

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TIRO RESTAURANT CORP.** :  
for Revision of Determinations of for Refund of Sales :  
and Use Taxes under Article 28 and 29 of the Tax Law :  
for the Period December 1, 2011 through August 31, 2014. :

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In the Matter of the Petition :  
of :  
**FERNANDO FIGUEROA** : DETERMINATION  
for Revision of Determinations of for Refund of Sales : DTA NOS. 826886,  
and Use Taxes under Article 28 and 29 of the Tax Law : 826887 AND 826888  
for the Period December 1, 2011 through August 31, 2014. :

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In the Matter of the Petition :  
of :  
**TITO FIGUEROA** :  
for Revision of Determinations of for Refund of Sales :  
and Use Taxes under Article 28 and 29 of the Tax Law :  
for the Period December 1, 2011 through August 31, 2014. :

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Petitioners, Tiro Restaurant Corp., Fernando Figueroa, and Tito Figueroa, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2011 through August 31, 2014.

On May 22, 2015, the Division of Tax Appeals issued to each petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the respective

petitions did not appear to be timely with respect to the statutory notices being petitioned. By request of the parties, the 30-day period to respond to the notices of intent to dismiss petition was extended to August 6, 2015. On July 3, 2015, petitioner Fernando Figueroa, on behalf of all petitioners, filed a letter in opposition to the dismissals. On July 31, 2015, the Division of Taxation by Amanda Hiller, Esq. (Leo Gabovich) submitted letters, together with affidavits and accompanying documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on August 6, 2015. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether petitioners filed timely petitions with the Division of Tax Appeals following the issuance of notices of determination.

### ***FINDINGS OF FACT***

1. On April 14, 2015, the Division of Tax Appeals received petitions from petitioners, Tiro Restaurant Corp., Fernando Figueroa, and Tito Figueroa, which each protest a notice of determination issued to each petitioner. The envelope containing the petitions bears a United State Postal Service (USPS) postmark of April 11, 2015. The notice for Tiro Restaurant Corp. is dated February 24, 2015; the respective notices for petitioners Fernando Figueroa, and Tito Figueroa are dated February 25, 2015. Each notice asserts a fraud penalty.

2. On May 22, 2015, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued separate notices of intent to dismiss petition to each petitioner. The notice of intent to dismiss petition issued to petitioner Tiro Restaurant Corp. indicates that the relevant notice of determination was issued on February 24, 2015, but that the petition was

not filed until April 11, 2015, or 46 days later. The notices of intent to dismiss petition issued to petitioners Fernando Figueroa and Tito Figueroa both state the relevant notice of determination was issued on February 25, 2015, but that the petitions were not filed until April 11, 2015, or 45 days later.

3. In response to the issuance of the notices of intent to dismiss petition, the Division submitted, among other documents: (i) three affidavits of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated July 30, 2015; (ii) three affidavits, each dated July 7, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) two "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 24, 2015 and February 25, 2015, respectively; and (iv) three affidavits, each dated July 8, 2015, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division's mail room.

4. In order to prove the notice of determination was sent to petitioner Tiro Restaurant Corp.'s last known address, the Division submitted a copy of an AU-431 Responsible Person Questionnaire filed with the Division on December 5, 2014, which was the last document filed with the Division by Tiro Restaurant Corp. prior to the issuance of the notice of determination. The address on said form matches the address contained on the notice of determination and that listed by petitioner Tiro Restaurant Corp. on the petition filed in this matter.

5. To prove the notice of determination was sent to petitioner Fernando Figueroa's last known address, the Division submitted a representation of his electronically filed 2013 IT-201, which was filed on April 15, 2014 and was the last return filed with the Division by him prior to the issuance of the notice of determination. The address on said return matches the address contained on the notice of determination.

6. To prove the notice of determination was sent to petitioner Tito Figueroa's last known address, the Division submitted a copy of his 2012 IT-201, which was filed with the Division on or about April 14, 2014, and was the last return filed with the Division by him prior to the issuance of the notice of determination. The address on said return matches the address contained on the notice of determination and that listed on the petition filed in this matter.

7. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last page of the CMR. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated

in the batch. 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 PO Address."

9. The February 24, 2015 CMR consists of 77 pages and lists 842 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated February 24, 2015 to each page of the CMR and also wrote his or her initials on each page thereof. Page 68 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0405 3992 and assessment number L-042535099, was mailed to petitioner Tiro Restaurant Corp. at the Islip, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. The February 25, 2015 CMR consists of 27 pages and lists 294 certified control numbers along with corresponding assessment numbers, names and addresses. A USPS employee affixed a USPS postmark dated February 25, 2015 to each page of the CMR and also wrote his or her initials on each page thereof. Page 22 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0405 7440 and assessment number L-042538733, was mailed to petitioner Fernando Figueroa at the Manorville, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner Fernando Figueroa's name and address as noted. Page 22 of the CMR also indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0405 7464 and assessment number L-042538732, was mailed to petitioner Tito Figueroa at the Manorville, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner Tito Figueroa's name and address as noted.

11. Each of the three affidavits of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply clerk, describe the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place 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. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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 initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed each page of the respective CMRs and affixed a postmark to each page of the respective CMRs. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the February 24 and 25, 2015 CMR's indicates that the USPS employee complied with this request by circling the number of pieces received.<sup>1</sup>

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<sup>1</sup> Page 77 of the February 24, 2015 CMR originally listed 843 pieces of mail; however, the number of pieces received at the post office indicates 842, in order to reflect the fact that one piece of certified mail had been "pulled" from the mailing record. A piece of mail may be pulled for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pulled piece of mail is segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the February 24, 2015 CMR indicates that a piece of mail listed on page 37 of the CMR was pulled. A line was appropriately placed through the entry for this taxpayer after the statutory notice was pulled. This deletion is reflected in the change of the total pieces received at the post office on page 77 of the CMR.

12. According to the Peltier affidavits, the subject notices were mailed to petitioners on February 24 and 25, 2015, as claimed.

13. In response to the notices of intent to dismiss petition, petitioner Fernando Figueroa submitted a letter on behalf of all petitioners. Mr. Figueroa acknowledges that the petitions were filed late but requests that the late filing be overlooked as he mistakenly believed that the time period to file the petitions was the same as that for another related entity that had undergone an audit by the Division.

### ***CONCLUSIONS OF LAW***

A. There is a 30-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a notice of determination that asserts a fraud penalty (Tax Law § 2008 [2] [a] [iii]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late filed petition (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 1138 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing: first, there must be proof of a standard procedure used by the Division for the issuance of statutory 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices. The CMRs have been properly completed and therefore constitute highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The addresses on the mailing cover sheets and CMRs are the same as contained on the last filings made by each of the petitioners prior to the issuance of the respective notices of determination. In fact, petitioners do not dispute that the petitions were filed late but contend that they were confused by a filing date for another matter. Unfortunately, however, the Division of Tax Appeals does not have jurisdiction over a petition that is even one day late (*Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

D. Since the petitions were not filed until April 11, 2015, or well in excess of 30 days from the issuance of the respective notices of determination, the petitions are untimely and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of these notices.

E. The petitions of Tiro Restaurant Corp., Fernando Figueroa, and Tito Figueroa are dismissed.

DATED: Albany, New York  
October 29, 2015

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE