

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DAVID GARITTA	:	DECISION
	:	DTA NO. 827065
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.	:	

Petitioner, David Garitta, filed an exception to the determination of the Administrative Law Judge issued on February 4, 2016. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq. of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on August 22, 2016, the date petitioner's letter brief in reply was received.

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have designated the determination's footnote 1, which recites part of the procedural history of this case, as an additional finding of fact, numbered 22 herein. As so modified, the Administrative Law Judge's findings of fact appear below.

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 Supervising Administrative Law Judge 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.

* * *

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 canceled. 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 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 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,¹ 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.

¹ 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 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 notices of determination dated October 23, 1995, were 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.

22. The petition in this matter initially also protested four withholding tax assessments (L-012799697-4, L-012799698-3, L-012799696-5, and L-012799695-6). The Division, however, was unable to provide proof of mailing of those assessments. The notice of intent to dismiss petition was therefore rescinded as to those assessments and they are proceeding on the merits under a new case number, DTA No. 827300, and are not discussed further herein.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed more than 90 days from the date of issuance of a notice of determination.

The Administrative Law Judge then observed that, as the instant matter proceeded from the issuance of a notice of intent to dismiss petition, the proper standard of review is the same as that for a summary determination motion. The Administrative Law Judge then reviewed the standards for granting such a motion.

With respect to disputes involving the timeliness of petitions, the Administrative Law Judge noted that the Division bears the burden of establishing that it properly issued a statutory notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge then recited the well-established rule that the Division must establish its standard mailing procedure and that its procedure was followed in this specific case in order to meet this burden.

The Administrative Law Judge concluded that the Division met the foregoing standards and established that copies of the subject notices of determination were properly mailed to petitioner on the dates claimed by the Division. The Administrative Law Judge further

concluded that the period for the filing of a petition with the Division of Tax Appeals to protest such notices expired 90 days from the date of mailing. As the subject petition was filed with the Division of Tax Appeals many years after the notices were issued, the Administrative Law Judge determined that such petition was untimely. The Administrative Law Judge thus concluded that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioner's protest and dismissed the petition.

In reaching this conclusion, the Administrative Law Judge rejected petitioner's contention that the subject notices were not mailed to petitioner's last known address and were therefore not properly issued. To the contrary, the Administrative Law Judge found that the notices were mailed to the addresses appearing on petitioner's New York resident income tax returns for the years 1994 and 1995, respectively, and that the Division thereby met its last known address mailing obligation under Tax Law §§ 1138 (a) (1) and 1147 (a) (1). Additionally, having determined that the Division established proper mailing, the Administrative Law Judge found that petitioner's argument that the subject notices were issued after the expiration of the 3-year period of limitations for assessment was without merit.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues, as he did below, that the Division failed to mail the subject notices to his last known address as required and that, accordingly, his petition should be deemed timely and a hearing on the merits granted.

Specifically, petitioner asserts that his 1994 New York income tax return lists his address, in part, as "East Rockaway, NY 11518-0387" and not "Rockaway, NY 11518-0387" as listed on notices of determination L-011250577-2 and L-011250578-1, both of which are dated October

23, 1995. Petitioner notes that his 1994 return is not in the record and suggests that the Division made an error in creating the return transcript, which is in the record. Petitioner also contends that the zip code of 11518 as listed on notices of determination L-011250577-2 and L-011250578-1 corresponds to East Rockaway, New York, and does not correspond to “Rockaway, NY,” the municipality in the address listed on these notices. Additionally, petitioner contends that the school and county codes listed on the 1994 return transcript also do not correspond to a “Rockaway, NY” address. According to petitioner, given these purported discrepancies, the Division was obligated to make a “reasonably diligent search” of petitioner’s last known address. As the Division made no such search, petitioner contends that it failed to mail the subject notices to petitioner’s last known address as required under Tax Law §§ 1138 (a) (1) and 1147 (a) (1).

Regarding the six assessments addressed to “10 Main St., E Rockaway, NY 11518-2003,” petitioner contends that his address on his New York resident income tax return for 2005 (i.e., the most recent tax return on file as of the date of issuance of those notices) was “10 Main St., P.O. Box 387, East Rockaway, NY 11518-4018.” As with his 1994 return, petitioner notes that his 1995 return is not in the record and suggests a Division transcription error.

Petitioner also contends that the Administrative Law Judge improperly determined that the four withholding tax assessments for which the Division did not provide mailing proof, and with respect to which the notice of intent to dismiss has been rescinded (*see* finding of fact 22), were not relevant to the present matter.

It is the Division’s position that the Administrative Law Judge correctly determined that the Division demonstrated proper mailing of the relevant statutory notices to petitioner’s last

known address. The Division asserts that its use of petitioner's address as indicated on the last income tax return filed by him satisfies the last known address requirement.

OPINION

The Administrative Law Judge's dismissal of petitioner's protest of the notices of determination at issue was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). That is, 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]).

"The proponent of a summary judgment [or determination] 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 (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In contrast, the opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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 the Bureau of Conciliation and Mediation Services 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]). A notice of determination is binding upon a taxpayer unless he or she files a timely petition or a timely request for conciliation conference (Tax Law § 1138 [a] [1]). 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]).

Where, as here, the timeliness of a taxpayer's petition 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). 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 this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge's conclusion that 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.

We also agree with the Administrative Law Judge's conclusion that the four relevant CMRs relevant to this matter CMRs for October 23, 1995, June 3, 1996, October 7, 1996 and

December 30, 1996, were properly completed. As noted, petitioner's name and address, and corresponding certified control and assessment numbers are included on each CMR.

Additionally, each CMR bears USPS postmarks dated October 23, 1995, June 3, 1996, October 7, 1996 and December 30, 1996, respectively, on each page thereof. A USPS employee either hand wrote the total pieces listed number or circled the preprinted total pieces listed number and also initialed the CMRs to indicate receipt by the post office of all pieces of mail listed thereon in accordance with the Division's standard mailing procedure. As so completed, the CMRs are highly probative evidence of the fact and date of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

In reaching this conclusion, we note that the Division submitted microfiche copies of the notices of determination bearing assessment numbers L-011250577-2 and L-011250578-1. The affidavits of Ms. Picard establish that the Division maintains microfiche copies of statutory notices in lieu of paper copies in the regular course of its operations and that the microfiche copies of the notices in evidence contain the same information as that contained on the paper copies of the same notices (*see Matter of Huang*, Tax Appeals Tribunal, April 27, 1995).

In her determination, the Administrative Law Judge noted the absence of any copies of the relevant mail cover sheets from the documents submitted by the Division. On this point, we agree with the Administrative Law Judge's finding that the lack of such documents in the record is overcome by the fact that the notices of determination herein each contain the address to which the notice was mailed, the notice number and the certified control number and that such information correlates with the information contained on the relevant CMRs (*cf. Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015).

We thus agree with the Administrative Law Judge's conclusion that the Division has met its burden to show that the subject notices of determination were mailed as addressed to petitioner on the dates claimed.

As to the question of petitioner's last known address, 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 a notice of determination to an individual at the address given in the last New York personal income tax return filed by that individual at the time of such mailing generally fulfills the Division's "last known address" obligation pursuant to Tax Law §§ 1138 (a) (1) and 1147 (a) (1) (*see Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003).

We conclude, based on our review of the record, that the Division has established that the addresses on the income tax return transcripts accurately reflect the addresses as reported on petitioner's 1994 and 1995 returns. Accordingly, the Division has shown that the notices at issue were mailed to petitioner at the address given in the last New York personal income tax return filed by him at the time of such mailing.² We thus conclude that the Division met its burden to

² Specifically, petitioner's 1994 return was filed on April 15, 1995. This was the last return filed at the time the October 23, 1995 notices of determination were issued. Both the 1994 return and the October 23, 1995 notices list the "PO Box 387, Rockaway, NY 11518-0387" address. Petitioner's 1995 return was filed on April 15, 1996. This was the last return filed at the time the June 3, 1996, October 7, 1996 and December 30, 1996 notices of determination were issued. The 1995 return and the June 3, 1996, October 7, 1996 and December 30, 1996 notices each list the "10 Main St, E Rockaway, NY 11518-2003" address. (*See* findings of fact 1-4, 20.)

show that the subject notices were mailed to petitioner at his last known address.

Our conclusion relies on the affidavits of Ms. Rynski, which establish that the Division maintains a system of capturing and storing information from taxpayer income tax returns and that the transcripts of petitioner's returns in evidence correctly reflect the information as reported on those returns. We also note that petitioner offered no evidence to counter the Rynski affidavits. Rather, petitioner relies on the unsubstantiated claims of his representative that the address on the income tax return transcripts did not reflect petitioner's address as reported on his returns (*see* finding of fact 8). Given the Rynski affidavits, it was incumbent upon petitioner to provide more than his representative's bald assertions as to the address reported on his returns (*see Whelan v GTE Sylvania*, 182 AD2d at 449).

We disagree with petitioner's assertion that, under the present circumstances, the Division had an obligation to verify that the address as reported on petitioner's returns was correct. *Terrell v Commr.* (625 F3d 254 [2010]), cited by petitioner in support of this assertion, is distinguishable. In that case, the Internal Revenue Service had notice that a taxpayer's last known address on file was incorrect because previous letters sent to that address had been returned. Here, there is no evidence that the Division received any notice that the addresses reported on the returns were incorrect. Under such circumstances, we find that it was reasonable for the Division to rely on the addresses as reported on the returns.

Finally, we reject as meritless petitioner's complaint that the Administrative Law Judge improperly determined that the four withholding tax assessments were not relevant to the present matter. We note that petitioner did not clearly articulate a basis for this position.

Pursuant to the foregoing discussion, we find that the Division properly issued the subject

notices of determination to petitioner at his last known address on October 23, 1995 (L-011250577-2 and L-011250578-1), June 3, 1996 (L-012146993-2), October 7, 1996 (L-012734105-9, L-012734106-8, L-012734107-7 and L-012734108-6) and December 30, 1996 (L-013059468-2), respectively. Petitioner's petition in protest of such notices, received on July 3, 2015, was thus untimely filed (*see* Tax Law § 1138 [a] [1]). 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 David Garitta is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of David Garitta is dismissed, with prejudice.

DATED: Albany, New York
February 21, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner