

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
THE POTTER'S CLAY CORP.
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, 2010
through August 31, 2013.

In the Matter of the Petition
of
ALFRED ALSTON
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, 2010
through August 31, 2013.

DETERMINATION
DTA NOS. 827117,
827118 AND 827119

In the Matter of the Petition
of
REGINA ALSTON
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, 2010
through August 31, 2013.

Petitioners, The Potter's Clay Corp., Alfred Alston and Regina Alston, 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 March 1, 2010 through August 31, 2013.

On May 6, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Howard S. Beyer, Esq., of counsel), filed three motions seeking dismissal of the petitions or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying each motion was the affidavit of Howard S. Beyer, Esq., dated May 6, 2016, and annexed exhibits supporting the motion. Petitioners, appearing pro se, did not respond to the motions. The 90-day period for issuance of this determination commenced on June 6, 2016 (20 NYCRR 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed timely filed requests for conciliation conference.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to Potter's Clay Corp. (Potter's), a Notice of Determination, number L-042251412-4 dated December 3, 2014, asserting additional sales tax due in the sum of \$158,117.94 plus penalty and interest.

2. Potter's protested the notice by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated "4/2015." The mailing envelope in which the request was enclosed, a United Parcel Service (UPS) envelope, bore a printed date of April 14, 2015. The envelope and its contents were stamped received by BCMS on April 15, 2015.

3. By a Conciliation Order Dismissing Request dated May 1, 2015, Potter's request was dismissed as not timely filed, stating:

"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 December 3, 2014, but the request was not mailed until April 15, 2015, or in excess of 90 days, the request is late filed."

4. Potter's challenged the dismissal order by filing a petition with the Division of Tax Appeals. The petition, sent by UPS Next Day Air, is dated July 30, 2015 and was stamped received by the Division of Tax Appeals on August 3, 2015. However, the petition was timely filed within 90 days of the issuance of the conciliation order. The petition alleges that the Notice of Determination was not received until after the time to request a conference had expired. On November 18, 2015, the Division timely filed its answer to the petition. Because the petition to the Division of Tax Appeals was timely, the Division of Tax Appeals has jurisdiction to hear this matter. Therefore, only the motion for summary determination will be entertained herein.

5. To show proof of proper mailing of the Notice of Determination on December 3, 2014, the Division provided the following: (i) an affidavit, dated May 6, 2016 of Howard S. Beyer, Esq.; (ii) an affidavit, dated April 28, 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 April 29, 2016, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (iv) the 16-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated December 3, 2014 together with its associated mailing cover sheets; (vi) a copy of a United States Postal Service (USPS) ZIP Code Lookup for petitioner's address; (vii) a copy of a sales

tax return filed by Potter's during the audit period, and (viii) corporate checks bearing Potter's address.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the Notice of Determination at issue herein, and other such notices during the period here in question, involved the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commenced with the CARTS computer-generation of a CMR and corresponding notices. The notices were predated with the anticipated date of their mailing, and each notice was assigned a certified control number. The certified control number for each notice appeared on a separate one-page "Mailing Cover Sheet" generated for each such notice, and that sheet bore 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 generated any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, was a discrete unit with the batch of notices. The Mailing Cover Sheet was the first sheet in the unit.

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

batch of statutory notices were 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 appeared at the upper right corner of each page of the CMR. All pages were banded together when the documents were delivered to the mail room and remained banded when the postmarked documents were returned to the Division after mailing, unless ordered otherwise.

8. Each statutory notice was predated with the anticipated date of its mailing. In contrast, each page of the CMR listed an initial date that was 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 set 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," was to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conformed 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).

9. Under the Division's standard mailing procedures, statutory notices that were ready for mailing were received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch was preceded by its mailing cover sheet and was accompanied by any required enclosures, and each batch included its accompanying CMR. A member of the mail room staff, in turn, operated a machine that put each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet showed through the window. The staff member then weighed, sealed and affixed

postage and fee amounts on the envelopes. A mail processing clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performed 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 delivered the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee was 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 was 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 was picked up at the post office by a staff member on the following day after its initial delivery and was delivered back to the Division for storage and retention.

10. The CMR for the batch of notices to be issued on December 3, 2014, including the notice addressed to Potter's, consisted of 16 pages. Each of these pages included in its upper left corner the preprinted year/day/time "run" listing of "20143291700." Appearing in the upper right corner of the CMR on pages 1 and 16 was the handwritten date "12/3/14," indicating the manually inserted date of actual mailing. Each of the 16 pages included a stamped date of December 3, 2014, presumably made by the Postal Service. The CMR listed 171 pieces of mail.

11. In this instance, on page 9, certified control number 7104 1002 9730 0331 4247 was assigned to assessment number L-042251412, addressed to "The Potter's Clay Corp., 13338 Springfield Blvd., Sprngfld Gdns, NY 11413-1458."

12. Appearing at the bottom of page 16 of the CMR was the preprinted heading “Total Pieces and Amounts,” to the right of which appeared preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflected the preprinted number of pieces of mail for this CMR, here 171, as well as postage and fee amounts for such pieces of mail. Immediately below this heading was the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “171” was handwritten and circled. Appearing at the lower right area of page 16 was 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 this stamped instruction reflected the aforementioned USPS date as well as initials presumably affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Ms. Nagengast, an employee and Director of the Division’s MAPS Bureau, and Mr. Peltier, an employee and supervisor in the Division’s mail room. Each affiant attested to their personal involvement in and familiarity with past and present practices and procedures concerning the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. The record included a copy of the Notice of Determination allegedly mailed by certified mail to Potter’s on December 3, 2014. The record also included a copy of Potter’s sales tax return for the period March 1, 2010 through February 28, 2011, which listed Potter’s address as “133-38 Springfield Blvd., Queens, NY 11413.” The Division also included a printout of “Zip Code Lookup” from the web page USPS.com that indicated the zip code 11413 included the default city name Springfield Gardens, New York, the same city used by the Division in their mailings to petitioner.

15. In addition, the Division submitted a check drawn on the checking account of Potter's Clay Corp., payable to NYS Sales Tax and deposited September 15, 2011, that lists and address of 13338 Springfield Blvd., Springfield Gardens, NY 11413-1458.

16. The Division of Taxation (Division) issued to petitioner Alfred Alston, a Notice of Determination, dated December 5, 2014, asserting additional sales tax due in the sum of \$158,117.94 plus penalty and interest. The notice bore assessment number L-042254106-3.

17. Mr. Alston protested the notice by filing a Request for Conciliation Conference with BCMS, dated "4/2015." The mailing envelope in which the request was enclosed, a UPS envelope, bore a printed date of April 14, 2015. The envelope and its contents were stamped as received by BCMS on April 15, 2015.

18. By an Order dated May 1, 2015, Mr. Alston's was dismissed as not timely filed, stating:

"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 December 5, 2014, but the request was not mailed until April 14, 2015, or in excess of 90 days, the request is late filed."

19. Mr. Alston challenged the dismissal order by filing a petition with the Division of Tax Appeals. The petition, sent by UPS Next Day Air, is dated July 30, 2015 and was stamped received by the Division of Tax Appeals on August 3, 2015. However, the petition was timely filed within 90 days of the issuance of the conciliation order. The petition alleges that the Notice of Determination was not received until after the time to request a conference had expired. On October 7, 2015, the Division timely filed its answer to the petition. Because the petition to the Division of Tax Appeals was timely, the Division of Tax Appeals has jurisdiction to hear this matter. Therefore, only the motion for summary determination will be entertained herein.

20. To show proof of proper mailing of the Notice of Determination on December 5, 2014, the Division provided the following: (i) an affidavit, dated May 6, 2016 of Howard S. Beyer, Esq.; (ii) an affidavit, dated April 28, 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 April 29, 2016, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (iv) the 39-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated December 5, 2014 together with its associated mailing cover sheet; (vi) a copy of a USPS ZIP Code Lookup for petitioner's address; and (vii) a copy of Alfred and Regina Alston's resident income tax return for 2011.

21. The Division's mailing protocols derived from the affidavits of Ms. Nagengast and Mr. Peltier contained in Findings of Fact 6, 7, 8 and 9 above, were identical to those set out in the Alfred Alston matter and are incorporated herein as if fully set forth.

22. The CMR for the batch of notices to be issued on December 5, 2014, including the notice addressed to Alfred Alston, consisted of 39 pages. Each of these pages included in its upper left corner the preprinted year/day/time "run" listing of "20143321700". Appearing in the upper right corner of the CMR on pages 1 and 39 was the handwritten date "12/5/14," indicating the manually inserted date of actual mailing. Each of the 39 pages included a stamped date of December 5, 2014, presumably made by the Postal Service. The CMR listed 422 pieces of mail.

23. In this instance, on page 19, certified control number 7104 1002 9730 0331 7156 was assigned to assessment number L-042254106, addressed to "Alfred Alston, 13164 231st St., Laurelton, NY 11413-1833."

24. Appearing at the bottom of page 39 of the CMR was the preprinted heading “Total Pieces and Amounts,” to the right of which appeared preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflected the preprinted number of pieces of mail for this CMR, here 422, as well as postage and fee amounts for such pieces of mail. Immediately below this heading was the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “422” was handwritten and circled. Appearing at the lower right area of page 39 was 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 this stamped instruction reflected the aforementioned USPS date as well as initials presumably affixed by the postal clerk.

25. The facts set forth above with respect to the mailing to Alfred Alston were established through the affidavits of Ms. Nagengast, an employee and Director of the Division’s MAPS Bureau, and Mr. Peltier, an employee and supervisor in the Division’s mail room. Each affiant attested to their personal involvement in and familiarity with past and present practices and procedures concerning the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

26. The record included a copy of the Notice of Determination issued to Alfred Alston and allegedly mailed by certified mail to him on December 5, 2014. The record also included a copy of Alfred and Regina’s resident income tax return for 2011, which listed their address as “131-64 231st Street, Laurelton, NY 11413.” The W-2 statements issued by Potter’s Clay Corp. to both Alfred and Regina Alston and attached to the return indicated an address of 131-64 231st Street, Laurelton, NY 11413. In addition, a W-2 statement issued to Regina Alston by Citibank

set forth the same address with a more specific nine digit zip code: 131 64 231st Street, Laurelton, New York 11413-1833.

The Division also included a printout of “Zip Code Lookup” from the USPS website that indicated the address 131-64 231st Street in zip code 11413 was more fully described as 13164 231st St., Laurelton, NY 11413-1833, the same address used by the Division in their mailings.

27. The Division issued to Regina Alston, a Notice of Determination, dated December 5, 2014, asserting additional sales tax due in the sum of \$158,117.94 plus penalty and interest. The notice bore assessment number L-042254107-2.

28. Ms. Alston protested the notice by filing a Request for Conciliation Conference with BCMS, dated “4/11/2015.” The mailing envelope in which the request was enclosed, a UPS envelope, bore a printed date of April 14, 2015. The envelope and its contents were stamped as received by BCMS on April 15, 2015.

29. By an Order dated May 1, 2015, Ms. Alston’s request was dismissed as not timely filed, stating:

“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 December 5, 2014, but the request was not received until April 15, 2015, or in excess of 90 days, the request is late filed.”

30. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax Appeals. The petition, sent by UPS Next Day Air, is dated July 30, 2015 and was stamped as received by the Division of Tax Appeals on August 3, 2015. However, the petition was timely filed within 90 days of the issuance of the conciliation order. The petition alleges that the Notice of Determination was not received until after the time to request a conference had expired. On October 7, 2015, the Division timely filed its answer to the petition. Because the petition to the

Division of Tax Appeals was timely, the Division of Tax Appeals has jurisdiction to hear this matter. Therefore, only the motion for summary determination will be entertained herein.

31. To show proof of proper mailing of the Notice of Determination on December 5, 2014, the Division provided the following: (i) an affidavit, dated May 6, 2016 of Howard S. Beyer, Esq.; (ii) an affidavit, dated April 28, 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 April 29, 2016, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (iv) the 39-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated December 5, 2014 together with its associated mailing cover sheet; (vi) a copy of a United States Postal Service (USPS) ZIP Code Lookup for petitioner's address; and (vii) a copy of Alfred and Regina Alston's resident income tax return for 2011.

32. The Division's mailing protocols derived from the affidavits of Ms. Nagengast and Mr. Peltier contained in Findings of Fact 6, 7, 8 and 9 above, were identical to those set out in the Regina Alston matter and are incorporated herein as if fully set forth.

33. The CMR for the batch of notices to be issued on December 5, 2014, including the notice addressed to Regina Alston, consisted of 39 pages. Each of these pages included in its upper left corner the preprinted year/day/time "run" listing of "20143321700." Appearing in the upper right corner of the CMR on pages 1 and 39 was the handwritten date "12/5/14," indicating the manually inserted date of actual mailing. Each of the 39 pages included a stamped date of December 5, 2014, presumably made by the Postal Service. The CMR listed 422 pieces of mail.

34. In this instance, on page 19, certified control number 7104 1002 9730 0331 7163 was assigned to assessment number L-042254107, addressed to “Regina Alston, 13164 231st St., Laurelton, NY 11413-1833.”

35. Appearing at the bottom of page 39 of the CMR was the preprinted heading “Total Pieces and Amounts,” to the right of which appeared preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflected the preprinted number of pieces of mail for this CMR, here 422, as well as postage and fee amounts for such pieces of mail. Immediately below this heading was the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “422” was handwritten and circled. Appearing at the lower right area of page 39 was 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 this stamped instruction reflected the aforementioned USPS date as well as initials presumably affixed by the postal clerk.

36. The facts set forth above with respect to the mailing to Regina Alston were established through the affidavits of Ms. Nagengast, an employee and Director of the Division’s MAPS Bureau, and Mr. Peltier, an employee and supervisor in the Division’s mail room. Each affiant attested to their personal involvement in and familiarity with past and present practices and procedures concerning the preparation and generation of notices such as those at issue herein, as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

37. The record included a copy of the Notice of Determination issued to Regina Alston and allegedly mailed by certified mail to her on December 5, 2014. The record also included a copy of Alfred and Regina Alston’s resident income tax return for 2011, which listed their address as “131-64 231st Street, Laurelton, NY 11413.” The W-2 statements issued by Potter’s

Clay Corp. to both Alfred and Regina Alston and attached to the return indicated an address of 131-64 231st Street, Laurelton, NY 11413. In addition, a W-2 statement issued to Regina Alston by Citibank set forth the same address with a more specific nine digit zip code: 131 64 231st Street, Laurelton, NY 11413-1833.

The Division also included a printout of “Zip Code Lookup” from the web page USPS.com that indicated the address 131-64 231st Street in zip code 11413 was more fully described as 13164 231st St., Laurelton, NY 11413-1833, the same address used by the Division in their mailings to Alfred and Regina Alston.

38. The corporation’s petition for hearing in the Division of Tax Appeals was signed by “Al Alston” on July 30, 2015. He did not identify himself as a corporate officer and, although he was an employee, attested to by the W-2 from Potter’s (Finding of Fact 26), no valid power of attorney was submitted, although requested by the administrative law judge in a letter to Mr. Alston, dated June 20, 2016.

CONCLUSIONS OF LAW

A. 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 the date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may protest a notice of determination by filing a request with the BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). In this case, petitioners chose the latter path.

The petition filed by Potter’s was not signed by a valid representative (20 NYCRR 3000.3[b][7]). A corporation may act through one of its officers or employees, the latter of

which must file a valid power of attorney (20 NYCRR 3000.2[a][1]). No other person may represent the corporation (20 NYCRR 3000.2[d]).

Mr. Alston was not identified as an officer of Potter's in any credible documentation submitted. Although he was an employee, as noted in Finding of Fact 26, he failed to file a valid power of attorney. The power submitted failed to identify Mr. Alston's title with the corporation.

Mr. Alston was alerted to this deficiency by letter from the administrative law judge, dated June 20, 2016, in which he was asked to submit a valid power of attorney or proof that he was an officer of Potter's. He failed to comply and, as a result, the petition of Potter's must be dismissed (20 NYCRR 3000.3[d][2]).

Even if the petition were adjudged to be in proper form, the relief it seeks would not be granted for the reasons set forth below.

B. A motion for summary determination "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]). 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, 853 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [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 v. Tri-Pac Export Corp.*, 22 NY2d 439, 441

[1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 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 [2d Dept 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, 449 [1st Dept 1992] *citing Zuckerman* at 562). As detailed hereafter, there exist no material and triable issues of fact, and the Division is entitled to summary determination in its favor.

C. Where the timeliness of a request is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, 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). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory 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 the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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 of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). The Division has also presented sufficient documentary proof, i.e., the CMRs, to establish that the notices of determination at issue were mailed by certified mail addressed to all three petitioners on December 3, 2014 and December 5, 2014, establishing that the general mailing procedures described in the affidavits were followed. Petitioners' names and addresses, as well as the numerical information on the notices, appeared on and corresponded to such information as set forth on the CMRs, each page of which bore a USPS date stamp of December 3, 2014 and December 5, 2014, and the initials of the USPS employee. On the December 3, 2014 CMR there were 171 certified mail control numbers listed, and the USPS employee who initialed the CMR indicated, by writing and circling the number "171" near such initials, that 171 items were received for mailing. Likewise, on the December 5, 2014 CMR there were 422 certified mail control numbers listed, and the USPS employee who initialed the CMR indicated, by writing and circling the number "422" near such initials, that 422 items were received for mailing. The CMRs were therefore properly completed, and constituted highly probative documentary evidence of both the date and fact of mailing to all petitioners herein (*see Matter of Rakusin*,

Tax Appeals Tribunal, July 26, 2001; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

E. The notice addressed to Potter's was at the address provided by it on its sales tax return filed during the audit period and on its corporate checks issued to pay its sales tax liability. The same address was used by Potter's on the request for BCMS conference and the petition herein. Thus, this "last known address" used by the Division in mailing the notice in issue was proper. With respect to Alfred and Regina Alston, the Division acquired their 2011 personal income tax return, filed jointly, with attached W-2s, all of which set forth their address in Laurelton, New York. It is the same address they provided on their requests for BCMS conference and petitions for hearing.

In addition, a printout of Zip Code Lookup from the USPS website indicated that the address 131-64 231st Street in zip code 11413 was more fully described as 13164 231st St., Laurelton, NY 11413-1833, the same address used by the Division in their mailings to Alfred and Regina Alston. The Division also included a printout of "Zip Code Lookup," which explained that zip code 11413 included the default city name of Springfield Gardens, NY, the same city used by the Division in their mailings. The USPS site noted that such city name should be used in place of "Queens," which Potter's had provided.

F. Having determined that the notices were properly issued on December 3, 2014 and December 5, 2014, petitioners bore the burden of proving that requests for conference were filed within 90 days thereof. The mailing dates, in this case the dates the envelopes were delivered to UPS for transport, were beyond the 90-day statutory limit. In all three matters, the envelopes

were delivered to UPS on April 14, 2015 and delivered to BCMS on April 15, 2015, in excess of 90 days from the dates of issuance for all the notices of determination herein.

Pursuant to Tax Law § 1147 (enacted as part of the Taxpayer Bill of Rights Act of 1991 [L 1997, ch 577]), private delivery services designated by the Secretary of the Treasury of the United States in accordance with Internal Revenue Code § 7502 will be treated as United States mail for purposes of the “timely mailing equals timely filing” rule of Tax Law § 691(a). UPS has been so designated by the Secretary of Treasury and is therefore a designated delivery service for purposes of section 1147 (*see* Technical Services Bureau Memorandum, TSB-M-97, November 25, 1997; Publication 55). The timely mailing as timely filing rule applied to United States mail (and as contained in Tax Law § 691[a][1]) provides that the date of the USPS postmark on an envelope containing a petition (or other document) will be considered the date of filing for purposes of the 90-day limitations period for the filing of a petition as set forth in Tax Law § 1138(a)(1). Tax Law § 691(a)(2)(A) extends this rule to certain designated private delivery services like UPS.

As set out in the facts, each of the envelopes containing the requests for BCMS conference were delivered to UPS on April 14, 2015, well beyond the 90-day period of limitations for filing said requests.¹

¹The petitions for hearing, however, were filed in the same manner and were filed within the 90-day period of limitations and all three of those filings were timely and the Division of Tax Appeals has jurisdiction to hear and decide these matters.

G. The Division's motions for summary determination are granted and the petitions of Potter's Clay Corp., Alfred Alston and Regina Alston are denied.

DATED: Albany, New York
September 1, 2016

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE