

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ADEM SERVICE STATION** : ORDER  
 : DTA NO. 825809  
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 December 1, 2008 :  
through November 30, 2011. :  
:

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Petitioner, Adem Service Station, 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 June 1, 2008 through November 30, 2011.

On January 2, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Lori P. Antolick, Esq., dated January 2, 2014 and annexed exhibits. Petitioner did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on February 2, 2014, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated March 14, 2013 and bearing assessment identification number L-039132591-9. The notice is addressed to petitioner, Adem Service Station Inc. at "7-ELEVEN STORE #39365A, 590 E FORDHAM RD, BRONX, NY 10458-5037." A copy of the notice was addressed to Leonard Fiegel, CPA, 200 Hempstead Avenue, Lynbrook, NY 11563. According to the notice, the Division's records indicated that Mr. Fiegel was petitioner's representative for the tax matters at issue.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination. The request was dated July 7, 2013 and stamped as received by BCMS on July 10, 2013.

3. On July 26, 2013, BCMS issued a Conciliation Order Dismissing Request. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on March 14, 2013 but the request was not received until July 10, 2013 or in excess of 90 days, the request is late filed.

4. Petitioner also filed a petition with the Division of Tax Appeals dated August 1, 2013 that was stamped as received on August 5, 2013. According to the petition, petitioner responded to a Statement of Audit Changes on March 25, 2013 and June 3, 2013.

5. To show proof of proper mailing of the March 14, 2013 Notice of Determination, the Division provided, among other things, the following with its motion papers: (i) a 27-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (ii) copies of the March

14, 2013 notices of determination with the associated mailing cover sheet; and (iii) a copy of the request for a conciliation conference.

6. Page 14 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1516 0108 and assessment ID number L-039132591 was mailed to petitioner at the Bronx, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

7. Page 18 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1516 0597 and assessment ID number L 0391132591 was mailed to Mr. Fiegel at the Lynbrook, New York, address listed on his copy of the Notice of Determination.

8. Each page of the CMR is postmarked March 14, 2013. The stamp indicates that the CMR was stamped by the Postal Service located at Colonie Center. Two entries on page 2 have been struck. The date "3/14/13" appears in the upper right corner of page 1 and the upper right corner of page 27. There is a stamp on the last page, which requests the post office to handwrite the total number of pieces and initial. The total number of pieces listed as received at the post office was 289. This number was struck and a handwritten 287 appears along with an individual's initials.

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

A. 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination to a

taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient. . . .” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

C. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170[3-a][b]; § 1138[a][1]). If a taxpayer fails to do so, or file a timely petition protesting a statutory notice (*see* Tax Law § 2006[4]), the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the Division must carry its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Division has not offered any affidavits or other evidence of either a standard procedure used by the Division for the issuance of statutory notices or any proof that the standard procedure was followed in this case. Under these circumstances, the Division’s motion must be denied.

F. The motion to dismiss or in the alternative for summary determination is denied without prejudice to renewal.

DATED: Albany, New York  
May 1, 2014

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE