

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DAVID GARITTA** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 827065  
Sales and Use Taxes Under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 1994 through :  
August 31, 1996. :  
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Petitioner, David Garitta, 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 September 1, 1994 through August 31, 1996.<sup>1</sup>

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated August 7, 2015, on the basis that the petition did not appear to have been filed in a timely manner. The notice advised that each party was afforded a period of 30 days, within which to file written responses to the notice. This time was extended, as requested by both parties, until November 9, 2015. Petitioner, by his representative, Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA), filed a response to the Notice of Intent of Dismiss Petition, opposing dismissal, on October 23, 2015. The Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel) submitted its response in support of dismissal by the due date of November 9, 2015, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5 [d]; 3000.9 [a] [4]). After due consideration

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<sup>1</sup> The petition initially also protested four withholding tax assessments (L012799697-4, L-012799698-3, L-012799696-5, and L-012799695-6) for which the Division of Taxation could not provide proof of mailing. The Notice of Intent to Dismiss Petition has been rescinded as to those assessments and they will go forward on the merits under a new case number, DTA 827300, and will not be discussed herein.

of the documents and arguments submitted by the parties, along with the pleadings and proceedings had herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued notices of determination numbers L-011250577-2 and L-011250578-1, dated October 23, 1995, to petitioner, David Garitta, asserting additional sales and use taxes in the sum of \$1,822.25 and \$23,403.52, respectively, taking into account payments and credits, for the period September 1, 1994 through February 28, 1995. The notices bore the address of "PO Box 387, Rockaway, NY 11518-0387."

2. The Division issued Notice of Determination number L-012146993-2, dated June 3, 1996, to petitioner, asserting additional sales and use taxes in the sum of \$20,679.07, plus penalty and interest, for the period June 1, 1995 through August 31, 1995. The address on the Notice was "10 Main St, E Rockaway, NY 11518-2003."

3. The Division issued notices of determination numbers L-012734105-9, L-012734106-8, L-012734107-7 and L-012734108-6, dated October 7, 1996, to petitioner, asserting additional sales and use taxes in the sum of \$5,312.50, \$5,672.23, \$7,632.41 and \$6,558.39, respectively, plus interest and penalty, taking into account payments and credits applied to notice L-012734108-6, for the periods March 1, 1995 through May 31, 1995 (assessment number L-012734108-6), and September 1, 1995 through May 31, 1996 (assessment numbers L-

012734105-9, L-012734106-8, and L-012734107-7) . The address on each of the four notices was “10 Main St, E Rockaway, NY 11518-2003.”

4. The Division issued Notice of Determination number L-013059468-2, dated December 30, 1996, to petitioner, asserting additional sales and use taxes in the sum of \$5,620.63, plus penalty and interest, for the period June 1, 1996 through August 31, 1996. The address on the Notice was “10 Main St, E Rockaway, NY 11518-2003.”

5. Petitioner filed a petition with the Division of Tax Appeals, which was received on July 3, 2015, having been delivered by United Parcel Service (UPS).

6. On August 7, 2015, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated, in pertinent part, as follows:

“You are hereby notified of our intent to dismiss the petition in the above referenced matter.

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

The notices of determination (Assessment Nos. L-011250577-2, L-011250578-1, L-012146993-2, L-012734108-6, L-012734106-8, L-012734107-7, L-012734105-9, and L-013059468-2) appear to have been issued on October 23, 1995, June 3, 1996, October 7, 1996, and December 30, 1996, respectively, but the petition was not filed with the Division of Tax Appeals until July 3, 2015, or seven thousand one hundred ninety-three (7,193), six thousand nine hundred sixty-nine (6,969), six thousand eight hundred forty-three (6,843), and six thousand seven hundred fifty-nine (6,759) days later.

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Pursuant to 20 NYCRR 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.”

7. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of the following Division employees: (i) Christopher O'Brien, Esq., an attorney in the Office of Counsel, dated November 2, 2015; (ii) Deena Picard, currently a Data Processing Fiscal Systems Auditor 3 in the Office of Budget and Management Analysis of the Division, formerly and during periods pertinent to this matter, in the Information Systems Management (ISM) Bureau, dated October 29, 2015; (iii) Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division, who, in her position, is familiar with the past and present office procedures as they relate to statutory notices, dated October 29, 2015; (iv) Bruce Peltier, a Principal Mail and Supply Clerk who has been a supervisor in the Division's mail room since March, 1999, dated October 29, 2015; and (v) Diane Rynski, a Taxpayer Services Administrator 2 in the Division's Office of Processing and Taxpayer Services-Personal Income Tax Bureau, and Division employee since 1989, dated October 15, 2015 and October 16, 2015.

In addition, the Division submitted various pertinent documents including, (i) a copy of the petition filed with the Division of Tax Appeals on July 3, 2015; (ii) copies of microfiche representations of two notices of determination dated October 23, 1995; (iii) a copy of the Notice of Determination dated June 3, 1996; (iv) copies of four notices of determination dated October 7, 1996; (v) a copy of the Notice of Determination dated December 30, 1996; (vi) copies of the "CERTIFIED RECORD FOR NON-PRESORT MAIL" (CMR) containing a list of the statutory notices mailed by the Division on each of these dates: October 23, 1995, June 3, 1996, October 7, 1996 and December 30, 1996; and (vii) two transcripts of petitioner's personal income tax return for tax years 1994 and 1995, filed April 15, 1995 and April 15, 1996, respectively.

8. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Michael Buxbaum, CPA, submitted a letter, dated October 23, 2015, that stated that the notices of determination were not addressed to petitioner's last known address, and since the statute of limitations had expired, such notices should be cancelled. A request is made, in the alternative, for a hearing on the merits of the matter on the basis that petitioner was not a responsible person for Dave's Wines and Liquors, Inc.

9. The affidavits of Deena Picard, a Data Processing Fiscal Systems Auditor 3 in the Division's Office of Budget and Management Analysis, discuss her position in the Information Systems Management (ISM) Bureau, where Ms. Picard worked from 1992 to 2006. As part of her regular duties in ISM, she oversaw the daily computer operations of the Division's computer system, which stores and prints the statutory notices that are issued to taxpayers. Specifically, Ms. Picard attests that:

"4. It is the Department's regular business practice to retain microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hardcopies of statutory notices. The manner in which microfiche copies of statutory notices are generated and retained by the Department of Taxation and Finance is explained below.

The Organization of Assessment Data

5. During the course of every business day, the Department's keyboard operators enter assessment data into the Department's CARTS (Case and Resource Tracking System) computer system from computer terminals. From the computer terminal, they direct the computer system to add a new 'case' using the information that has been entered. The 'on-line' program which controls the data entry procedure then stores the data entered in a record format in the control area of the computer system until the close of business. After business hours each night, the 'Create Assessment' program within the computer system 'sweeps' the data, accumulated during the course of the day, in the computer's control area.

6. This nightly sweep procedure takes the data in the computer, organizes it by assessment and for each assessment, by filing period, assigns assessment numbers to the data for all the respective taxpayers and sets up a CARTS case in the computer system for each individual assessment. For example, in this matter, the

data for the Petitioner was organized and set up under assessment number L-011250577 [L-011250578 for the second assessment]. Once a case has been set up in the CARTS system in this manner, Department personnel can access the case information from a computer terminal by keying in the assessment number.

#### The Generation of Statutory Notices

7. After the case has been set up in the CARTS system, the creation of statutory notices is controlled by the billing program within the system. This program updates interest and penalties and stores a record of the statutory notices and other documents which are generated by the CARTS system and sent to the taxpayer and/or the representative (e.g. Statement of Proposed Audit Changes, Notice of Deficiency, Notice and Demand, Notice of Estimated Determination, Etc.). This record includes a description of the document generated and sent, the date on the document, the amounts due which were set forth in the document, the address on the document, and any other addresses to which the document was to be sent.

8. The billing program produces a document when told to do so via a command entered by a data entry person. Once the particular notice has been created within the computer system by the billing program, but prior to printing, the data is copied onto one large computer disk referred to as the billing output file, so that it can be run through the Department's pre-sort procedure.

#### The Pre-sort Procedure

9. The purpose of the pre-sort procedure is to prepare the particular notice for mailing. The pre-sort procedure is run by computer program which, among other things, organizes the data so that the notices are sorted according to whether they are to be sent by regular first class mail or certified mail (Notices of Deficiency and Notices of Determination). They are then sorted within each batch by zip code, which results in a discount to the Department on postage costs. The hard copies of the notices are later printed and stacked according to zip code to facilitate the insertion of the statutory notices and any attached pages into envelopes by a sophisticated machine referred to as an intelligent inserter.

10. During the pre-sort procedure, bar codes are placed in the upper left hand corner of each page of the notice so that the intelligent inserter knows how many pages are included with each statutory notice so that all pages can be inserted together into one envelope. The pre-sort procedure also entails the assignment of a certified mail control number to the particular notice. This number will correspond with the number appearing on the mailing log and the certified mail documentation affixed to the envelope at the time of mailing. The pre-sort program then inserts a code in the data which will be printed in the right margin of the microfiche. This code, which has been highlighted in yellow in the right margin of Exhibit 'A' is inserted so that the microfiche copy of the notice can be sorted according to the particular Tax Department organizational unit that generated the statutory notice.

11. Once the pre-sort procedure is complete, a computer file containing the data which will be printed on each statutory notice is recorded on computer tape (hereinafter 'the record tape'). During the production of the record tape, the pre-sort program omits the bar codes and job control language (print formatting commands) such that the information generated, when applied to the microfiche, will not be in the same format as the printed hard copy.

12. Although the format is different, the content is identical except that (1) the microfiche contains a numerical code (highlighted in the upper left corner of the microfiche Exhibit 'A') which, among other things, represents the day and time that the nightly sweep procedure begins, and (2) the hard copy contains a similar code (highlighted in the lower left hand corner of the hard copy). The content of the microfiche copy is discussed in greater detail below. After the record tape has been generated, the pre-sorted data is then sent to the print phase of the computer system so the hard copy can be printed and sent to the taxpayer.

13. A record tape is then sent to the New York State Office of General Services (OGS) twice a week. The computer system at OGS reads the information from the computer tape and the information is then applied to microfiche using a special machine located at OGS. OGS then sorts the microfiche using the organizational unit code in the right hand margin (see, Par. 10) and, within approximately two days, sends the prepared microfiche to the Department where it is retained.

#### A Comparison of Microfiche with a Hard Copy

14. Attached hereto as Exhibit 'B' is a copy of a Notice of Determination which was generated by the CARTS system and sent to another individual taxpayer. The assessment information has been redacted to preserve confidentiality. Also attached as part of Exhibit 'B' is a microfiche copy of the Notice of Determination for this case. The microfiche copy has been marked up and numerically cross-referenced to the hard copy of the Notice of Determination to illustrate that the microfiche copy is indeed an unformatted copy of the hard copy of the Notice of Determination.

15. Attached as Exhibit 'C' is a copy of the form which, at the time the Notice of Determination for this case was generated, was the overlay, i.e. the blank form that the hard copy was printed on. As the form indicates, the Department letterhead and logo, the boxing notation and the language, 'KEEP THIS NOTICE FOR YOUR RECORDS' is preprinted on the first page of the form. The language, 'KEEP THIS NOTICE FOR YOUR RECORDS', is also preprinted on the second page of the form. The fact that these notations are preprinted on the form explains why they do not appear on the microfiche copies.

16. In summary, based upon a review of Exhibits 'A,' 'B,' and 'C' it is clear that, with the exception of the computer codes mentioned above, the content of the

microfiche copy of the Notice of Determination contains all the information printed on the hard copy."

Having examined the two microfiche documents, copies of which were attached to her affidavits, Ms. Picard attested that such documents were true and accurate microfiche copies of the notices of determination, Nos. L-011250577 and L-011250578, issued on October 23, 1995, to petitioner at his PO Box 387, Rockaway, NY 11518-0387 address.

10. The affidavits of Mary Ellen Nagengast set forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from the Case and Resource Tracking System (CARTS) the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and assigned a certified control number. CARTS also generates any enclosures referenced within the body of each notice. Each batch of statutory notices is accompanied by a CMR, listing each statutory notice being mailed, with a certified control number assigned to each, and specified under the heading entitled, "CERTIFIED NO." The assessment numbers are listed under the heading, "NOTICE NUMBER." The names and addresses of the recipients are listed under, "NAME OF ADDRESSEE, STREET AND PO ADDRESS."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing. Following the Division's general practice, this date was manually changed on the first page of each CMR in the present case to reflect the actual mailing dates of each of the four CMRs pertinent to this matter: "10-23-95," "6-3-96," "10/7/96" and "12/30/96."

11. According to the Nagengast affidavit relating to the CMR dated October 23, 1995, the CMR consists of 10 connected pages and lists 108 certified control numbers along with

corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, wrote the number 108 on page 10 and initialed the same page.

Page 5 of the CMR indicates that two statutory notices with certified control numbers P 911 204 625 and P 911 204 626, and assessment ID numbers L 011250577 and L 011250578, respectively, were both mailed to petitioner at "PO BOX 387, ROCKAWAY, NY 11518-0387," the address listed on the microfiche representations of the subject notices.

Based upon the review by Ms. Nagengast of the affidavits of Deena Picard with attached exhibits, and her personal knowledge of notices issued to taxpayers, Ms. Nagengast attested that the microfiche copy of notices of determination presented into evidence, No. L-011250577, bearing certified control number P 911 204 625, and No. L-011250578, bearing certified control number P 911 204 626, issued to petitioner, are true and accurate copies taken from the hard copies of the notices issued to petitioner on October 23, 1995. Further, she attested that the assessment identification numbers and the certified control numbers that appear on the CMR for October 23, 1995 are the same as those located on the microfiche copies of the two notices issued on that date.

12. According to the Nagengast affidavit relating to the CMR dated June 3, 1996, the CMR consists of 21 connected pages and lists 221 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled the number 221 on page 21 and initialed the same page.

Page 11 of the CMR indicates that a statutory notice with certified control number P 911 204 292 and assessment ID number L-012146993 was mailed to petitioner at "10 MAIN ST, E ROCKAWAY, NY 11518-2003," the address listed on the Notice of Determination dated June 3, 1996.

Ms. Nagengast attested that the Notice of Determination presented into evidence, No. L-012146993, bearing certified control number P 911 205 292, issued to petitioner, is a true and accurate copy of the notice issued to petitioner on June 3, 1996, and that the assessment identification number and the certified control number that appear on the CMR for June 3, 1996, are the same as those located on the Notice of Determination issued to petitioner on that date.

13. According to the Nagengast affidavit relating to the CMR dated October 7, 1996, the CMR consists of 11 connected pages and lists 119 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that

all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR,<sup>2</sup> wrote and circled the number 119 on page 11 and initialed the same page.

Page 6 of the CMR indicates that four statutory notices with certified control numbers P 911 205 069, P 911 205 070, P 911 205 071 and P 911 205 072, and assessment ID numbers L 012734105, L 012734106, L 012734107 and L 012734108, respectively, were mailed to petitioner at “10 MAIN ST, E ROCKAWAY, NY 11518-2003,” the address listed on each of the subject notices.

Ms. Nagengast attested that the notices of determination presented into evidence, Nos. L 012734105, L 012734106, L 012734107 and L 012734108 bearing certified control numbers P 911 205 069, P 911 205 070, P 911 205 071 and P 911 205 072, respectively, are true and accurate copies of the notices issued to petitioner on October 7, 1996, and that the assessment identification numbers and the certified control numbers that appear on the CMR for October 7, 1996, are the same as those located on the notices of determination issued to petitioner on that date.

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<sup>2</sup> Although two pages of the CMR bear only partial date stamps, there is sufficient information on the stamp along with sequential numbering of the certified numbers on the CMR to conclude that the date stamp was from the same time frame.

14. According to the Nagengast affidavit relating to the CMR dated December 30, 1996, the CMR consists of 14 connected pages and lists 147 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled the number 147 on page 14 and initialed the same page.

Page 4 of the CMR indicates that a statutory notice with certified control number P 911 203 953 and assessment ID number L 013059468 was mailed to petitioner at "10 MAIN ST, E ROCKAWAY, NY 11518-2003," the address listed on the Notice of Determination dated December 30, 1996.

Ms. Nagengast attested that the Notice of Determination presented into evidence, No. L-013059468, bearing certified control number P 911 203 953, and issued to petitioner, is a true and accurate copy of the notice issued to petitioner on December 30, 1996, and that the assessment identification number and the certified control number that appear on the CMR for December 30, 1996 are the same as those located on the Notice of Determination issued to petitioner on that date.

15. The affidavit of Bruce Peltier, a mail room supervisor, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for

“Outgoing Certified Mail.” A staff member operates a machine that puts each notice and the associated documents into a windowed envelope so the addresses and certified numbers from the Mailing Cover Sheet show through the windows. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. The Mail Processing Center (Center) further requests that the USPS employee either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR.

16. According to the Peltier affidavit relating to assessment ID numbers L-011250577 and L-011250578, and the CMR dated October 23, 1995, Mr. Peltier noted that the USPS employee initialed page 10 of the CMR and affixed a postmark dated October 23, 1995, to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by writing the number “108” on the last page next to the heading “Total Pieces Received at Post Office.” Based upon his review, Mr. Peltier attested to the fact that petitioner’s name and his address as set forth on the statutory notices would have been displayed in the windows of the envelope. According to the Peltier affidavit, a copy of the subject notices of determination were mailed to petitioner on October 23, 1995, as claimed.

17. According to the Peltier affidavit relating to assessment ID number L-012146993, and the CMR dated June 3, 1996, Mr. Peltier noted that the USPS employee initialed page 21 of the

CMR and affixed a postmark dated June 3, 1996 to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by circling the number "221" on the last page next to the heading, "Total Pieces Received at Post Office." Based upon his review, Mr. Peltier attested to the fact that petitioner's name and his address as set forth on the statutory notice would have been displayed in the windows of the envelope. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner on June 3, 1996, as claimed.

18. According to the Peltier affidavit relating to assessment ID numbers L-012734105, L-012734106, L-012734107 and L-012734108, and the CMR dated October 7, 1996, Mr. Peltier noted that the USPS employee initialed page 11 of the CMR and affixed a postmark dated October 7, 1996 to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by circling the number "119" on the last page next to the heading, "Total Pieces Received at Post Office." Based upon his review, Mr. Peltier attested to the fact that petitioner's name and his address as set forth on the statutory notices would have been displayed in the windows of the envelope. According to the Peltier affidavit, copies of the subject notices of determination were mailed to petitioner on October 7, 1996, as claimed.

19. According to the Peltier affidavit relating to assessment ID number L-013059468, and the CMR dated December 30, 1996, Mr. Peltier noted that the USPS employee initialed page 14 of the CMR and affixed a postmark dated December 30, 1996 to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by circling the number "147" on the last page next to the heading, "Total Pieces Received at Post Office." Based upon his review, Mr. Peltier attested to the fact that

petitioner's name and his address as set forth on the statutory notice would have been displayed in the windows of the envelope. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner on December 30, 1996, as claimed.

20. The affidavits of Diane Rynski stated that as part of her regular duties she oversees the analysis and testing of computer systems that process tax information, store information derived from various sources and generate printed documents that are sent to taxpayers, including printouts of purged information. Ms. Rynski examines the documents that are generated after a taxpayer's information is captured from the taxpayer's actual return and stored in a record. The taxpayer's address is a part of that information, and based upon review of the respective printouts, Ms. Rynski attested that the address shown on petitioner's 1994 return was "PO Box 387, Rockaway, NY 11518-0387," and the printout shows a filing date of April 15, 1995. This was the last return filed with the Division before the Notice of Determination dated October 23, 1995, was issued. According to Ms. Rynski, the address shown on petitioner's 1995 return was "10 Main St., E Rockaway, NY 11518-2003," and the printout shows a filing date of April 15, 1996. This was the last return filed with the Division before the notices of determination dated June 3, 1996, October 7, 1996 and December 30, 1996 were issued.

21. The facts set forth above in Findings of Fact 9 through 20 were, as noted, established through the affidavits of Deena Picard, Mary Ellen Nagengast, Bruce Peltier and Diane Rynski, as well as the documentary evidence presented by the Division.

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

A. Tax Law § 1138 (a) (1) authorizes the Division of Taxation to issue a Notice of Determination for additional sales and use taxes due. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination within 90 days of the mailing of

the notice of determination (*see* Tax Law § 1138 [a] [1]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment (*id.*). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.9 (a) (4).

B. Section 3000.9 (a) (4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9 (a) (1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9 [a] [1] [ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9 [a] [2] [I]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9 (a) (4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9 (a) (1) (ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss.

C. As provided in section 3000.9 (b) (1) of the Rules, a motion for summary determination “shall 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.” Section 3000.9 (c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima

facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [1960]). “To defeat a motion for summary judgment the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

D. Where the timeliness of a taxpayer’s petition is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered 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 (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the

standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process. However, in each of the Peltier affidavits, he describes how the statutory notices and associated documents are placed into a windowed envelope so that the addresses and certified numbers from the “Mailing Cover Sheet” show through the windows, indicating a clear presence of a mailing cover sheet. Mr. Peltier’s conclusion is that petitioner’s name and address alone, as set forth on the statutory notice, would have been displayed in the windows of the envelope, intimating the absence of the mailing cover sheet and, perhaps, the certified number. No mailing cover sheets were included with any of the notices of determination in this matter. The Tax Appeals Tribunal has recently held that the absence of the mail cover sheet raises a material factual issue of whether the Division’s standard mailing procedure was followed in a particular case (*Matter of Alvarenga*, May 28, 2015). The importance placed upon the mail cover sheet by the Tribunal is the fact that it lists both the taxpayer’s address and the certified control number, both of which can be compared to and verified against the CMR. The Tribunal in *Alvarenga* found no other evidence in that record to overcome the evidentiary flaw of the absence of the mailing cover sheet. In this case, however, unlike *Alvarenga*, the notices of determination, each identified with its own assessment ID number, including the microfiche representations of the notices dated October 23, 1995, all bear petitioner’s address and the certified control number associated with it. A comparison of the addresses, the certified control numbers and the assessment ID numbers on each of the notices can be found on the CMR, sufficient to conclude that such notices were mailed on the dates established by the CMR to which they correspond. This information,

coupled with the postmarks and the completed final page of each CMR as previously described, results in the conclusion that the CMRs for October 23, 1995, June 3, 1996, October 7, 1996 and December 30, 1996, were properly completed and constitute documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Petitioner did not dispute that the eight notices were mailed as addressed on October 23, 1995, June 3, 1996, October 7, 1996 and December 30, 1996, respectively, but rather that they were not mailed to petitioner's last known address, and therefore, were defective, and their issuance was beyond the statute of limitations and, thus, they should be cancelled.

Tax Law § 1138 (a) (1) requires that a Notice of Determination "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." On the same point, Tax Law § 1147 (a) (1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." The mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed" (*Matter of Rakusin*).

G. Here, the record shows that petitioner's address as listed on the Resident Income Tax Return, Form IT-201, filed by petitioner for tax year 1994, on April 15, 1995, was "PO Box 387, Rockaway, NY 11518-0387," the same address that appears on assessment ID numbers L-011250577 and L-011250578. This was the last return filed before the notices of determination were issued on October 23, 1995, and constitutes his last known address for those notices.

Concerning the remaining six notices, the record shows that petitioner's address as listed on the Resident Income Tax Return, Form IT-201, filed by petitioner for tax year 1995, on April 15, 1996, was "10 Main St, E Rockaway, NY 11518-2003," the same address that appears on assessment ID numbers L-012146993, L-012734105, L-012734106, L-012734107, L-012734108 and L-013059468. This was the last return filed before the notices of determination were issued on June 3, 1996, October 7, 1996 and December 30, 1996, and constitutes his last known address for those notices.

Accordingly, the Division has shown that it mailed the subject notices of determination to petitioner at his "last known address" consistent with Tax Law § 1138 (a) (1) and at "such address as may be obtainable" under Tax Law § 1147 (a) (1). Therefore, petitioner's argument to the contrary fails.

H. Tax Law § 1147 (b) provides that no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return. It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (*see Matter of Adamides v. Chu*, 134 AD2d 776 [1987], *lv denied* 71 NY2d 806 [1988]; *Matter of Convissar v. State Tax Commn.*, 69 AD2d 929 [1979]; *Matter of Servomation Corp. v. State Tax Commn.*, 60 AD2d 374 [1977]). To establish this defense, the taxpayer must proceed forward with a prima facie case showing the date on which the limitation period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (*Matter of Richards*, Tax Appeals Tribunal, December 3, 1991; *see also Amesbury Apts., Ltd. v. Commr.*, 95 TC 227 [1990]; *Matter of Jencon*, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable. The

Division then must proceed with countervailing evidence demonstrating that the statutory notice was timely mailed (*Matter of Richards*; see also *Coleman v. Commr.*, 94 TC 82 [1990]).

Petitioner failed to introduce the evidence necessary to present a prima facie case to support the statute of limitations defense. The sales tax returns were not introduced into evidence to establish the date of filing, and no other evidence was offered to establish this fact. In absence of any evidence that the notices of determination were received after the expiration of the statutory period, petitioner has failed to show an essential element of the statute of limitations claim. Further, as a matter of law, the sales tax return for the quarter ending November 30, 1994 (the earliest tax period assessed) was filed no earlier than December 20, 1994. Thus, the period of limitation for the mailing of a notice of determination for such period would expire on December 20, 1997 (Tax Law § 1147 [b]). Since it has already been established that the notices were all mailed to petitioner as maintained by the Division prior to December 20, 1997 (the latest being December 30, 1996), no portion of the assessments in issue are deemed time-barred by the statute of limitations.

I. In light of the conclusions reached above, the Division of Taxation has established that it properly mailed the notices of determination to petitioner on October 23, 1995, June 3, 1996, October 7, 1996 and December 30, 1996, respectively, and the petition, filed on July 3, 2015, was not timely. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this matter (*Matter of Sak Smoke Shop*).

J. The petition of David Garitta is hereby dismissed.

DATED: Albany, New York  
February 4, 2016

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE