

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**AZIZ KHAN** : ORDER  
 : DTA NO. 825293  
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, 2005 through February 28, 2007. :

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Petitioner, Aziz 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 June 1, 2005 through February 28, 2007.

On November 29, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On December 31, 2012, petitioner Aziz Khan, appearing pro se, submitted written comments in opposition to dismissal. On December 13, 2012, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), elected to proceed based upon documents submitted in a prior action (DTA 825136) in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on December 31, 2012. After due consideration of the documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. On October 12, 2012, petitioner, Aziz Khan, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review assessment number L-030504127-1, which was attached to the petition.

2. Assessment number L-030504127-1 related to a Notice of Determination, dated August 7, 2008, and was addressed to petitioner at a Dix Hills, New York, address.

3. On November 29, 2012, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of a Notice of Determination issued to petitioner on August 7, 2008 and that the petition was not filed until October 12, 2012.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated October 17, 2012, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which included the Case and Resource Tracking System (CARTS) Control Unit, with knowledge of both past and present office procedures relating to statutory notices; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated August 7, 2008; (iii) an affidavit, dated October 17, 2012, of Bruce Peltier, the current Principal Mail and Supply Supervisor; and (iv) a copy of petitioner's jointly filed 2003, 2008, and 2010 New York resident income tax returns, each of which reported the same Dix Hills, New York, address for petitioner as that listed on the subject Notice of Determination.

5. The petition filed in this matter also reported the same Dix Hills, New York, address for petitioner as that reported on the subject Notice of Determination and the 2003, 2008, and 2010 New York resident income tax returns submitted by the Division.

6. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices prior to shipment to the mail processing center. Mr. Maney averred that he held this position since January 2010. He stated that he receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced (or run) approximately 10 days in advance of the anticipated date of mailing and the date (and time) of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "8-7-08." It is also the Division's general practice 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 its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

8. The CMR relevant to the Notice of Determination under protest consisted of 45 pages and listed 491 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney noted that portions of the CMR that were attached to his affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee affixed a USPS postmark to many pages of the CMR, many of which were illegible, and also wrote his or her initials on each page thereof. The legible postmarks indicated a date of "Aug-7 2008." There was no legible postmark on the last page of the CMR, page 45, which contained a statement of the total number of pieces received by the Postal Service for mailing.

9. Page 24 of the CMR indicated that a Notice of Determination, assigned certified control number 7104 1002 9730 0787 5133 and assessment number L-030504127, was mailed to petitioner at the Dix Hills, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a supervisor in the Registry Unit since 1999 and currently a mail and supply supervisor in the Division's Mail Processing Center (Center), described the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The mailing cover sheet preceded each notice. A staff member retrieved the notices and mailing cover sheets and operated a machine that put each notice and mailing cover sheet into a windowed envelope. Staff members then weighed, sealed and placed postage on each envelope. The envelopes were counted and the names and certified control numbers verified against the CMR. A staff member then delivered the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee would then affix a postmark and also place his or her signature or

initials on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contained the postal service employee's initials but not a legible postmark. The Center further requested that the USPS 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. Here, the USPS employee complied with this request by circling the number "491" on the last page and placing his or her initials on the page.

11. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Determination was mailed to petitioner on August 7, 2008, as claimed.

12. In his petition, petitioner stated that the assessment was derived from the Division's determination that he was responsible for the taxes due from 492 Fast Food, Inc., but claimed that he was not involved in the affairs of that corporation because he was a dentist by profession, signed no checks, and received no dividends. He stated that he had resigned from the corporation in 2004, prior to the instant audit period. Petitioner also argued that he believed that another responsible person had filed a petition in this matter on behalf of the corporation and that, because of that petition, he was not required to file a petition herein.

13. In comments filed in response to the Notice of Intent to Dismiss, petitioner asserted that he never received the Notice of Determination herein, L-030504127, and was out of the country during the month of August 2008.

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

A. Tax Law § 1138(a)(1) authorizes the Division 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 (Tax Law § 1138[a][1]). 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).

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. Accordingly, the instant matter shall be treated as a motion for summary determination, and “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” (20 NYCRR 3000.9[b][1]).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry focuses on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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).

C. 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 Conditioning Sales & Serv.*).

D. In this case, the Division has not fulfilled the requirement to introduce adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier. Specifically, the affidavit of Bruce Peltier indicated that he had been a supervisor in the Registry Unit of the New York State Department of Taxation and Finance since March 1999. However, there is no explanation of what the unit does, where it exists within the Tax Department and whether Mr. Peltier's duties in the Registry Unit since 1999 involved mailing procedures. In fact, his affidavit appears to distinguish his prior supervisory experience in the Registry Unit and his current position of Principal Mail and Supply Supervisor, wherein he has acquired a familiarity with the operations and procedures of the Mail Processing Center. This confusion makes it impossible to conclude that Mr. Peltier was familiar with the mailing operations and procedures in effect when the notice in this matter was allegedly mailed, or issued.

Further, the Maney affidavit fails to state how his current position, held only since January 2010 and after the issuance of the notice herein, qualified him to make statements in his affidavit concerning specific mailing procedures conducted by the Mail Processing Center. It also does not explain why he would have any knowledge of mailing procedures given his statement that he supervised the processing of notices of determination *prior* to shipment to the Department's Mail Processing Center.

Similar shortcomings were recently discussed in *Matter of Madoff* (Tax Appeals Tribunal,

April 19, 2012):

In this case, the Division has attempted to offer proof to establish the mailing of the statutory notice on the same date that the notice was dated, i.e., May 4, 2009, to petitioner's last known address. The affidavits submitted by the Division describe the Division's general mailing procedures. The affidavit of Patricia Finn Sears, the supervisor of the CARTS unit, sets forth certain aspects of the Division's general practice and procedure for processing statutory notices. Ms. Sears' affidavit indicates that the CARTS unit supervises the processing of statutory notices prior to their shipment to the Department's Mail Processing Center for mailing. Accordingly, Ms. Sears is not competent to assert what procedures take place in the Division's Mail Processing Center or what services the United States Postal Service performs for the Mail Processing Center personnel.

The Division also submitted the affidavit of James Steven VanDerZee, the mail and supply supervisor of the Division's Mail Processing Center. In his affidavit, Mr. VanDerZee described the center's operations and procedures as they pertain to statutory notices. However, in his affidavit, Mr. VanDerZee did not clearly represent whether he was employed with the Division on the date the Notice was alleged to have been mailed, i.e., May 4, 2009, and thus how he knew the Mail Processing Center's operation and procedures on that date. Rather, in his affidavit, Mr. VanDerZee, in relevant part, represented that he has been with the Division, at his current supervisor's title, since February of 2010, which is months after the date that the relevant Notice is claimed to have been mailed.

The Tribunal reversed the determination of the Administrative Law Judge that granted summary determination for the Division and found that further proceedings were warranted in order to clarify the ambiguities in the affidavits submitted and establish the proper mailing of the notice.

E. The Division has also failed to present sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on August 7, 2008. Specifically, this document did not contain legible USPS postmarks on each page, indicating the mailing date of August 7, 2008, despite the fact that both the Peltier and Maney affidavits assert that a postmark was affixed to each page.



In this regard, it was notable that there was no legible postmark on the last page, page 45, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Based on record presented, there appear to be triable issues of fact and the Notice of Intent to Dismiss Petition, dated November 29, 2012, is withdrawn and the Division of Taxation shall have 75 days from the date of this Order to file an answer to petitioner's petition.

DATED: Albany, New York  
March 14, 2013

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE