

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AHMED NAGI AHMED	:	DECISION
	:	DTA NO. 827803
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period March 1, 2013 through	:	
May 31, 2015.	:	

Petitioner, Ahmed Nagi Ahmed, filed an exception to the determination of the Administrative Law Judge issued on March 23, 2017. Petitioner appeared by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on October 11, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether petitioner filed a timely protest against the Division of Taxation’s assessment of tax and interest against him.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have

modified findings of fact 1 and 18 to better reflect the record. As so modified, the Administrative Law Judge's findings of fact are set forth below.

1. Petitioner, Ahmed Nagi Ahmed, by his duly appointed representative, Jacqueline S. Kafedjian, Esq., filed a petition with the Division of Tax Appeals. The petition is dated as signed on August 17, 2016, was mailed by United States Postal Service (USPS) certified mail, and the envelope in which the petition was mailed bears a USPS postmark dated August 17, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on August 22, 2016.

2. The petition specifically identifies the assessment at issue as assessment ID # L-044649192-4, and further specifies that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was "not held."¹ In addition to setting forth the substantive argument that petitioner was not a person responsible or required to collect and remit sales and use taxes on behalf of Uncle Grocery, Deli & 99 Plus Corp. (Uncle Grocery), the petition also alleges that a notice of determination representing the specified assessment was never served on petitioner.

3. Attached to the petition was:

a) A statement of proposed audit change for sales and use tax, dated March 10, 2016 and proposing a tax liability in the amount of \$24,403.20, against Uncle Grocery for the period spanning September 1, 2012 through May 31, 2015, plus interest. The lower portion of this statement includes an area wherein a taxpayer may, by the "Signature of Owner, Partner, or

¹ There is no claim, indication or evidence that a conciliation conference was requested by petitioner or his representative. Hence, it appears that such a conference was "not held" because one was not requested.

Corporate Officer or Authorized Representative,” consent to the proposed liability. This area reflects, under the title “president,” an illegible signature and the date “Mar 21/16.”

b) A notice and demand for payment of tax due, dated August 8, 2016, against petitioner, Ahmed N. Ahmed, listing the same assessment ID number (L-044649192-4; *see* finding of fact 2) and address for petitioner as are specified above (*see* finding of fact 1). The computation section attached to this notice and demand reflects tax due for the period spanning March 1, 2013 through May 31, 2015 in the amount of \$20,017.71, plus interest, and states that petitioner is liable, as an officer or responsible person, per Tax Law § 1138 (a), § 1131 (1) and § 1133, for the taxes owed by Uncle Grocery. It is noted that the period specified in the notice and demand does not include the earliest two sales tax quarterly periods set forth on the statement of proposed audit change pertaining to Uncle Grocery.

4. On October 13, 2016, Daniel J. Ranalli, then-Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing to petitioner, to petitioner’s current representative, and to the Division of Taxation (Division), a notice of intent to dismiss petition (notice of intent). The notice of intent provides as follows:

“In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested. Petitioner did not include the required notice of determination, and therefore the petition does not appear to have been timely filed.”

Under the notice of intent, petitioner was afforded a period of thirty days within which to file a corrected petition (i.e., provide the requisite statutory document conferring the right to a hearing), and to provide written comments on the proposed dismissal of the petition.

5. In response to the notice of intent, petitioner admits that he executed a consent for the

tax liability pertaining to the corporate entity, Uncle Grocery (presumably referring to the consent and illegible signature referenced in finding of fact 3.a), but did not execute a consent for himself personally. He maintains that while he received the notice and demand referenced above (*see* finding of fact 3.b), he never received a notice of determination assessing tax against him personally and asserts that the same was never issued against him.

6. On October 18, 2016, petitioner's representative requested a copy of the notice of determination allegedly issued in this matter. In response, on October 19, 2016, the Division provided a copy of the (admittedly received) notice and demand, dated August 8, 2016 and addressed to petitioner (described above), as well as a copy of a notice of determination, dated April 22, 2016 and addressed to petitioner (described hereafter).

7. The notice of determination, dated April 22, 2016, bearing assessment ID L-044649192-4, and addressed to petitioner, assesses sales tax due for the period spanning March 1, 2013 through May 31, 2015, in the amount of \$20,017.71, plus interest. In order to prove proper mailing of the foregoing notice of determination to petitioner, and to petitioner's representative, as claimed on April 22, 2016, the Division provided the following documents: (i) an affidavit, dated December 6, 2016 of Adam Roberts, Esq.; (ii) an affidavit, dated November 17, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a stores and mail operations supervisor in the Division's mail room; (iv) a 14-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the notice of determination dated April 22, 2016, together with its associated mailing cover sheet; and (vi) a copy of petitioner's Form IT-201 (New York State resident

income tax return) for the year 2011, filed February 20, 2012, listing petitioner's address as that set forth above, and representing petitioner's last filed return and last known address prior to the claimed date of issuance of the notice of determination at issue.

8. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of determination such as that at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page mailing cover sheet (form DTF-997) generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices. The mailing cover sheet is the first sheet in the unit.

9. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first column heading entitled "Certified No." The assessment numbers for the notices appear under the second column heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third column heading entitled "Name of Addressee, Street and P.O. Address." Remaining column headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory

notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., page: 1, page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

10. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

11. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces

of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

12. The CMR for the batch of notices to be issued on April 22, 2016, including the notice of determination addressed to petitioner and the copy thereof addressed to petitioner's representative, consists of 14 cut sheet pages. Each of the pages includes, in its upper left corner, the preprinted year/day/time "run" listing of "20161061700" (*see* finding of fact 10). Appearing in the upper right corner of the CMR on pages numbered "1" and "14" is the handwritten date "4/22/16," indicating the manually inserted date of actual mailing (*see* finding of fact 10). Each of the CMR pages submitted includes a legible USPS postmark of the Colonie Center branch office of the USPS, dated April 22, 2016 and listing zip code "12205." All pages of the CMR include 11 entries for pieces of mail, with the exception of page 14 (the final page), which includes seven entries for pieces of mail, thus resulting in a total of 150 pieces of mail listed on the CMR as originally printed.

13. In this case, the printed entry for the piece of mail listed on page six of the CMR and bearing certified control number 7104 1002 9730 0820 4932 was assigned to the reference (i.e., assessment) number L-044649192, and was to be mailed to petitioner at 4624 Avenue D, Brooklyn, NY 11203-5816. This information agrees with such information as appearing on the notice of determination and on the cover sheet associated therewith. Further, certified control number 7104 1002 9730 0820 5168 was also assigned to reference (i.e., assessment) number L-044649192, and was to be mailed to petitioner's representative, Jacqueline S. Kafedjian, at 62-26 Myrtle Avenue, Suite 105, Glendale, NY 11385.²

14. Appearing below the seven entries on page 14 of the CMR is the preprinted heading "Total Pieces and Amounts," to the right of which appear preprinted columns headed "Pieces," "Postage," and "Fees." These columns reflect the preprinted number of pieces of mail for this CMR, here 150, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading "Total Pieces Received At Post Office," to the right of which the number 150 is handwritten and circled. Appearing at the lower right area of page 14 is a stamped box bearing the instruction "POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas." The area immediately above and to the right of this stamped instruction reflects the aforementioned April 22, 2016 USPS postmark as well as the initials affixed by the postal clerk.

15. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division's MAPS Bureau, and Bruce Peltier, an

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

employee and supervisor in the Division's mail room (*see* finding of fact 7), and upon review of the CMR submitted by the Division. Each affiant avers to his or her personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

16. Petitioner initially responded to the notice of intent on October 26, 2016, and filed a supplemental response on December 13, 2016. In his initial response, petitioner maintained that a notice of determination was never issued against him in his own name and assessing personal liability against him for the sales taxes consented to and owed by Uncle Grocery (*see* finding of fact 5). On October 18, 2016, petitioner's representative requested (by facsimile to the Division) that the Division provide a copy of any such notice of determination. Petitioner initially maintained that he only received in response a copy of the notice and demand referenced above (*see* finding of fact 3-b).

17. Petitioner's supplemental response notes that the Division included a copy of the notice of determination assessing tax against him in his own name as part of its December 7, 2016 response to the notice of intent. Petitioner maintains that this was the first time that he or his representative received a copy of the notice of determination, maintains that the period of limitations within which to protest such notice should properly be tolled until December 7, 2016, and asserts that his petition should therefore either be deemed timely, or that the notice should be cancelled (at least in part) presumably because it was not issued within the period of limitations on assessment.

18. As part of his supplemental response, petitioner provided a USPS tracking information printout for each of the items of mail issued by the Division based upon the respective tracking numbers (i.e., the certified mailing control numbers specified in finding of fact 13). Petitioner's representative obtained the tracking information from the USPS website (usps.com). The tracking information lists the status of the items on various dates and associates a location with each listed status. Such location information consists of a city and a five-digit zip code, but not a street address. Consistent with the Division's mailing evidence, the tracking information shows that each of the two items of certified mail arrived at a USPS facility in Albany, New York, on April 22, 2016.

The tracking information for the item bearing the tracking number pertaining to petitioner (7104 1002 9730 0820 4932) indicates that delivery of this item was initially refused on April 25, 2016 at a Brooklyn, New York location with the same five-digit zip code as the address on the notice of determination bearing petitioner's name. The tracking information indicates "Addressee Unknown" on May 6, 2016 at the same Brooklyn zip code location. The tracking information further indicates that the item was subsequently routed through USPS facilities in "New York, NY" and Brooklyn, and was ultimately delivered by individual pick-up on May 17, 2016 at a USPS facility in Brooklyn, New York 11201. This is the same five-digit zip code as the return address on the notice of determination, which is the address of the Division's office at 345 Adams Street in Brooklyn.

The tracking information for the item bearing the tracking number pertaining to petitioner's representative (7104 1002 9730 0820 5168) reports: (1) "Notice Left (No Authorized Recipient Available)" on April 25, 2016 at a Ridgewood, New York location with the same zip

code as petitioner's representative's street address; (2) "Undeliverable as Addressed" on April 27, 2016 at the same zip code location; and (3) "Unclaimed/Max Hold Time Expired" on May 13, 2016 at same zip code location. The tracking information further indicates that the item was subsequently routed through USPS facilities in "New York, NY" and Brooklyn, and was ultimately delivered on May 20, 2016 to a Brooklyn, New York location with the zip code 11201, which, as noted, matches the zip code of the Division's Brooklyn office.

19. Finally, the record includes a copy of the Division's response to petitioner's representative's October 18, 2016 request (by facsimile) for a copy of the notice of determination at issue (*see* finding of fact 6). This October 19, 2016 response by the Division (included as exhibit F attached to petitioner's October 26, 2016 initial response to the subject notice of intent) consists of seven pages. Contrary to petitioner's claim that he only received in such response a copy of the notice and demand, the Division's full seven-page response dated October 19, 2016 (i.e., one day after petitioner's representative's facsimile request), references "Notes: Copy of *Notices for Ahmed N. Ahmed*," (italics added) and clearly includes therein both the notice and demand, at pages six and seven, and the notice of determination, at pages three, four and five, with each addressed to petitioner. By contrast, and concerning petitioner's claim that he only received the notice and demand in response to his representative's facsimile request, exhibit E (also attached to petitioner's October 26, 2016 initial response to the notice of intent) only includes pages one, two, six and seven thereof, and not pages three, four and five, on which the notice of determination is set forth.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first observed that, as the present matter proceeds by way of a notice of intent to dismiss, the standard of review is the same as that of a summary

determination motion. The Administrative Law Judge noted that such a motion may be granted where no disputed material issue of fact exists and a determination can be rendered as a matter of law.

Next, the Administrative Law Judge reviewed well established statutory and case law relevant to the timeliness of protests of notices of determination. The Administrative Law Judge found that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge also noted that the Division must show that it mailed a copy of the notice to the taxpayer's representative. The Administrative Law Judge found 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 these evidentiary standards and established that copies of the subject notice of determination were properly mailed to petitioner and his representative on April 22, 2016. Specifically, the Administrative Law Judge found that the Division established its standard mailing procedure through affidavits of Ms. Nagengast and Mr. Peltier. The Administrative Law Judge also concluded that such affidavits, along with the properly completed CMRs, established that such procedure was followed with respect to the notices at issue. Accordingly, the Administrative Law Judge found that the petition in this matter, filed on August 17, 2016, was filed more than 90 days from the issuance of the notice of determination and was, therefore, untimely.

The Administrative Law Judge rejected petitioner's claim that neither he nor his representative received the notice of determination. The Administrative Law Judge found such a claim to be unavailing in the face of the Division's proof of mailing.

The Administrative Law Judge also rejected petitioner's claim that the USPS tracking information supported petitioner's claim of nonreceipt. He concluded that the tracking information printouts "lack any foundational affidavit or evidentiary explanation whatsoever." Moreover, upon review, the Administrative Law Judge found that the tracking information actually supports the Division's position in this matter because such information shows that the notices were mailed as claimed by the Division and, according to the Administrative Law Judge, that such notices were delivered to petitioner and his representative "in due course."

The Administrative Law Judge thus concluded that the Division of Tax Appeals lacks jurisdiction in this matter and dismissed the petition herein.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the Administrative Law Judge wrongly applied a trial standard by weighing the evidence presented to rebut the presumption of receipt. Petitioner argues that the Administrative Law Judge should have examined whether such evidence is sufficient to create a material issue of fact. Petitioner contends that the evidence submitted is sufficient to raise a material issue of fact regarding whether he or his representative received a copy of the notice of determination from the USPS. Specifically, petitioner asserts that the USPS tracking information, together with his and his representative's affidavits denying receipt, raise an issue of fact regarding receipt of the notice. Petitioner contends that the 90-day limitations period in which to file a petition would be tolled if either he or his representative did not receive a copy of the notice. Petitioner thus contends that the determination should be reversed; the notice of intent withdrawn; and this matter remanded for a hearing on the issue of the timeliness of the petition.

The Division contends that, by properly applying the standards with respect to the Division's burden to prove proper mailing of a statutory notice, the Administrative Law Judge applied the correct standard of review in dismissing the petition. The Division asserts that the Administrative Law Judge correctly found that the Division met its burden here.

The Division agrees with the Administrative Law Judge's conclusion that petitioner failed to rebut the presumption that the properly mailed notices were received by petitioner and his representative. The Division further agrees with the Administrative Law Judge's conclusion that the USPS tracking information lacks a foundation, noting that the record lacks any information regarding how the entries were compiled or what they mean. Even if deemed credible, the Division contends that the tracking information indicates that petitioner and his representative received copies of the notice of determination (via the "delivered" entries) or constructively received them (via the "refused," "undeliverable," "no authorized recipient," and "unclaimed" entries). The Division thus contends that the USPS tracking information does not suffice to rebut the presumption of receipt.

Accordingly, the Division asserts that the determination should be affirmed.

OPINION

The question presented in this matter arises from the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, 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 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” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). 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 [1st Dept 1992] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[I]n reviewing a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion” (*Matter of Guffin*, Tax Appeals Tribunal, September 18, 2014 [citations omitted]).

A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice, with certain exceptions not relevant here (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [protest filed one day late is untimely]). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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 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" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016 [citations omitted]).

The 90-day period for filing a petition or a request for a conciliation conference is tolled if the taxpayer's representative is not also served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). The Division thus must also show that it mailed a copy of the notice to petitioner's representative in the present matter.

We agree with the Administrative Law Judge's finding that the Division has established the existence of a 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 relevant period. We also agree with the Administrative Law Judge's finding that the CMR in the present matter has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). We thus conclude, as did the Administrative Law Judge, that the Division has met its burden to show that copies of the notice of determination at issue were mailed as addressed to petitioner and his representative on April 22, 2016.

The Division must mail a notice of determination by certified or registered mail addressed to the taxpayer at his or her “last known address” (Tax Law § 1138 [a] [1]; *see also* Tax Law § 1147 [a] [1] [a notice must be mailed to a taxpayer “at the address given in the last return filed by him pursuant to the provisions of this article 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 issuance generally fulfills this requirement (*see Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

Here, the notice of determination dated April 22, 2016 was mailed to petitioner at the address set forth on his resident income tax return filed on February 20, 2012. The Division avers that this was the address reported by petitioner on the last New York income tax return filed by him prior to the issuance of the notice (*see* finding of fact 7). Petitioner has not contested the accuracy of this assertion. Under such circumstances, we find that the Division has made a prima facie showing that petitioner’s notice of determination was properly addressed in accordance with Tax Law §§ 1138 (a) (1) and 1147 (a) (1).

It is also undisputed that the copy of the notice of determination mailed to petitioner’s representative was addressed correctly.

Tax Law § 1147 (a) (1) provides that the proper mailing of a notice of determination “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” Receipt is thus “a part of the procedural equation [in sales tax cases] and by characterizing mailing as only ‘presumptive evidence’ establishes the taxpayer’s right to rebut the presumption” (*Matter of Ruggerite v State Tax Comm., Dept. of Taxation & Fin. of State of N.Y.*, 64 NY2d 688, 690

[1984]). However, a successful rebuttal “must consist of more than a mere denial of receipt” (*Matter of T. J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3rd Dept 1986]).

Here, petitioner asserts that the USPS tracking information shows that neither he nor his representative received the subject notice from the USPS. Even construing this evidence in a light most favorable to petitioner, as we must (*see Matter of Guffin*), we find that the tracking information is insufficient as a matter of law to rebut the presumption of receipt.

Under certain circumstances, a properly mailed notice of determination may be deemed constructively received and thus evidence of actual non-receipt may be insufficient to rebut the presumption. One such circumstance occurs when a taxpayer refuses to accept delivery of a notice (*Cars ‘R’ Us v Chu*, 147 AD2d 797 [3rd Dept 1989]). Here, the USPS tracking information indicates that the notice of determination addressed to petitioner was offered for delivery and refused (*see* finding of fact 18). Another such circumstance occurs when a notice is offered for delivery, but it is subsequently returned to the Division as unclaimed (*Matter of New York City Billionaires Constr. Corp.*). The tracking information pertaining to the notice mailed to petitioner’s representative indicates that this notice was offered for delivery, but was unclaimed (*see* finding of fact 18).

We note that petitioner has offered no evidence suggesting that the USPS failed to follow its own procedures for the delivery of certified mail with respect to the delivery of either of the notices in question (*cf. Matter of Ruggerite, Inc. v State Tax Commn. Dept. of Taxation & Fin. of State of N.Y.* [presumption was rebutted where notice was returned to the Division as unclaimed, but where taxpayer showed that the post office failed to follow its own regulations]).

Further, as noted previously, petitioner has not contended that the relevant mailing addresses were incorrect in any way.

In reaching this conclusion, we are mindful of petitioner's argument that he does not claim to have rebutted the presumption of receipt, but only to have raised an issue of material fact requiring a hearing on the issue of timeliness. Rather, we have concluded that, based upon the assertions made by petitioner and looking at the facts in a light most favorable to him, no hearing is required because as a matter of law, even if proven, petitioner's assertions could not rebut the presumption of receipt under the particular circumstances of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ahmed Nagi Ahmed is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ahmed Nagi Ahmed is dismissed.

DATED: Albany, New York
April 10, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner