

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**PET ARK DALE, INC.** : DETERMINATION  
 : DTA NO. 827342  
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 June 1, 2012 through May 31, 2014. :  
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On November 10, 2015, petitioner, Pet Ark Dale, Inc., filed a petition 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 June 1, 2012 through May 31, 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Frank Nuarra, Esq., of counsel), brought a motion on October 31, 2016, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(1)(ii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Frank Nuara with attached exhibits. Petitioner, appearing by Ahmed Abdelhalim, CPA, did not file a response to the motion. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on November 30, 2016. 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 petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice 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 a Notice of Determination dated April 20, 2015 bearing assessment identification number L-042732869. The notice is addressed to petitioner, Pet Ark Dale, Inc., at a Bronx, New York, address. It asserts sales and use taxes due for the period June 1, 2012 through May 31, 2014. The notice explains that petitioner must file a request for a conciliation conference or a petition for a Tax Appeals hearing by July 19, 2015.

2. On November 16, 2015, the Division of Tax Appeals received a petition from petitioner that protests the Notice of Determination. The envelope containing the petition bears a United States Postal Service (USPS) postmark of November 10, 2015. The petition alleges that the Notice of Determination was never received.

3. In support of its motion and to prove mailing of the Notice of Determination, the Division submitted, among other documents: (i) an affidavit, dated October 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 20, 2015; and (iii) an affidavit, dated October 21, 2016, of Bruce Peltier, a Stores and Mail Operations Supervisor in the Division's mail room.

4. In order to prove that the Notice of Determination was sent to petitioner's last known

address, the Division submitted a copy of petitioner's e-filed sales tax return, form ST-100, for the sales tax quarter ended May 31, 2014, filed on June 17, 2014, which was the last document filed with the Division by petitioner prior to the issuance of the Notice of Determination. The address on said form, in Bronx, New York, matches the address contained on the Notice of Determination and that listed for petitioner on the petition filed in this matter.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets 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 pages of the CMR, in this case to April 20, 2015. 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.

6. 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 taxpayer's mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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 P.O. Address.”

7. The April 20, 2015 CMR consists of 30 pages and lists 324 computer-printed certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 30, which contains 5 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

8. Page seven of the CMR indicates that the Notice of Determination, assigned certified control number 7104 1002 9730 0452 8612, and assessment number L-042732869 was mailed to petitioner at the Bronx, New York, address listed thereon. The corresponding mailing cover sheet for the notice bears this certified control number and petitioner’s name and address as noted.

9. Page 11 of the CMR also indicates that a Notice of Determination with certified control number 7104 1002 9730 0452 9107 and assessment number L-042732869 was sent to “Ashraf Hanno 24-16 Steinway Street, Astoria, NY 11103.” An enclosure with the notice states that a copy of the notice was forwarded to Mr. Hanno because the Division’s records indicated that a power of attorney is on file for the tax matters at issue in the notice.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a stores and operations supervisor, describes 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 of mail 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. The CMR 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. In this case, the USPS employee initialed and affixed a USPS postmark dated April 20, 2015 to each page of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. A review of the CMR indicates that the USPS employee complied with this request by handwriting the number “324” to indicate the number received.

11. According to the Peltier affidavit, a copy of the notice was mailed to petitioner and its representative on the date indicated as claimed.

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

A. 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 fact is presented” (20 NYCRR 3000.9[b][1]).

B. A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9[c]). “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]). As summary judgment is the procedural equivalent of a trial, it should be denied “where there is any doubt as to the existence of [a triable issue] or where the issue is ‘arguable’” (*Glick & Dolleck v Tri-Pac Export Fire Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). A case should not be decided on a motion, but warrants a full trial, if material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts (*Gerard v Inglese*, 11 AD2d 381, 382 [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 v City of New York*, 49 NY2d 557, 562 [1980]).

C. Tax Law § 1138(a)(1) requires a taxpayer to file a petition in protest of a notice of determination with the Division of Tax Appeals within 90 days from the date of mailing of the notice. Alternatively, a taxpayer can file a request for conciliation conference with the Bureau of Conciliation and Mediation services to protest of a notice of determination if it is filed within the 90-day statutory time limit (Tax Law § 170[3-a][a]). The Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case if the petitioner fails to file within the statutory time limit, even by one day (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (*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 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*).

E. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination, establish the Division's standard mailing procedure and show that the procedure was followed in this instance. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The mailing cover sheet bears petitioner's name and a Bronx, New York, address that is identical to the address on the last sales tax return filed by petitioner prior to issuance of the notice and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's entry. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears USPS postmarks dated April 20, 2015 on each page. There are 324 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number “324” near the line stating “Total Pieces Received at Post Office,” that the post office received 324 items for mailing. In short, the

Division established that it mailed the Notice of Determination to petitioner by certified mail on April 20, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). In addition, the same proof also establishes that the Division also mailed a copy of said notice to petitioner's representative on the date mailed to petitioner.

F. Petitioner has offered no evidence to counter the Division's evidence that the Notice of Determination was issued on April 20, 2015. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]). Since the petition was not filed until November 10, 2015, or 204 days after the notice was issued, the Division of Tax Appeals is without jurisdiction to consider the merits.

G. The Division's Motion for Summary Determination is granted and the petition of Pet Ark Dale, Inc., is dismissed.

DATED: Albany, New York  
February 23, 2017

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE