

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**GAETANO MODICA** : DECISION  
for Revision of a Determination or for Refund of Sales : DTA NO. 826119  
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, Gaetano Modica, filed an exception to the determination of the Administrative Law Judge issued on September 11, 2014. Petitioner appeared by Michael Buxbaum, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a letter brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in reply. Neither party requested oral argument. The six-month period for the issuance of this decision began on April 3, 2015, the date of receipt of petitioner's reply letter brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether petitioner timely protested a notice of determination.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except for findings of fact 5 and 10, which we have modified to more fully reflect the record. We have also made an

additional finding of fact, numbered 13 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

1. The subject of the instant matter is the timeliness of petitioner's protest of a notice of determination, dated January 16, 2013 and bearing assessment number L-039004312. Such notice is addressed to petitioner, Gaetano Modica, at "1837 CHANNEL RD, BROAD CHANNEL, NY 11693-1233." It assesses sales and use taxes for the period December 1, 2008 through November 30, 2011 in the amount of \$72,543.83, plus interest and penalty. The notice states that petitioner must file a request for conciliation conference or a petition for a Tax Appeals hearing by April 16, 2013.

2. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was postmarked November 19, 2013 and received by BCMS on November 25, 2013.

3. On December 13, 2013, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice 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 January 16, 2013, but the request was not received until November 25, 2013, or in excess of 90 days, the request is late filed."

4. Petitioner timely filed a petition challenging the dismissal on February 27, 2013. In it, petitioner stated that the notice was not sent to petitioner's last known address and that petitioner never received a copy of the notice.

5. The Division of Taxation (Division) brought a motion for summary determination seeking denial of the petition on the basis that petitioner's request for conciliation conference

was untimely. In support of its motion and to prove mailing of the notice of determination under protest, the Division submitted, among other documents, the following: (i) the petition of Gaetano Modica, dated February 27, 2013; (ii) an affidavit, dated May 15, 2014, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 16, 2013; (iv) an affidavit, dated May 16, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (v) a copy of petitioner's resident income tax return (IT-201) for the year 2011.

6. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMR is printed approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page of the CMR, in the upper right corner, to the actual mailing date of "1/16/13." In addition, the pages of the CMR are banded together when the documents are delivered to the United States Postal Service (USPS) and stay banded unless ordered by Mr. Maney. The page numbers of the CMR run consecutively, beginning with "PAGE: 1," and are noted in the upper right corner of each page.

7. Each notice is assigned a certified control number that appears on a separate one-page mailing cover sheet. The mailing cover sheet also bears a bar code, the taxpayer's mailing address, the Division return address on the front and the taxpayer assistance information on the

back. In addition, the certified control number is listed on the CMR under the heading “Certified No.” The assessment numbers are listed under the heading “Reference No,” while the names and addresses of the recipients are listed under “Name of Addressee, Street and P.O. Address.”

8. The CMR contains 17 pages and lists 183 certified control numbers. The entire CMR is attached to Mr. Maney’s affidavit, and portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark to each page of the CMR and signed or initialed the last page.

9. Page 13 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 1445 5670 and assessment number L-039004312 was sent to “Modica - Gaetano, 1837 Channel RD, Broad Channel, NY 11693.” The corresponding mailing cover sheet bears the same certified control number and petitioner’s name and address.

10. The affidavit of Bruce Peltier describes the Division’s Mail Processing Center’s (Center) general operations and procedures. The Center receives the notices in an area designated for “Outgoing Certified Mail.” A staff member operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Then the staff members weigh, seal and place postage on each envelope. The first and last pieces are checked against the information on the CMR. A clerk then performs a random review of up to 30 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 places his or her signature or initials on the CMR, indicating receipt by the post office. The Center requests 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 CMR. Here, each page of the CMR contains a USPS postmark of January 16, 2013 and on page 17, the USPS employee circled the preprinted number 183 (i.e., the total number of pieces listed on the CMR) and wrote his or her initials adjacent thereto.

Appearing below the preprinted number 183 on page 17 of the CMR is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” A review of page 17 reveals no handwritten number.

11. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on January 16, 2013 as claimed.

12. The resident income tax return for the year 2011, bearing the same address shown on the notice and the CMR, was filed on March 21, 2012. This was the last return filed before the notice was issued.

13. Following the issuance of the Administrative Law Judge’s determination, petitioner brought a motion to reopen the record and for reargument. By order dated November 26, 2014, the Administrative Law Judge denied petitioner’s motion.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge concluded that the Division had met its burden of establishing the date and fact of mailing of the subject notice of determination to petitioner’s last known address. Specifically, the Administrative Law Judge found that the CMR in this matter was properly completed and thus constituted probative evidence of the date and fact of mailing. Accordingly, the Administrative Law Judge concluded that the CMR, along with the Maney and Peltier affidavits, established that the Division had a general mailing procedure and that such procedure was followed in this instance. The Administrative Law Judge also found that the

record established that the Division met its obligation to mail the notice to petitioner's last known address. The Administrative Law Judge thus concluded that the Division proved proper mailing of the notice on January 16, 2013, and accordingly, that petitioner's request for conciliation conference, filed on November 19, 2013, was untimely. The Administrative Law Judge rejected petitioner's claim that he did not receive the notice as insufficient to rebut the Division's evidence of mailing.

### ***ARGUMENTS ON EXCEPTION***

As he did in his opposition to the Division's summary determination motion and on his motion to reopen and reargue, petitioner asserts that the CMR was not properly completed. Specifically, petitioner claims that the circling of the total pieces number on page 17 of the CMR is inconsistent with the stamped instruction to "Hand write total # of pieces" on that page. Petitioner thus contends that the stamped instruction represents the Division's mailing policy and that the Division did not follow that policy in mailing the subject notice of determination. Petitioner further asserts that the Maney and Peltier affidavits are insufficient to overcome this failure because the affidavits describe a mailing policy that was changed subsequent to January 16, 2013 in light of the Division's failure to follow the stamped instruction on the CMR.

Petitioner also asserts, for the first time in this matter, that he seeks relief herein due to the impact of Hurricane Sandy. He requests that this Tribunal take official notice of a news article on the effect of that storm on petitioner's local post office in Broad Channel, Queens, New York. Petitioner also requests that official notice be taken of certain notices issued by the Division and the Internal Revenue Service extending certain filing deadlines as a consequence of the storm.

The Division asserts that the documentation submitted establishes proper mailing of the

statutory notice on the date claimed. The Division thus asserts that the Administrative Law Judge properly determined that petitioner's request for conciliation conference was late-filed.

The Division objects to any consideration of facts related to Hurricane Sandy. The Division contends that this is a new factual issue and that such issues may not be raised on exception. Alternatively, the Division argues that, even if the notices cited by petitioner on exception are considered, they provide no relief to petitioner.

### ***OPINION***

The Administrative Law Judge's determination granted a motion for summary determination brought by the Division. Our Rules of Practice and Procedure provide that such a motion "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]).

Our rules further provide that a motion for summary determination is subject to the same provisions as a motion for summary judgment brought under the CPLR (20 NYCRR 3000.9 [c]). We have articulated the well-established standard for the granting of such a motion as follows:

"Inasmuch 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, 293 NYS2d 93). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (*Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990)" (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

With certain exceptions not relevant here, there is a 90-day statutory time limit for filing a

petition following the issuance of a notice of determination (Tax Law § 1138 [a] [1]).

Alternatively, a taxpayer may file a request for conciliation conference with BCMS to protest a notice of determination if such request is filed within the same 90-day statutory time limit (Tax Law § 170 [3-a] [a]). Pursuant to these provisions, a notice of determination is binding upon a taxpayer unless a timely petition or a timely request for conciliation conference is filed. The Division of Tax Appeals and this Tribunal lack jurisdiction to consider the merits of a late-filed protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). When such evidence is furnished, the Division is not required to produce employees who personally recall the mailing of the notice in question (*see Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice of determination was mailed as addressed to petitioner on January 16, 2013. Specifically, this document lists certified control numbers and assessment numbers with corresponding names and addresses and bears USPS postmarks dated January 16, 2013, on each page. As noted, petitioner's name, address and the relevant assessment and certified control numbers appear on page 13 of the CMR. There are 183 pieces of mail listed on the CMR and a postal employee circled the preprinted 183 total pieces listed number and initialed the CMR to indicate receipt by the post office of all 183 pieces of mail listed thereon in accordance with the Division's standard mailing procedure. We thus conclude that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montasanto*, Tax Appeals Tribunal, March 31, 1994).

In reaching the foregoing conclusions we necessarily reject petitioner's contention that the mailing procedures as described in the Peltier affidavit were created after the fact and were not reflective of the Division's mailing procedures on the date the subject notice was mailed. There are numerous decisions of this Tribunal over many years indicating that, as part of its standard mailing procedure, the Division has requested USPS employees to either write the total number of pieces received or to circle the total number of pieces listed to indicate receipt of the same (*see e.g. Matter of Malrath Real Estate Development Corp.*, Tax Appeals Tribunal, July 15, 1999;

*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of Leibowitz*, Tax Appeals Tribunal, August 13, 2015). Accordingly, the stamped instruction on page 17 of the CMR notwithstanding, we concur in the Administrative Law Judge's conclusion that the affidavits establish the Division's standard mailing procedure.

We also reject petitioner's contention that the CMR was not properly completed because, contrary to the stamped instruction, the number of pieces received was not handwritten by the USPS employee. As we have accepted the Division's standard mailing procedure as set forth in the Peltier affidavit, it follows that the circling was an acceptable means for the USPS employee to indicate receipt of the items and thereby complete the CMR (*cf. Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001 [a properly completed CMR "shows the Division's compliance with its own procedures"]). We note further that the CMR contains a January 16, 2013 postmark on each page and that it is, in all other respects, undisputedly properly completed. Additionally, we note that this Tribunal has previously held that the Division met its burden to prove mailing where, as in the present matter, a USPS employee circled the preprinted total pieces on the CMR in accordance with the Division's standard mailing procedure, notwithstanding the presence of a similar stamped instruction to "hand write" the total number of pieces on the CMR's last page (*Matter of Cato*).

In support of his contention that proper completion of the CMR in this case required the USPS employee to hand write the total number of pieces received, petitioner notes the following language in this Tribunal's decision in *Matter of Rakusin*:

"Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed; i.e., by entering the number of pieces of mail received in the space provided for that entry."

We disagree with petitioner that our decision in *Rakusin* requires that a USPS employee hand write the total number of pieces received in order to properly complete the CMR. In *Rakusin*, the Division produced only selected pages of the relevant CMR and, as a consequence, this Tribunal determined that the page containing the petitioner's mailing information could not be associated with any of the other pages. More significant to the present discussion, the single page of the CMR containing petitioner's information contained no indication of receipt of the items on that page by a USPS employee, i.e., neither a handwritten number nor a circled total pieces number. Hence, our decision in *Rakusin* held that a CMR with no indication of USPS receipt was insufficient to establish delivery to the USPS, and not as petitioner asserts, that a handwritten number was specifically required to establish such delivery. Consistent with our holding in *Rakusin*, and underscoring the status of the language cited by petitioner as dicta, this Tribunal subsequently held that the circling of the preprinted number of pieces listed on a CMR in accordance with the Division's mailing procedure by a USPS employee was sufficient to prove delivery of the items to the USPS (*Matter of Kushner*, Tax Appeals Tribunal, June 27, 2002; *see also Matter of Leibowitz*). Still later, and consistent with both *Rakusin* and *Kushner*, this Tribunal issued *Matter of Cato*, discussed above, wherein the circling of the preprinted number in accordance with Division mailing procedure was sufficient, even where the CMR contained a stamp similar to the one on page 17 of the CMR at issue.

We next address petitioner's claim on exception that the impact of Hurricane Sandy provides a basis upon which to provide relief herein. Contrary to the Division's assertion, we find that this is a legal issue and therefore may be raised on exception (*see Matter of Leibowitz*). In support of his position, petitioner cites two Department of Taxation and Finance "important

notices” (*see* NY St Dept of Taxation & Fin Important Notice N-12-11 [October 2012] [“Announcement Regarding Hurricane Sandy”] and N-12-16 [December 2008] [“Additional Extension of Dues Dates for Victims of Hurricane Sandy”]). In its brief, the Division also cites three executive orders issued by Governor Cuomo in the aftermath of the storm (*see* Executive Order [Cuomo] No 47 [Oct 26, 2012], No 52 [Oct 31, 2012] and No 81 [Nov 20, 2012]). Upon review, we agree with the Division that the cumulative effect of the cited documents (as relevant here) was to extend then-running limitations periods for the filing of requests for conciliation conference or petitions until December 25, 2012. The cited notices and executive orders do not extend limitations periods commencing after December 25, 2012. The subject notice of determination is dated January 16, 2013, and the 90-day limitations period commenced as of that date. Accordingly, the cited notices and executive orders have no application to the instant circumstances. In the absence of any extension of filing deadlines, petitioner’s request for conciliation conference remained subject to the statutory 90-day period (*see Matter of Leibowitz*). Contrary to petitioner’s contention, this Tribunal lacks the discretion to extend the period of limitations to file a petition or request for conciliation conference (*see Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Given this lack of discretion, we note that the Internal Revenue Service notice extending certain filing deadlines is plainly irrelevant to the instant matter.

We agree with the Division that petitioner’s request that we take notice of the effect of Hurricane Sandy on his local post office is a new factual issue that is not properly raised on exception (*see Coram Diner Corp.*, Tax Appeals Tribunal, March 12, 2015). Accordingly, we decline to address this issue.

Pursuant to the foregoing discussion, we find that the Division properly issued the subject notice of determination to petitioner at his last known address on January 16, 2013. Pursuant to Tax Law § 1138 (a) (1), petitioner had 90 days from that date to file either a request for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. Petitioner's request for conciliation conference was filed on November 19, 2013, well-beyond the 90-day period. As noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gaetano Modica is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Gaetano Modica is denied.

DATED: Albany, New York  
October 1, 2015

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner