

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SHORT'S OIL COMPANY, INC.</b>	:	DETERMINATION
	:	DTA NO. 826512
for Revision of Determinations or for Refund	:	
of Motor Fuel Tax under Article 12-A of the Tax Law	:	
and Tax on Petroleum Businesses under Article 13-A	:	
of the Tax Law for the Period November 1, 2010	:	
through June 30, 2013.	:	

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Petitioner, Short's Oil Company, Inc., filed a petition for revision of determinations or for refund of motor fuel tax under Article 12-A of the Tax Law and tax on petroleum businesses under Article 13-A of the Tax Law for the period November 1, 2010 through June 30, 2013.

On November 4, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4), on the basis that the petition did not appear to have been filed in a timely manner. By a letter dated December 1, 2014, the 30-day period within which to respond to the Notice of Intent to Dismiss Petition was extended, upon the Division's request, to January 20, 2015. On December 3, 2014, petitioner, appearing by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., of counsel), submitted a letter in opposition to dismissal. On January 20, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich) submitted an affidavit and accompanying documents in support of the proposed dismissal of the petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on January 20, 2015. After due consideration of the

affidavits, documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals challenging two notices of determination.

***FINDINGS OF FACT***

1. Petitioner, Short's Oil Company, Inc., filed a petition protesting two notices of determination, each pertaining to the period spanning November 1, 2010 through June 30, 2013, and assessing, respectively, additional motor fuel tax under Tax Law Article 12-A in the amount of \$84,951.52, plus interest, and additional tax on petroleum businesses under Tax Law Article 13-A in the amount of \$170,906.24, plus interest.

2. The petition is dated as signed on September 18, 2014. The envelope in which the petition was filed, by certified mail, bears a machine metered (Pitney Bowes) postmark also dated September 18, 2014. The petition and the envelope are date stamped as received by the Division of Tax Appeals on September 19, 2014.

3. On November 4, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice is issued.

In this case, two notices of determination (Assessment Nos. L-040429497 and L-040429470) were issued to petitioner on November 20, 2013. However the petition was not filed until September 18, 2014, or three hundred and two (302) days later.

The parties were afforded 30 days from the date of the Notice of Intent to submit written

comments on the proposed dismissal. That 30-day period was extended, upon the request of the Division of Taxation (Division), to January 20, 2015.

4. In response to the Notice of Intent to Dismiss Petition, the Division provided the following: (i) an affidavit, dated January 15, 2015, of Leo Gabovich; (ii) an affidavit, dated January 6, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated January 9, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a copy of petitioner's Petroleum Business Tax Return (Form PT-100), filed on October 20, 2013, which reports the same address for petitioner as that listed on the notices of determination at issue herein; and (v) the 30-page "Certified Record for Presort Mail - Assessments Receivable" (CMR) for November 20, 2013, together with copies of the notices of determination referenced in Finding of Fact 1.

5. According to the affidavit of Ms. Nagengast, the process by which the Division generates and subsequently issues statutory notices, such as the notices of determination at issue herein and other such notices, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). Ms. Nagengast attests to her use of and familiarity with the Division's CARTS system.

6. The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one page "Mailing Cover Sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the

front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on

the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS) (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the windows. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York, area for mailing. A USPS employee then affixes his or her initials or signature and/or a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

10. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of items being mailed, so as to allow for correction or issuance at another time. When a piece of mail is pulled, a line is placed through the entry on the CMR for that piece of mail and the preprinted total number of pieces of mail listed on the last page of the CMR is manually adjusted to reflect the actual number of pieces being mailed after any items have been pulled.

11. The CMR for the batch of notices to be issued on November 20, 2013, includes the two notices of determination addressed to petitioner herein, and to petitioner’s former representative, bearing the assessment numbers set forth in Finding of Fact 1. The CMR consists of 30 cut sheet pages, including page 27, which is the page on which information pertaining to petitioner and to petitioner’s former representative appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time “run” listing of “20133171700” (*see* Finding of Fact 8). Appearing in the upper right corner of the first and last pages of the CMR (i.e., pages 1 and 30), is the handwritten date “11/20/13” reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each page of the CMR includes a USPS postmark dated November 20, 2013. All pages of the CMR include 11 entries, with the exception of page 27, where one of the original 11 entries is crossed out, and page 30, the last page of the CMR, which contains 6 entries.

12. In this case, certified control numbers “7104 1002 9730 0100 5185” and “7104 1002 9730 0100 5192,” pertaining to petitioner, were assigned to the notices of determination bearing

assessment numbers L-040429470 and L-040429497, and were to be mailed to petitioner at its Rd 4, Box 65, Wellsville, NY 14895-9804 address. Certified control numbers “7104 1002 9730 0100 5161” and “7104 1002 9730 0100 5178,” pertaining to petitioner’s previous representative, were likewise assigned to the notices of determination bearing assessment numbers L-040429470 and L-040429497, and were to be mailed to petitioner’s former representative at his 14 Washington Street, Wellsville, NY 14895 address. This same information appears at Page 27 of the CMR to indicate that the notices of determination bearing such certified control numbers and reference numbers were mailed to petitioner and to its previous representative at such addresses.<sup>1</sup>

13. Appearing on Page 30 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 325, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” Appearing to the immediate right of this heading is the handwritten, circled and initialed number 324, above which the preprinted number 325 has been manually canceled. Appearing at the lower right side of page 30 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately below and to the right of this stamped instruction reflects the initials of the postal clerk and the aforementioned USPS postmark dated November 20, 2013. In fact, these same initials and USPS postmark appear on each page of the

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<sup>1</sup> The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

CMR. Thus, page 30 of the CMR indicates that a total of 324 pieces of mail were delivered into the custody of the USPS on November 20, 2013.

14. As noted, a piece of mail may be pulled from a mailing for any number of reasons (*see* Finding of Fact 10). Review of the CMR in this case reveals that one piece of mail, assigned certified control number 7104 1002 9730 0100 5246 was pulled, and a line is drawn through the information for that piece of mail as appearing on page 27 of the CMR. As described, the preprinted number 325 reflecting the Total Pieces and Amounts listed on page 30 of the CMR, has been crossed out and the handwritten number 324 has been inserted after the preprinted listing for Total Pieces Received at Post Office.” This change is consistent with the removal or “pulling” of one piece of mail from the 325 items to be mailed on November 20, 2013.

15. The facts set forth above as Findings of Fact 5 through 14 were established through the affidavits of Mary Ellen Nagengast, a Division employee and Director of its MAPS bureau, and Bruce Peltier, a Division employee and Supervisor in the Division’s mail room (*see* Finding of Fact 4), together with the documents submitted therewith. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those notices of determination at issue herein as well as their subsequent issuance by mailing via delivery to the USPS.

16. Petitioner’s Form PT-100 filed on October 21, 2013, lists petitioner’s name and Wellsville, New York, address, as well as the name of petitioner’s previous representative, Jack J. Crawford.

16. The Division maintains that the foregoing evidence establishes that the notices of determination at issue herein properly issued to petitioner and to petitioner's previous representative on November 20, 2013. In turn, the Division asserts that the petition challenging such notices was filed more than 90 days after the date on which they were issued, leaving the same untimely and the Division of Tax Appeals without jurisdiction to review the same on the merits.

17. Petitioner's current representative correctly notes that the Division bears the burden of providing requisite proof that the notices of determination were properly mailed to petitioner and to its previous representative on November 20, 2013, as claimed by the Division. Petitioner's current representative alleges that the notices were not received by petitioner or its previous representative, but rather were only received when the same were furnished to petitioner's current representative by e-mail on July 22, 2014. In turn, petitioner's current representative notes that the petition filed on September 18, 2014, or some 58 days after receipt of such e-mail, was timely as filed within 90 days after receipt of actual notice of the assessments.<sup>2</sup>

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

A. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may be granted:

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<sup>2</sup> In so arguing, petitioner's representative makes no concession that providing notice of a tax assessment via e-mail in any manner constitutes providing proper notice thereof.

“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]).

C. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law §§ 288[5]; 315; 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, there is no claim or evidence that petitioner filed a request for a conciliation conference with BCMS. Thus, the question presented is whether the petition herein was filed within 90 days after the issuance of the notices of determination.

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the underlying statutory notices by mailing the same, via certified or registered mail, to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air*

*Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. Here, the Division has offered proof sufficient to establish the proper mailing of the two statutory notices of determination described in Finding of Fact 1 to petitioner’s last known address on November 20, 2013, and also properly mailed a copy of such notices to petitioner’s then-representative, as required, on the same date (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on the last return (Form PT-100) for Tax Law Article 12-A and Article 13-A purposes filed by petitioner prior to the issuance date of the subject notices, and satisfies the “last known address” requirement. The notices were thus properly mailed on November 20, 2013, and it was incumbent upon petitioner to file either a

Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

F. The foregoing two notices of determination were, as set forth above, properly mailed on November 20, 2013. However, the petition in this matter was not filed until September 18, 2014, or some 302 days thereafter. The petition was thus not timely filed and as a consequence, the Division of Tax Appeals is without jurisdiction to provide a hearing to address the substantive merits of these notices. Accordingly, the Notice of Intent to Dismiss Petition is sustained as to these two notices of determination and the petition is dismissed with respect thereto.

G. The Notice of Intent to Dismiss Petition is sustained and the petition of Short's Oil Company, Inc., is dismissed.

DATED: Albany, New York  
April 2, 2015

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE