

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ANNA SILVESTRI** : DECISION  
 : DTA NO. 829386  
for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Periods Ended August 31, 2015, February 29, 2016 :  
through November 30, 2016, and February 28, 2017 :  
:

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Petitioner, Anna Silvestri, filed an exception to the determination of the Administrative Law Judge issued on May 20, 2021. Petitioner appeared by Abraham Schwartz, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel).

Petitioner did not file a brief in support of the 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 the issuance of this decision began on September 30, 2021, the due date for petitioner's reply brief.

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

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of six notices of determination assessing sales and use taxes.

***OPINION***

As noted in the Administrative Law Judge's determination, the Division of Taxation brought a motion, dated January 21, 2021, seeking an order dismissing the petition or, in the

alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (i) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules of Practice and Procedure). Petitioner did not respond to the motion.

The Division's motion papers consist of the following: (i) an affidavit of Mary R. Humphrey, Esq., dated January 19, 2021; (ii) three affidavits of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Projects Services Bureau (MAPS), each dated January 8, 2021; (iii) three multipage documents entitled, in part, "Certified Record for Presort Mail – Assessments Receivable" (CMR), postmarked, respectively, December 31, 2015, April 25, 2017, and July 11, 2017; (iv) three affidavits of Susan Saccocio, a supervisor in the Division's mail room, each dated January 11, 2020; (v) a copy of each of the six notices at issue, including the associated mailing cover sheet for each; (vi) a copy of petitioner's New York State resident income tax return for the year 2014 (form IT-201) filed on October 13, 2015, a copy of petitioner's form IT-370 filed on April 21, 2016, requesting an extension of time to file her individual income tax return for the year 2015, and a copy of petitioner's form IT-201 for the year 2015 filed on October 17, 2016, each of which documents lists the same Staten Island, New York, address for petitioner as is listed on the notices at issue herein.

Following a review of these documents, the Administrative Law Judge determined that the petition in this matter was untimely with respect to the notices under protest and is properly subject to dismissal. He also found that, to the extent the petition seeks a refund, it is properly subject to dismissal for lack of jurisdiction. The Administrative Law Judge thus granted the Division's motion and dismissed the petition.

We have reviewed the entire file of the Division of Tax Appeals in this matter and,

although all the Division's supporting papers are present, we are unable to locate a copy of the notice of motion referenced in the determination. Given its absence from our file and petitioner's failure to oppose the motion below, we are unable to conclude from the record that a notice of motion was served on petitioner.

A notice of motion is required under our Rules of Practice and Procedure (20 NYCRR 3000.5) and is necessary to "ensure that the elements of due process are present" in our procedures (Tax Law § 2000; *see also Burstin v Public Serv. Mut. Ins. Co.*, 98 AD2d 928, 929 [3d Dept 1983]). Under the present circumstances, we find that the absence of a notice of motion renders the motion invalid (*see* Siegal, NY Prac § 247 at 372 [2nd ed 1991]). As this finding effectively nullifies the Division's motion, we deem it inappropriate to further address the determination's findings of fact or conclusions of law.

We therefore reverse the determination of the Administrative Law Judge and remand this matter to the Supervising Administrative Law Judge<sup>1</sup> for further proceedings consistent with this decision, without prejudice to any subsequent motion to dismiss or for summary determination on the issue of timeliness of the petition.

This Tribunal will not retain jurisdiction over this matter. If either party wishes to take exception to the determination issued on remand, they may do so by filing a timely exception thereto.

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<sup>1</sup> We remand this matter to the Supervising Administrative Law Judge for reassignment as the Administrative Law Judge who issued the determination has since retired from State service.

DATED: Albany, New York  
March 17, 2022

/s/ Anthony Giardina  
Anthony Giardina  
President

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

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner