

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SALVATORE MONTANA** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NO. 826728  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Periods December 1, 1996 through February 28, :  
1997 and June 1, 1997 through February 28, 1998. :  
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Petitioner, Salvatore Montana, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1996 through February 28, 1997, and June 1, 1997 through February 28, 1998.

On October 29, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) and (b). Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion by his due date of November 30, 2015, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits, documents and argument presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of four notices of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of the following four notices of determination, each dated June 1, 1999:

<b>Assessment ID No.</b>	<b>Tax Period Ended</b>	<b>Tax Assessed</b>	<b>Interest Assessed</b>	<b>Penalty Assessed</b>	<b>Payments/Credits</b>	<b>Balance Due</b>
L-016420321-3	2-28-98	\$2,048.18	\$317.17	\$491.53		\$2,856.88
L-016420322-2	11-30-97	\$1,722.40	\$326.45	\$464.98		\$2,513.83
L-016420324-9	8-31-97	\$1,425.71	\$321.72	\$427.57		\$2,175.00
L-016420325-8	2-28-97	\$1,176.98	\$128.18	\$235.01	\$1,200.00	\$340.17

All four notices are addressed to petitioner, Salvatore Montana, at a Seminole Road, Franklin Square, New York, address, and assert sales and use taxes due in the amounts and for the periods described above as a responsible officer or person of CNS Pizza Corp. The notices contain Certified Control Nos. P 911 173 947, P 911 173 948, P 911 173 950 and P 911 173 951, respectively, on the face of the notices.

2. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) concerning sales and use taxes for the periods "2/28/97-2/28/98."<sup>1</sup> The basis for petitioner's Request is his assertion that he has never been an owner or responsible person for CNS Pizza corporation in West Babylon, New York. The address borne by the Request was a post office box in Franklin Square, New York. The Request is dated October 27, 2014. Included with the Request is a copy of the envelope

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<sup>1</sup> Petitioner's Request references a notice dated September 12, 2014, but this was not submitted as part of the record, and no further information about this document is available.

presumably used to mail the Request, bearing a postmark from the United States Post Office (USPS) of October 29, 2014, and is also date-stamped as received by BCMS on November 6, 2014.

3. BCMS issued a Conciliation Order Dismissing Request (CMS No. 263964) to petitioner dated November 21, 2014. The order determined that petitioner's protest of the subject notices of determination was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on June 1, 1999, but the request was not mailed until October 29, 2014, 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 January 7, 2015, bearing the address with a post office box in Franklin Square, New York.

5. To show proof of proper mailing of the June 1, 1999 notices of determination, the Division provided, along with the October 29, 2015 affidavit of Lori P. Antolick, Esq., the following with its motion papers: i) an affidavit, dated October 14, 2015, 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 October 16, 2015, of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (since March 1999); (iii) the “New York State Department of Taxation and Finance Assessments Receivable Certified Record for Presort Qualified Mail” (CMR) postmarked June 1, 1999; (iv) copies of petitioner's four notices of determination, dated June 1, 1999, as described in Finding of Fact 1; (v) the petition filed with the Division of Tax Appeals bearing a postmark of January 7, 2015, and date-stamped as received by the Division of Tax Appeals on

January 9, 2015; (vi) an affidavit, dated October 27, 2015, of 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; and (vii) a transcript of petitioner's personal income tax return for tax year 1998, filed July 30, 1999.

6. The affidavit of Mary Ellen Nagengast sets 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 the CMR in the present case to reflect the actual mailing date of the four notices pertinent to this matter, i.e., "6/1/99."

7. According to the Nagengast affidavit, the CMR consists of 40 connected pages and lists 437 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,<sup>2</sup> wrote “437” on page 40 and initialed the same page.

Page 9 of the CMR indicates that four statutory notices with certified control numbers P 911 173 947, P 911 173 948, P 911 173 950 and P 911 173 951, and assessment ID numbers L 016420321, L 016420322, L 016420324 and L 016420325, respectively, were mailed to petitioner at the Seminole Road, Franklin Square, New York address listed on the subject notices.

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 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 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

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<sup>2</sup> Although a few of the postmarks on the CMR were only partially legible, page 9, bearing petitioner’s name and address, has a clear postmark and appears in sequential order based upon the certified control numbers and page numbers of the CMR.

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.

9. On the CMR dated June 1, 1999, Mr. Peltier noted that the USPS employee initialed page 40 of the CMR and affixed a postmark dated June 1, 1999, to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number the number of pieces to verify such number by writing the number "437" on the last page under 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 envelopes. According to the Peltier affidavit, a copy of the subject notices of determination were mailed to petitioner on June 1, 1999, as claimed.

10. The affidavit 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 examined 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 1998 return was the Seminole Road, Franklin Square, New York, address.

11. According to the Nagengast, Peltier and Rynski affidavits, the subject notices of determination were mailed to petitioner on June 1, 1999, as claimed, to his Seminole Road, Franklin Square, New York, address.

### **CONCLUSIONS OF LAW**

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b).

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).”

C. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “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 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]). 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, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446 [1992] *citing Zuckerman*).

Petitioner failed to file a response to the instant motion; therefore he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts set forth in the Nagengast, Peltier and Rynski affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

D. Where, as here, the timeliness of a petitioner's protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, 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. However, in the Peltier affidavit, he describes how the statutory notices and associated documents are placed into a windowed envelope so that the addresses and certified numbers from the "Mailing Cover Sheet" show through the windows, indicating a clear presence of a mailing cover sheet. Mr. Peltier's conclusion is that petitioner's name and address alone, as set forth on the statutory notices, would have been displayed in the window of the envelopes, intimating the absence of the mailing cover sheet and, perhaps, the certified number. No mailing cover sheets

were included with any of the notices of determination in this matter. The Tax Appeals Tribunal has recently held that the absence of the mail cover sheet raises a material factual issue of whether the Division's standard mailing procedure was followed in a particular case (*Matter of Alvarenga*, May 28, 2015). The importance placed upon the mailing cover sheet by the Tribunal is the fact that it lists both the taxpayer's address and the certified control number, both of which can be compared to and verified against the CMR. The Tribunal in *Alvarenga* found no other evidence in that record to overcome the evidentiary flaw of the absence of the mail cover sheet. In this case, however, unlike *Alvarenga*, the notices of determination, each identified with its own assessment ID number, all bear petitioner's address and the certified control number associated with it, on the face of each notice. A comparison of the addresses, the certified control numbers and the assessment ID numbers on each of the notices can be found on the CMR, sufficient to conclude that such notices were mailed on the date established by the CMR, i.e., June 1, 1999. This information coupled with the postmarks and the completed final page of each CMR as previously described, results in a conclusion that the CMR for June 1, 1999, was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. Petitioner claimed in his petition that he never received the notices and was not responsible for the taxes of the named corporation. 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 such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

Here, the record shows that petitioner’s address as listed on the Resident Income Tax Return, Form IT-201, filed by petitioner for tax year 1998, was the same Franklin Square, New York, address that appears on the four subject assessments. Petitioner’s 1998 tax return was not filed until July 30, 1999, after the notices of determination herein were issued, and thus, such return could not independently establish petitioner’s last known address. However, the Division’s affidavit stated that the Franklin Square, New York, address was petitioner’s last known address, and petitioner did not offer any indication to the contrary. Having offered nothing further, petitioner is deemed to have admitted that his last known address was the one asserted by the Division, and used in the mailing of the four notices (*see Kuehne & Nagel*).

F. Based on the foregoing, through the submission of documents and affidavits, the Division has met its burden of establishing proper mailing of the notices to petitioner’s last known address. In his petition, although petitioner claims he did not receive the notices from the Division, his bare assertion, absent more, is insufficient to rebut the presumption of receipt established by the Division’s proof of mailing (*Matter of T. J. Gulf v. State Tax Commn.*, 124 AD2d 314 [1986]). Accordingly, the Division has established a prima facie case warranting a determination in its favor.

G. The Division of Taxation's motion for summary determination is hereby granted, and the petition is denied.

DATED: Albany, New York  
February 11, 2016

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE