

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**KHURRAM KHAN** : DETERMINATION  
 : DTA NO. 823409  
 :  
for Revision of a Determination or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 of :  
the Tax Law for the Period March 1, 2006 through :  
February 28, 2009. :

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Petitioner, Khurram Khan, 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 March 1, 2006 through February 28, 2009.

On June 1, 2010, the Division of Taxation filed a motion requesting an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Accompanying the motion to dismiss, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, then submitted a response in opposition to the Division's motion on June 16, 2010, and pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Khurram Khan, Notice of Determination L-031854178, dated April 27, 2009.
2. In protest of the notice of determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was dated September 5, 2009 and delivered to BCMS on September 3, 2009.
3. Following this request, BCMS issued a Conciliation Order Dismissing Request (CMS No. 234955) on September 25, 2009 denying petitioner's request for a conciliation conference because, having filed a request for conciliation conference on September 3, 2009, petitioner had allowed 130 days to elapse between the issuance of the notice of determination and subsequent request.
4. On December 19, 2009, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of determination at issue.
5. The Division provided a copy of petitioner's last personal income tax return for 2007, which confirmed petitioner's last known address as 90-15 211<sup>th</sup> Street, Queens Village, NY 11428, for purposes of issuing the notice of determination at issue on April 27, 2009.
6. The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the New York State Department of

Taxation and Finance (Department). CARTS refers to the Department's computer system for generating documents that include notices of determination issued to taxpayers. The computer generated statutory notices are predated with the anticipated date of mailing and each are assigned a certified control number.

7. Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was generated and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

8. The CMR for the notice issued to petitioner on April 27, 2009 consisted of 18 pages, with the words, "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on page 18.

9. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of determination is placed in the "Outgoing Certified Mail" area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last

pieces of certified mail listed on the CMR against the information contained on the CMR and performs a random review of up to 30 pieces of the certified mail listed.

10. Once review takes place, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

11. A review of the CMR confirms that a USPS employee initialed page 18 of the CMR, affixed a postmark to each page of the CMR and wrote the total number of pieces of certified mail received. Page 18 of the CMR originally listed 189 pieces of mail; however, the number of pieces received at the post office shows 184, reflecting the fact that 5 pieces of certified mail had been “pulled” from the mailing record. The 5 pieces that were pulled from the CMR did not concern the listing for petitioner.

12. On April 27, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 90-15 211<sup>th</sup> Street, Queens Valley, NY 11428, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

13. The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in preparing United States Postal Form 3811-A to request return receipts after mailing certified mail. Ms. Corina attested to the request she made to the Postal Service for delivery information on the certified mail sent to petitioner. Specifically, the Form 3811-A detailed that certified mail number 7104 1002 9730 1317 9355 was delivered on

April 29, 2009 at 1:13 P.M. at petitioner's Queens Village address. It also shows the scanned signature image of the recipient, which appears as Naseem Akhtas with 90-15 211 St. written as well.

14. Petitioner responded to Division's motion to dismiss on June 16, 2010, asserting that he did not receive the notice of determination until the 90-day period in which he had to reply had nearly expired. Mr. Khurram's explanation for this occurrence was that he was in Pakistan from January 11, 2009 until July 21, 2009.

15. Mr. Khurram provided photocopies of his passport, showing a stamp from the Lahore Airport in Pakistan, dated January 11, 2009, on page 10 of his passport and a stamp from customs in New York, dated July 21, 2009, on page 20 of his passport.

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

A. Tax Law § 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due. As an alternative to petitioning for a hearing in the Division of Tax Appeals, the taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" (20 NYCRR 4000.3[a]).

B. Tax Law § 170(3-a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

The filing of a written request, and one conformed copy, with the BCMS “suspends the running of the period of limitations for the filing of a petition for a hearing” (20 NYCRR 4000.3[c]).

Pursuant to these provisions, petitioner had 90 days from the date the assessment was issued (April 27, 2009) to either request a conciliation conference or file a petition for a hearing, but failed to do either within the allowable time requirement.

C. 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, Inc.*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is 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 Katz*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory 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.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

G. The production of the CMR by the Division constitutes sufficient documentary evidence to establish the subject notice of determination was mailed as addressed to petitioner on April 27, 2009. The document listed: (1) name and address, (2) a corresponding certified control number, (3) U.S. Postal Service postmarks dated April 27, 2009, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. The CMR has been properly completed, therefore, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. Here, as in *Matter of T.J. Gulf Inc. v. New York State Tax Commn.*, petitioner merely denies receipt of the notice, yet does not provide any evidence that routine office practices were not followed by the Division or the U. S. Postal Service (*Matter of T.J. Gulf Inc. v. New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]). In fact, the evidence shows that the notice was actually delivered to petitioner's last known address.

I. Furthermore, petitioner arrived home from Pakistan on July 21, 2009, by which date he would still have had time to file a timely request with BCMS or a petition with the Division of Tax Appeals, but he did not comply with this requirement.

J. The petition of Khurram Khan is hereby dismissed.

DATED: Troy, New York  
August 19, 2010

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE