Mail-Assessments Receivable." All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. Each CMR lists 259 certified control numbers. Each such certified control number, on each such CMR, was assigned to an item of mail listed on the 24 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains eleven entries, with the exception of the last page (page 24) which contains six entries. Further, at page 12 of each of the CMR's, one of the entries has been crossed out, such that there remain only 10 entries on page 12 of each CMR. The names, addresses and other identifying information with regard to taxpayers other than petitioner have been redacted from the CMR's so as to preserve the confidentiality of the information relating to such other taxpayers.

10. Information regarding the notices of determination issued to petitioner was contained on page 19 of the CMR relating to the Notice numbered L-026763827, and on page 18 of the CMR relating to the Notice numbered L-026758754, and shows, respectively, the following corresponding certified mailing numbers and assessment numbers:

Certified (Mailing) Number	Reference (Assessment ID) Number
7104-1002-9730-1174-0991	L-0026763827
7104-1002-9730-1174-0984	L-026758754

Petitioner's name, and the address "74 Dyker Rd., N. Branch, NY 12766-5303" (with respect to the notice numbered L-026763827) and "74 Dyker Rd. North Branch, NY 12766-5303" (with respect to the notice numbered L-026758754), appear on the respective CMR's in the column immediately after each of the subject notices of determination.

11. Each page of each CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 17, 2006, and the initials "SD" representing the postal employee, verifying receipt of the items.

12. The last page of each CMR, page 24, contains a preprinted entry of "259" corresponding to the heading "Total Pieces and Amounts." Appearing directly beneath this preprinted entry and corresponding to the heading "Total Pieces Received At Post Office" is the handwritten number "258," which is also handwritten immediately to the right thereof a second time and is manually circled and followed by the initials "SD," representing the Postal Service employee accepting receipt of the items.

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the hand writing and circling of the "258" indicate that 258 of the 259 pieces listed on each of the respective CMR's were received at the post office. The numerical difference results from the item crossed out at page 12 on each of the CMR's (*see*, Finding of Fact "9"), and represents a piece of mail that has been "pulled" from the mailing record for that page. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled will be segregated from the remaining group of statutory notices for subsequent correction and issuance at another (later) time.

14. In the ordinary course of business, the CMR is returned to the Division's CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

15. The facts set forth above in Findings of Fact "4" through "14" were established through the affidavits of Patricia Finn Sears and Bruce Peltier. Ms. Sears is employed as a Supervisor in the Division's CARTS Control Unit. Ms. Sears's duties included supervising the processing of notices of determination. Mr. Peltier is employed as a Mail and Supply Supervisor in the Division's Mail Processing Center. Mr. Peltier's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

16. The address on the subject notices of determination was the same as the address given on petitioner's Form PT-200 ("New York State Quarterly Petroleum Business Tax Return"), Form PT-201 ("Retailers of Heating Oil Only"), as filed with the Division on December 8, 2005, and on Form ST-102-A ("Annual Sales and Use Tax Return"), as filed with the Division on May 27, 2005. The Division's records, including its "Petroleum Business Tax Taxpayer Return Summary" and its "NYS Department of Taxation and Finance Sales Tax Filing History," reveal that the returns identified above were the last returns filed by petitioner pursuant to Tax Law Article 13-A and Tax Law Articles 28 and 29, respectively, prior to the issuance of the subject notices of determination.

17. Petitioner did not respond to this motion, nor has petitioner offered any arguments or evidence to support a claim that he filed any protest against the notices at issue within the requisite period of time, i.e., 90 days after their issuance.

#### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Specifically, since petitioner presented no evidence to contest the facts alleged in the Sears and Peltier affidavits, those facts may, as a consequence, be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 1138(a)(1) and Tax Law § 288(a)(1), (5) (as made applicable by Tax Law § 315[a]), respectively, authorize the Division to issue a Notice of Determination to a taxpayer where a return required by Article 28 of the Tax Law or by Article 13-A of the Tax Law is not filed or, if a return is filed, is incorrect or insufficient. The Tax Law further provides that such a notice shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this State. In this case, the record is clear that the address listed on each of the subject notices of determination was petitioner's last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see*, Tax Law § 1138[a][1]; § 288[5]; § 315[a];

§ 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. (*See, Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) 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 produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

G. The Division also presented sufficient documentary proof, in the form of a CMR pertaining to each of the subject notices, to establish that the notices of determination in issue were mailed to petitioner on April 17, 2006. Specifically, each of the 24-page CMR documents

provided herein list certified control numbers and notice of determination numbers with corresponding names and addresses, including petitioner's certified control numbers, notice of determination numbers, name and address. All 24 pages of each CMR bear a USPS postmark dated April 17, 2006. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 24 of the CMR and wrote and circled "258" on that page of each CMR to indicate receipt by the post office of 258 pieces of mail out of the 259 pieces of mail listed thereon, with the difference accounted for by the "pulling" or removal of one piece of mail as specified (*cf.*, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject notices of determination to petitioner on April 17, 2006.

H. Petitioner's request for conciliation conference was filed on July 19, 2006, a date which falls more than 90 days after the April 17, 2006 date of mailing of the instant notices of determination. The request was therefore untimely filed (*see*, Tax Law § 1138[a][1]; § 288[a][5]; § 315[a]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The petition of Thomas Russell is hereby dismissed.

DATED: Troy, New York  
May 10, 2007

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE