

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**LARRY D. NAPIER, JR.** : DECISION  
 : DTA NO. 827392  
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, 2008 through August 31, 2014. :

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Petitioner, Larry D. Napier, Jr., filed an exception to the determination of the Administrative Law Judge issued on December 22, 2016. Petitioner appeared by Steven Nussbaum, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on April 14, 2017, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except findings of fact 1, 2, 8 and 9, which we have modified for clarity. In addition, we have omitted finding of fact

12, which is a summary of petitioner's arguments in opposition to the Division's motion. As so modified, these facts are set forth below.

1. On September 1, 2016, the Division of Taxation (Division) brought a motion before the Administrative Law Judge for an order dismissing the petition in this matter, or, in the alternative, an order granting summary determination. The subject of the motion was the timeliness of petitioner's protest of a notice of determination, assessment number L-042587538-5, dated March 17, 2015, and addressed to petitioner, Larry D. Napier, Jr., of USA Paving, at a Walter Smith Road, Catskill, New York, address. The notice assessed sales and use taxes due in the amount of \$53,243.04, plus interest and penalty, for the period September 1, 2008 through August 31, 2014. The mailing cover sheet that accompanied the notice of determination contained certified control number 7104 1002 9730 0422 6662.

2. Petitioner had filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) concerning sales and use taxes for the periods "2008-2014." The request references a notice dated October 28, 2015, and identified as notice L-042587538.<sup>1</sup> The basis for petitioner's request was his assertion that no sales taxes were due because the work was for capital improvements. The address that petitioner set forth on the request was a Picnic Woods Road, Clintondale, New York, address. The request was dated October 29, 2015, the date it was filed.

3. BCMS issued a conciliation order dismissing request (CMS No. 268371) to petitioner dated November 13, 2015. The order determined that petitioner's protest of the subject notice of determination was untimely and stated, in part:

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<sup>1</sup> A notice bearing this date was not submitted as part of the record.

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on March 17, 2015, but the request was not mailed until October 29, 2015, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on December 23, 2015, bearing the same Clintondale, New York, address as set forth on the request.

5. To show proof of proper mailing of the notice of determination in issue, the Division provided, along with the September 1, 2016 affidavit of Adam Roberts, Esq., the following with its motion papers: i) an affidavit, dated August 15, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since October 2005), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated August 16, 2016, of Bruce Peltier, a Division mail room supervisor (since March 1999); (iii) the New York State Department of Taxation and Finance Certified Record for Presort Mail-Assessments Receivable (CMR) date-stamped March 17, 2015; (iv) a copy of petitioner’s notice of determination, dated March 17, 2015, as described in finding of fact 1; (v) the petition filed with the Division of Tax Appeals with a copy of the face of its mailing envelope bearing a postmark of December 23, 2015, and date-stamped as received by the Division of Tax Appeals on December 28, 2015; and (vi) a copy of petitioner’s form MT-903-MN highway use tax return for the period July 1, 2014 through September 30, 2014, dated July 7, 2014, and, according to the Division’s records, filed on July 9, 2014.

6. The affidavit of Mary Ellen Nagengast sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast receives from 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. The certified number for each notice appears on a separate one-page mailing cover sheet that is generated by CARTS for each statutory notice. 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 "REFERENCE NO." The names and addresses of the recipients are listed under "NAME OF ADDRESSEE, STREET AND P.O. 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 and last pages of the CMR to reflect the actual mailing date of the notice, i.e., "3/17/15."

7. According to the Nagengast affidavit, the CMR consists of 45 cut sheet pages and lists 491 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 portions of the CMR that are attached to her affidavit have 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 "491" on page 45 and initialed the same page.

Page 37 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0422 6662 and assessment number L-042587538 was mailed to petitioner at the Walter Smith Road, Catskill, New York, address listed on the subject notice.

8. 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 that the addresses and certified number 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 of mail 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 room staff 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 CMR.

9. On the CMR dated March 17, 2015, Mr. Peltier noted that the USPS employee initialed or signed the last page, i.e., page 45, of the CMR and affixed a postmark dated March 17, 2015 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 "491" on the last page of the CMR. 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.

10. According to the Nagengast and Peltier affidavits, the subject notice of determination was mailed to petitioner on March 17, 2015, as claimed, to his Catskill, New York, address.

11. The Division submitted a copy of petitioner's form MT-903-MN, highway use tax return, dated July 7, 2014. According to the Division's records, this return was filed on July 9, 2014, and is the last return filed with the Division before the notice of determination was issued. The address appearing on the return is the same Catskill, New York, address as the one listed on the statutory notice and the CMR.

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

The Administrative Law Judge began her determination by noting that the Division's motion to dismiss the petition or, in the alternative, a motion for summary determination was brought under section 3000.9 (a) (b) of our Rules of Practice and Procedure (Rules). The Administrative Law Judge determined that because the petition in this matter was filed within 90 days of the issuance of the BCMS conciliation order dismissing petitioner's request for a conciliation conference, the Division of Tax Appeals had jurisdiction over the petition. Thus, according to the Administrative Law Judge, a motion for summary determination was the proper vehicle to consider the timeliness of petitioner's request.

The Administrative Law Judge next considered the standard of review for a motion for summary determination. According to the Administrative Law Judge, such a motion may be granted, if, upon all the papers and proof submitted, an administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. She next cited our Rules, which provide that a motion for summary determination is subject to the same provisions as a motion for summary judgment. The Administrative Law Judge cited

the case law that describes the standard of review for a motion of summary judgment, noting that a proponent of a such a motion must provide sufficient evidence to establish entitlement to judgment as a matter of law. However, according to the Administrative Law Judge, such a motion should be denied if material facts are in dispute or arguable.

Next, the Administrative Law Judge took note of petitioner's failure to submit evidence to contest the facts set forth in the Division's affidavits concerning the fact and date of mailing, resulting in those facts being deemed admitted.

The Administrative Law Judge cited the statutory provision that provides for administrative review if a taxpayer files a protest of a notice of determination within 90 days of issuance of the notice. She also stated that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit.

The Administrative Law Judge stated that, where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to petitioner's last known address. According to the Administrative Law Judge, the Division must show evidence of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures and proof that the standard procedure was followed in this particular instance.

The Administrative Law Judge determined that the Division had introduced adequate proof of its standard mailing procedures through the affidavits of the Division employees familiar with the procedure for issuing statutory notices. She also observed that the CMR was properly completed, and thus constitutes highly probative evidence of the mailing of the subject notice to the address listed on the date indicated. The Administrative Law Judge determined that the Division had established that it mailed a copy of the subject notice to the address listed on the

CMR on March 17, 2015 to petitioner at his Catskill, New York, address, which conformed with the address reported on the last return petitioner filed with the Division prior to the issuance of the statutory notice. Because petitioner offered nothing opposing the Division's evidence, the Administrative Law Judge concluded that petitioner was deemed to have admitted that his last known address was the one used in the mailing of the statutory notice.

The Administrative Law Judge further stated that because the Division established that it properly mailed the notice of determination on March 17, 2015, the statutory 90-day time limit for petitioner to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals expired well before petitioner's request for a conciliation conference was filed on October 29, 2015. In determining that petitioner's request was untimely filed, the Administrative Law Judge concluded that the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest. Thus, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition in this matter.

#### ***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner asserts that he did not receive the notice of determination here at issue. He argues that this raises an issue of fact that precludes granting summary determination in favor of the Division. Petitioner also avers that the additional tax asserted by the Division stemmed from work related to capital improvements and was not subject to sales and use tax. Furthermore, petitioner argues that the affidavits of the Division's employees amounted to hearsay evidence and thus did not support the Administrative Law Judge's conclusion that the notice of determination here at issue was issued to him.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. It argues that contrary to petitioner's position, hearsay evidence can be the basis of an



administrative determination. It also deems petitioner's argument that the income giving rise to the additional taxes here at issue stemmed from installation of capital improvements as immaterial because petitioner's protest was ultimately untimely filed.

### ***OPINION***

We note that the petition here was filed with the Division of Tax Appeals within 90 days of the issuance of the BCMS order dismissing petitioner's request for a conciliation conference, and as such, we concur with the Administrative Law Judge that the Division of Tax Appeals has jurisdiction over the petition in this matter (Tax law §§ 170 [3-a] [a], [e] and 2006 [4]; ***Matter of Novar TV & Air Conditioner Sales & Serv., Inc.***, Tax Appeals Tribunal, May 23, 1991). We also agree with the Administrative Law Judge that where the Division of Tax Appeals has jurisdiction over a petition, a motion to dismiss petition or, in the alternative, for summary determination is properly treated as a motion for summary determination (***Matter of 3410 Pons Food Corp.***, Tax Appeals Tribunal, September 7, 1995).

A motion for summary determination shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that no material and triable issue of fact is present and that the administrative law judge can, as a matter of law, issue a determination in favor of a party (20 NYCRR 3000.9 [b]). Such a motion for summary determination shall also be subject to the same provisions as a motion for summary judgment under CPLR 3212 (20 NYCRR 3000.9 [c]).

Previous Tribunal decisions have articulated the burden required of the movant for summary determination 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 [1968]). 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 [1960]). 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 [1989]).” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

Where, as here, the timeliness of a taxpayer’s request for a conciliation conference 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; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*). 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 Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

The Division issues a notice of determination of sales and compensating use taxes by certified or registered mail to the person liable for the collection or payment of sales and compensating use taxes at his last known address (Tax Law §§ 1138 [a] [1]; 1147 [a] [1]). The mailing of such a notice is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id.*) The Division is entitled to rely on the address listed on the last return

filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003). After 90 days of the mailing of the notice of determination, the notice becomes an assessment of the amounts of tax, interest and penalty asserted in the notice unless the taxpayer has filed a protest of the determination within that statutory period (Tax Law § 1138 [a] [1]).

We find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue.

We also find that the CMR was properly completed and, together with proof of the Division's standard mailing procedure, constituted highly probative evidence of both the fact and date of mailing of the notice of determination dated March 17, 2015. The CMR bears petitioner's name, the address listed on petitioner's highway use tax return dated July 19, 2014, a certified control number corresponding to the notice of determination's cover sheet, an assessment ID corresponding to the notice of determination, a dated postmark on each page, the initials of the postal employee accepting the articles of mail listed on the CMR and the total number thereof on the last page.

Having found that the Administrative Law Judge correctly determined that the Division bore its burden of demonstrating proper mailing of the notice of determination, we note that such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (*see* Tax Law § 1147 [a] [1]). First, petitioner's mere denial of receipt of the notice of determination is not sufficient to overcome this presumption (*see Matter of T.J. Gulf v New York*

*State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]). Second, it is of no consequence that evidence in this matter was submitted in the form of affidavits by persons familiar with the Division's mailing procedures, as this is substantial evidence upon which a determination may be based (*see Matter of Balan; Matter of Western Aries Constr.*). Petitioner's remaining argument relates to the substantive claims of his protest, which we do not reach as his request for a conciliation conference was untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Larry D. Napier, Jr. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Larry D. Napier, Jr. is denied.
4. The BCMS conciliation order dated November 13, 2015 is sustained.

DATED: Albany, New York  
September 28, 2017

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner