STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **BARRY E. SNYDER** **D/B/A SENECA HAWK** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period January 1, 1989 through December 31, 1989.	:	DETERMINATION DTA NOS. 809458,809647 AND 809648
In the Matter of the Petitions of **BARRY E. SNYDER** **D/B/A SENECA HAWK** for Revisions of Determinations or for Refunds of Motor Fuel Tax under Article 12-A of the Tax Law for the Period January 1, 1989 through December 31, 1989.	:	

Petitioner, Barry E. Snyder, Sr., d/b/a Seneca Hawk, Routes 5 and 20, Irving, New York 14081, filed a petition 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 January 1, 1989 through December 31, 1989.

Petitioner, Barry E. Snyder, Sr., d/b/a Seneca Hawk, Routes 5 and 20, Irving, New York 14081, filed two petitions for revision of determinations or for refund of motor fuel tax under Article 12-A of the Tax Law for the period January 1, 1989 through December 31, 1989.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 15, 1996. Briefs were filed by both parties. Petitioner's reply brief was filed on December 18, 1995 which began the six-monthstatutory period for the issuance of this determination. Petitioner appeared by Timothy J. Toohey, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation has established that petitions challenging its assessments of motor fuel tax were filed more than 90 days from the mailing of the statutory notices.

II. Whether the statute of limitations provided for in Tax Law § 288(5) of the Tax Law may be waived on either equitable grounds or because petitioner has established that he is a Native American and thus not subject to the taxing authority of the Division of Taxation.

III. Whether the Division of Tax Appeals has jurisdiction to hear petitioner's claims regarding an assessment of cigarette and tobacco products tax.

FINDINGS OF FACT

1. Petitioner, Barry Snyder, Sr., d/b/a Seneca Hawk, filed a petition challenging a determination of tax due made by the Division of Taxation ("Division") (from here on, "the sales tax petition"). Attached to the petition was a copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated January 14, 1991. The notice assessed sales tax due for the period January 1, 1989 through December 31, 1989 in the amount of $1,402,596.27 plus penalty and interest. The sales tax petition states that "[t]he tax in question is sales (Article 28) and cigarette tax (Article 20)." The total amount of tax challenged is $1,402,596.27.

2. In its answer to the sales tax petition, the Division denied that the petition challenged a determination of cigarette tax because (1) petitioner did not attach a notice of determination assessing cigarette tax to the petition and (2) the amount of tax protested is equal to the assessment of sales tax indicating that no amount of cigarette tax was included in the tax amount protested.

3. Petitioner filed two additional petitions (the "petitions" or the "motor fuel tax" petitions). The records of the Division of Tax Appeals indicate that these petitions were received on May 30, 1991 and signed by Timothy J. Toohey, Esq., as petitioner's representative. The petitions were returned to Mr. Toohey with a letter requesting that he resubmit the petitions

with a power of attorney and copies of the statutory notices being challenged (letter to Timothy J. Toohey, Esq., dated June 3, 1991 from Frank A. Landers).[1] The two petitions were resubmitted on June 12, 1991. They requested revisions of determinations of tax due as follows:

Tax Type	Article	Period of Assessment	Tax Amount
Diesel motor fuel	Article 12-A	1/1/89 -- 12/31/89	$679,986.50
Gasoline motor fuel	Article 12-A	1/1/89 -- 12/31/89	$398,539.60

4. In response to the request that statutory notices be submitted, petitioner attached a Notice and Demand for Payment of Tax Due to each petition. Each of the notices is dated April 25, 1991.

5. In its answers to the motor fuel tax petitions, the Division alleged that on January 14, 1991 two notices of determination of motor fuel tax due were mailed to petitioner and that petitioner actually received those notices on January 16, 1991. The Division also alleged that it mailed a Notice of Determination of cigarette and tobacco products tax to petitioner on January 14, 1991. Based on these assertions, the Division requested that the petitions for redetermination of motor fuel tax be dismissed as untimely.

6. Steven Galka, an employee in the Fuel, Alcohol, Cigarette, Care and Tax section of the Transaction and Transfer Tax Bureau ("TTTB-FACCTS"), testified about the Division's normal procedure for mailing notices of determination of motor fuel tax due and the actual mailing of the notices issued to petitioner. Mr. Galka's duties in 1991 involved the preparation of tax notices and the mailing of those notices.

7. Notices of determination of motor fuel tax due are produced by the Division's Case and Resource Tracking System ("CARTS"). Notices of determination mailed to addresses in the United States are sent by certified mail. CARTS assigns a certified mail control number to each notice and prints that number in the upper right hand corner of the notice. The certified mail control number is also printed on a certified mail record ("CMR") produced by CARTS.

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[1]Official notice is taken of the facts regarding the filing of these petitions pursuant to State Administrative Procedure Act § 306(4).

The CMR identified each notice as a separate item of mail identifying that item by the certified mail number appearing on the notice. Each addressee's name and address is listed on the CMR next to the certified mail control number. In 1991, Mr. Galka's unit manually reviewed the notices of determination and the CMR to verify the accuracy of the information on the documents. No evidence was offered regarding the Division's ordinary procedure for mailing sales tax notices of determination.

8. The four notices of determination in issue (one sales tax notice, two motor fuel tax notices and one cigarette tax notice) were not mailed in accordance with the Division's normal procedures. Mr. Galka was told that the four notices were to be mailed to petitioner in one envelope along with other material. He was assigned the task of coordinating the mailing of the notices.

9. In 1991, notices of determination of sales tax due were not produced by CARTS. They were manually prepared by various units within the Division. An employee named Earl Willis gave Mr. Galka a manually prepared notice of determination of sales tax due to be mailed to petitioner. As stated in Finding of Fact "1", that notice was dated January 14, 1991. Mr. Galka obtained the original notices of determination of motor fuel tax due and cigarette tax due produced by CARTS and addressed to petitioner. Each of those notices bore a certified mail control number assigned by CARTS. Mr. Galka used a product he called "white-out" to cover the certified mail number on each original document. He noticed that the address heading on one of the notices was different from the other three. It did not contain the line "Seneca Hawk" under petitioner's name. Mr. Galka had a secretary type a label that included the name Seneca Hawk in conformity with the addresses on the other notices. It was affixed over the existing name and address. He then made photocopies of each notice.

10. Mr. Galka recalled preparing the envelope for mailing. He remembered placing all documents to be mailed in a single, large, brown envelope. He stated that he specifically remembered placing in the envelope the following documents: (1) a cover letter from Daniel P. O'Connell, Tax Auditor III, to petitioner, (2) a notice of determination of sales tax due, (3) the

notices of determination of motor fuel tax and cigarette tax due, (4) payment documents corresponding to the notices and (5) a form TA 9.1, Notification of Right to Protest. Mr. Galka stated that he compared the addresses on the notices to the address on the mailing label affixed to the envelope.

11. Mr. Galka stated that his unit maintained a supply of the forms used to send mail by certified mail. The Division produced completed United States Postal Service ("USPS") forms 3800 and 3811 that Mr. Galka identified as the postal service forms completed in connection with the mailing of documents to petitioner. The form 3800 has two parts: one part consists of a certified mail number that can be affixed to the article being mailed, and the other part is a receipt bearing the same certified mail number. The Division produced the receipt section of a form 3800 bearing certified mail number P 712 781 189 and petitioner's name and address--Barry E. Snyder, Seneca Hawk, Rte 5 and 20, Irving, NY 14081. Mr. Galka stated that the portion of the form bearing the preprinted certified mail number was affixed to the left of center of the mailing envelope. His unit retained the receipt portion of the form.

Form 3811 is a green card. The Division produced a form 3811 bearing petitioner's name and address under the heading, "Article Addressed to". Number P 712 781 189 was entered on the form 3811 under the heading "Article Number". Mr. Galka stated that the envelope addressed to petitioner was sealed, and the form 3811 was attached to the back of the envelope.

12. A clerk in Mr. Galka's unit prepared a form 3877 for the certified mail list. On that list, the certified mail control number shown on forms 3800 and 3811 appears under the heading, "Number of Article". Petitioner's name is shown under the heading for name and address. The form 3877 was redacted so that petitioner is the only addressee appearing on the form. Mr. Galka recalled personally delivering the envelope bearing petitioner's name and address and the form 3877 to the Division's mailroom. The form 3877 was returned to Mr. Galka after it was postmarked and signed by the postal employee. At the bottom of the form 3877, the handwritten entry, "4", appears under the heading, "Total number of Pieces Listed by Sender". Under the heading, "Total number of Pieces Received at Post Office", is the

handwritten entry "4". A signature appears in the space indicated for the signature of a postal employee. A USPS date stamp of January 14, 1991 appears on the sheet.

13. Form 3811, the green return receipt card, was returned to the Division by the USPS. It shows that Article Number P 712 781 189 was delivered to petitioner on January 16, 1991. The three postal service forms--the certified mail list (form 3877), the Receipt for Certified Mail (form 3800) and the Domestic Return Receipt (form 3811)--were maintained by the Division in its files.

14. The mailing to petitioner deviated from the Division's standard and ordinary mailing procedures in several ways. It was not the standard procedure to mail more than one notice of determination per envelope. It was not the ordinary procedure to mail a sales tax notice of determination with notices assessing other taxes. Each notice of motor fuel tax or cigarette tax due ordinarily had a CARTS assigned certified mail control number printed at the top of the first page of the notice. That number could be cross-referenced to the Article Number on the certified mail list. In this case, the assigned certified mail number was obliterated; consequently, cross-referencing from the notices to the certified mail list is impossible. It was the Division's ordinary practice to mail the notices of determination of motor fuel tax due generated by CARTS. In this case, the CARTS-generated copies were retained by the Division and were not mailed to petitioner.

15. Mr. Galka testified that he was instructed by another employee, Deborah Dahlhaus, to mail, or to coordinate the mailing of, the four notices of determination in one envelope. He was very specific in naming her as the person who gave him his instructions (tr., pp. 28, 40). In later testimony, he initially stated that Ms. Dahlhaus verbally instructed him to "white-out" the certified mail numbers on the notices of determination, but then modified that testimony stating: "Well, I'm not sure about that. All I know is that they were gonna go in one single envelope. And I can't remember, offhand, if she told me to white them out or not" (tr., p. 44). Mr. Galka testified that somebody told him to cover the certified mail numbers on the notices, stating: "I wouldn't deface the documents until somebody told me" (tr., p. 44).

16. Ms. Dahlhaus testified that she did not instruct Mr. Galka to mail the notices in one envelope; rather, she recommended to Mr. Galka's supervisor, Daniel Connell, that they be mailed in that fashion, and he accepted the recommendation. She also testified that she was present when Mr. Connell instructed Mr. Galka to prepare the documents for mailing in one envelope and that neither she nor Mr. Connell told Mr. Galka to white out the certified mail control numbers originally appearing on the notices.

17. According to Ms. Dahlhaus's testimony, the other taxpayers whose names were redacted from the form 3877 in evidence were Indian retailers.

18. Ms. Dahlhaus was not present when Mr. Galka actually prepared the documents for mailing to petitioner and did not see him place the notices of determination in an envelope.

19. Mr. Galka stated that the certified mail control numbers were covered to avoid the confusion that might result from having different numbers on the notices and on the certified mail list. He also stated that photocopies were mailed to petitioner because the white out on the original copies gave the documents an unprofessional appearance.

20. Ms. Dahlhaus recommended that the notices of determination be mailed all in one envelope to avoid potential confusion. As she stated, "[Separate mailings might cause petitioner to] think that one document was a duplicate of another, or that one document superseded another" (tr., p. 65). Ms. Dahlhaus offered a second reason for not following the ordinary mailing procedure, stating that it afforded the Division an opportunity to send a cover letter explaining the basis for the tax due and reminding petitioner that he would need to file individual protests to each notice.

21. A copy of the cover letter referred to by Ms. Dahlhaus in her testimony was placed in evidence. It is dated January 14, 1991 and addressed to petitioner. As pertinent, it states:

> "Please note that on the enclosed assessments, the excise and sales taxes are billed separately relative to the type of product sold. Therefore, you will find enclosed, separate assessments which detail the tax type, the article of the Tax Law under which the assessment is authorized, the periods covered, and your liability for tax, penalty and interest.
>
> "Be sure to read the explanation and instructions for each assessment carefully. Pay particular attention to the time limitation within which you must act in order to

> preserve your administrative protest rights. These rights are explained in detail in the enclosed 'Notice of Taxpayer Rights' (DTF-996) for excise taxes, and 'Notification of Your Right to Protest an Action Taken by the New York State Department of Taxation and Finance' (TA-9.1) for sales tax. Your failure to act in a timely fashion could result in your losing these protest rights.
>
> "Payments on the enclosed assessments as well as protests should be returned in the enclosed pre-addressed envelopes."

22. Mr. Galka could not recall whether he included the pre-addressed envelopes in the envelope mailed to petitioner.

CONCLUSIONS OF LAW

A. Tax Law § 288(5) provides in pertinent part that a determination of tax due made pursuant to Article 12-A of the Tax Law shall finally and irrevocably fix the tax unless a petition is filed within 90 days of the giving of notice of such a determination. The 90-day time period begins to run from the date of mailing of a notice of determination of tax due, and the mailing of the notice is presumptive evidence of its receipt by the person to whom it is addressed (Tax Law § 289-d[2]).

The Division alleges that two notices of determination of motor fuel tax due were mailed to petitioner on January 14, 1991 by certified mail and actually received by petitioner on January 16, 1991. The Division requests that the motor fuel tax petitions challenging these determinations be dismissed as untimely.

Petitioner alleges that the Division has failed to prove the proper mailing of the Article 12-A notices. Petitioner's representative asserts that petitioner did not receive the Article 12-A notices and that petitioner was apprised of the existence of the assessments when petitioner received the notices and demands dated April 25, 1991.

If a petition is not filed within 90 days of the issuance of a notice of determination under Article 12-A, the Division of Tax Appeals does not have jurisdiction of the case (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).

Where, as here, the Division asserts that a petition for a hearing was not filed within 90 days of the mailing of a notice of determination, it bears the burden of proving both the fact and date of mailing of that notice (T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314,

508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). The Tax Appeals Tribunal requires the Division to prove that the notice of determination was properly delivered to the postal service for mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; Matter of Katz, supra). The act of mailing may be proven by evidence of the Division's standard mailing practices and evidence showing that the standard practice was followed in a particular case (Matter of Air Flex Custom Furniture, supra; Matter of Katz, supra; see also, Coleman v. Commissioner, 94 TC 82).

A properly completed form 3877, reflecting postal service receipt of a notice for mailing, represents direct documentary evidence of the date and fact of mailing of that notice (Matter of Air Flex Custom Furniture, supra). In addition, a properly completed form 3877 shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (id.). Here, the Division produced a completed form 3877 proving that an item was mailed to petitioner on January 14, 1991. However, the Division cannot rely on the form 3877 to prove the fact of mailing of any particular notice or to create a presumption of official regularity. This is so because the form 3877 does not provide evidence of the mailing of any particular notice of determination. It merely establishes that something was mailed. Moreover, the Division admittedly did not comply with its own procedures for mailing notices of determination of motor fuel tax due.

Under the standard procedure in effect in 1991, notices of motor fuel tax due were each mailed in a separate envelope. A certified mail control number was assigned to each notice by CARTS, and that number was printed on the notice. The same certified mail control number was listed on the CMR. This standard procedure made it possible to cross-reference each notice with the certified mail number assigned to it and appearing on the CMR. Thus, if other procedures were also followed, the CMR could serve as direct documentary evidence of the mailing of a notice because the standard procedure provided evidence of exactly what was mailed. The standard procedure was not followed in this case. Notices produced by CARTS

were interrupted from the normal flow and altered by removal or obliteration of the certified mail control number originally printed on those documents. As a consequence, neither form 3877 nor the other documents submitted by the Division provided documentary evidence that the article of mail mailed to petitioner contained the notices of determination of motor fuel tax due.

Petitioner argues that since the Division deviated from its standard procedures "the presumption of mailing has not been sustained" (Petitioner's brief, p.5) and that the Division has not sustained its burden of proving that petitioner "received" all four notices. On that basis alone, petitioner argues that the petitions must be deemed timely. I disagree. The Division's failure to comply with its standard mailing procedures may not be fatal if it introduces persuasive and competent evidence of the actual mailing of the notices (Coleman v. Commissioner, supra). The Division produced a properly completed form 3877 proving that an article of mail addressed to petitioner was delivered to the USPS on January 14, 1991. In order to prevail, the Division was required to produce sufficient evidence to show that what was mailed included the two motor fuel tax notices of determination.

The Division relied on the testimony of Mr. Galka to prove that the motor fuel tax notices were mailed on January 14, 1991. Mr. Galka testified that he had an exact recollection of having placed the motor fuel tax notices in a single envelope with the sales tax notice and the cigarette tax notice. Although the existence of an event concerning procedure may be established by testimony (see, Dorsey v. Commissioner, 65 TCM [CCH] 2474, 2477), in this case, I find that Mr. Galka's testimony was not sufficient to satisfy the Division's burden of proof.

The events that Mr. Galka related took place over four years from the date of the hearing. His testimony showed that in that time his memory of the events surrounding the mailing has faded. He testified that Ms. Dahlhaus instructed him to coordinate the mailing to petitioner. Ms. Dahlhaus testified that it was not she but Mr. Connell who directed Mr. Galka. At first, Mr. Galka testified that Ms. Dahlhaus instructed him to white out the certified control numbers

on the notices. He later modified that testimony stating that "somebody" told him to do it, and he stated emphatically that he would not have defaced the notices unless he had been instructed to do so. Ms. Dahlhaus testified that she did not tell Mr. Galka to change or cover over the certified control numbers. Moreover, she stated that she was present when Mr. Connell directed Mr. Galka to coordinate the mailing and that he did not give such an instruction at the time. Mr. Galka could not recall whether he placed pre-addressed return envelopes in the mailing, although Mr. Connell's letter states that they were enclosed.

To support a determination, the proof relied on should be of a substantial nature and have the ability to inspire confidence. It should be "of the quality that a reasonable mind would accept as adequate to support a conclusion or ultimate fact on the record considered as a whole" (Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412, appeal dismissed 79 NY2d 978, 583 NYS2d 195). Mr. Galka's lapses in memory do not directly contradict his recollection of having placed the notices altogether in one envelope. They do cast doubt on his ability to accurately recollect individual acts that occurred years before his testimony was given. I have no doubt that Mr. Galka was directed to mail all the notices in one envelope or that he intended to do so. But I cannot find that his memory alone is sufficient evidence to prove that the four notices were actually mailed. In light of the fact that there is no documentary evidence to support Mr. Galka's memory of having placed four notices in one envelope, I find that the Division has failed to prove that the mailing to petitioner included the motor fuel tax notices of determination. Finally, there is no evidence that petitioner received the two motor fuel tax notices of determination. Since the mailing of the notices has not been proven, the Division of Tax Appeals lacks jurisdiction to consider the petitions and the notices are null and void (Matter of Malpica, supra).

B. A timely petition was filed by petitioner challenging the Division's assessment of sales and use taxes. A Notice of Determination and Demand for Payment of Sales and Use Taxes under Article 28 of the Tax Law was attached to that petition. The petition states that the tax protested includes cigarette tax under Article 20 of the Tax Law, but a notice of determination

of cigarette tax was not attached to the petition. The total amount of tax challenged is equal to the sales tax assessment; therefore, the disputed tax amount cannot include cigarette tax. Moreover, petitioner denies ever having received the notice of determination of cigarette tax. Based on these facts, the Division urges that this petition not be construed as a petition to the cigarette tax notice of determination. Petitioner claims that the petition placed the Division "on notice as to which tax notice was involved and the fact that the specific notice was not attached by number to the petition should not bar that petition from being proper for both sales and use tax and cigarette tax" (Petitioner's brief, p. 8, fn. 2).

It is undeniable that the Division understood that the sales tax petition was intended to challenge an assessment of cigarette tax. It took some pains in its answer to deny that the petition was complete and specific enough to be considered a protest of a cigarette tax assessment. However, it is also true that the petition does not identify either the amount of cigarette tax purportedly petitioned or the tax period involved. Without such information, neither the Division nor the Division of Tax Appeals could be certain of the specific notice being protested. Accordingly, I find that petitioner never filed a petition protesting a notice of determination of cigarette and tobacco products tax. Since no petition was filed, the Division of Tax Appeals lacks jurisdiction to consider whether such a notice was mailed to petitioner or whether the assessment is correct.

C. In his brief, petitioner claims that the Division lacks the authority to assess tax against him because he is a Native American retailer doing business on the Cattaraugus Reservation of the Seneca Nation of Indians. Based on that claim, he argues that the 90-day statute of limitations does not apply to the tax notices in issue. Petitioner states that a taxpayer may raise a claim of unconstitutionality of a tax statute at anytime without regard to the statutory time limits for seeking administrative review. The cases cited in petitioner's brief do not support his position.

In First National City Bank of New York v. City of New York Finance Administration (36 NY2d 87, 365 NYS2d 493), the Court noted that the plaintiff had the option of challenging the

constitutionality of a taxing statute in a judicial or administrative proceeding. Had the plaintiff pursued a plenary action in a court of law, there would have been no time bar to the proceeding. The plaintiff, however, chose to seek relief through the statutory refund procedure and to challenge the constitutionality of the tax in an Article 78 proceeding. Having done so, the Court stated, the plaintiff was limited by the time bars of the statutory procedure. "The bank could not take part and reject part, as suits its purposes, of the statutory procedure" (First National City Bank of New York v. City of New York Finance Administration, supra, 36 NY2d at 93, 365 NYS2d at 498). To avoid dismissal of the action, the Court converted petitioner's Article 78 petition into an action for money, proceeding under the authority of CPLR 103, (First National City Bank of New York v. City of New York Finance Administration, supra, 36 NY2d at 94, 365 NYS2d at 499).

The Division of Tax Appeals does not have the authority to convert this administrative proceeding into another form or to waive the time limits of the statutes which authorize an administrative proceeding. Petitioner recognizes that the cases cited in its brief apply to judicial rather than administrative proceedings but states that "[i]t would make no sense" to confine the rulings in those cases to judicial proceedings only. I have no authority to do otherwise. Petitioner's claim that he is not subject to the Tax Law may be raised in an administrative procedure to contest a tax assessment, but the time limitations of the administrative procedure may not be waived.

D. Petitioner argues that if any of his petitions are deemed untimely, he should nonetheless be allowed to contest all four tax assessments. Petitioner states:

> "As the petitions are absolutely identical and a determination on the merits of each individual petition would be res judicata for all the petitions, these petitions should be consolidated into one proceeding, treated as timely brought, and further proceedings conducted pursuant to law." (Petitioner's brief, p. 8.)

If a taxpayer does not file a petition for review of an assessment of motor fuel tax within 90 days of the mailing of that assessment, the tax assessed is irrevocably fixed (Tax Law § 288[5]). The same is true regarding an assessment of cigarette and tobacco products (Tax Law

§ 478). A determination rendered concerning the petition of the sales tax assessment would have no affect, res judicata or otherwise, on the motor fuel or cigarette tax assessments.

Petitioner also argues that his petitions should be deemed timely as a matter of equity.[2] He cites to no statutory authority which would empower the Division of Tax Appeals to waive the time limits of Article 12-A or Article 20 on the basis of equity. There is no such authority.

E. The petitions of Barry E. Snyder (DTA Nos. 809647/809648) are dismissed, and the notices of determination of motor fuel tax due are cancelled.

The petition of Barry E. Snyder (DTA No. 809458) protesting a Notice of Determination of Sales and Use Taxes Due, dated January 14, 1991, will be scheduled for a hearing on the merits as soon as possible.

DATED: Troy, New York
April 18, 1996

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

[2]In connection with this argument, petitioner submitted additional evidence attached to his reply brief. As the record was closed to further evidence at the close of the hearing, this submission was not considered.