

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ELI DEITSCH**<sup>1</sup> : DETERMINATION  
for Revision of Determinations or for Refund of Sales and : DTA NO. 827584  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period March 1, 2013 through November 30, 2014. :

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Petitioner, Eli Deitsch, 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 period March 1, 2013 through November 30, 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel), brought a motion dated December 30, 2016 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Isaac Sternheim, CPA, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Although the petition filed in this matter lists petitioner's name as "Eli Deitsch," the power of attorney form filed with the petition lists petitioner's name as "Elie S. Deitsch." Additionally, petitioner's request for conciliation conference, the Conciliation Order Dismissing Request dated April 8, 2016, the subject notices of determination dated March 23, 2015, and petitioner's 2013 resident income tax return list petitioner's name as "Elie S. Deitsch."

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination for the period March 1, 2013 through November 30, 2014.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of notices of determination dated March 23, 2015, bearing notice numbers L-042608393, L-042608394, L-042608395, L-042608396, L-042608397, L-042608398, and L-042608399. The notices are addressed to petitioner, Elie S. Deitsch, at c/o Lenat Co 315 Westchester A, Port Chester, New York 10573.

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the March 23, 2015 notices of determination. The request was mailed to BCMS on March 16, 2016 and received by BCMS on March 18, 2016.<sup>2</sup>

3. On April 8, 2016, BCMS issued a Conciliation Order Dismissing Request to petitioner. 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 March 23, 2015, but the request was not mailed until March 16, 2016, or in excess of 90 days, the request is late filed.”

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<sup>2</sup> The copy of the envelope in which the request was mailed has a metered postage date stamp of March 15, 2016. The envelope also contained a certified mail label which, although difficult to read, appears to be date-stamped March 16, 2016.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on April 12, 2016.

5. To show proof of proper mailing of the March 23, 2015 notices of determination, the Division provided the following with its motion papers: (i) an affidavit, dated December 21, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) pages numbered 1, 331, 332, and 1,231 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each legibly postmarked March 23, 2015; (iii) an affidavit, dated December 28, 2016, of Melissa Kate Koslow, a supervisor in the Division's mail room; (iv) an affidavit, dated December 28, 2016, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) USPS Forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS responses to such requests dated December 5, 2016; (vi) copies of the March 23, 2015 notices of determination with the associated mailing cover sheets; (vii) petitioner's request for conciliation conference, dated March 15, 2016 and mailed March 16, 2016 (*see* Footnote 2); and (viii) a copy of petitioner's electronically filed Form IT-201, resident income tax return for the year 2013, filed October 2, 2014, which lists petitioner's name as "Elie S Deitsch" and address as c/o Lenat Co 315 Westchester A, Port Chester, New York 10573.<sup>3</sup> The IT-201 was the last return filed with the Division by petitioner before the notices were issued.

6. 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

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<sup>3</sup> The return was filed jointly with Heather Deitsch, who was not named in the petition filed in this matter.

notices. Ms. Nagengast is the Director of MAPS, a unit 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 was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "3/23/15." 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.

7. 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."

8. According to the Nagengast affidavit, the CMR in the present matter consists of 1,231 pages. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of

the CMR, wrote and circled the number “13531” on page 1,231, and initialed or signed page 1,231. She adds that the total number of statutory notices mailed pursuant to the CMR was 13,531.

9. Attached to the Nagengast affidavit, as exhibit “A,” are copies of pages 1, 331, 332, and 1,231 of the CMR. Pages 1 and 1,231 have a handwritten entry of “3/23/15” in the top right corner; however, pages 331 and 332 do not have a similar entry.

10. Page 331 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0427 7817 and assessment ID number L-042608393 was mailed to “Deutsch - Elie S” at the Port Chester, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. Page 332 of the CMR indicates that notices of determination with the following certified control numbers and assessment ID numbers were mailed to “Deutsch - Elie S” at the Port Chester, New York, address listed on the subject notices of determination: certified control number 7104 1002 9730 0427 7824 and assessment ID number L-042608394; certified control number 7104 1002 9730 0427 7831 and assessment ID number L-042608395; certified control number 7104 1002 9730 0427 7848 and assessment ID number L-042608396; certified control number 7104 1002 9730 0427 7855 and assessment ID number L-042608397; certified control number 7104 1002 9730 0427 7862 and assessment ID number L-042608398; and certified control number 7104 1002 9730 0427 7879 and assessment ID number L-042608399. The corresponding mailing cover sheets, attached to the Nagengast affidavit as exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

12. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since 2010, and currently a head mail and supply clerk, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow 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. 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 mail room 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.

13. Each of the four pages of the CMR in exhibit "A" of the Nagengast affidavit contains a USPS postmark of March 23, 2015. On page 1,231, corresponding to "Total Pieces Received at Post Office," the USPS employee wrote and circled the number "13531," wrote his or her initials or a signature, and affixed a postmark. According to Ms. Koslow, the affixation of the postmarks and the USPS employee's initials indicate that all 13,531 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on March 23, 2015.

14. According to both the Nagengast and Koslow affidavits, copies of the subject notices were mailed to petitioner on March 23, 2015, as claimed.

15. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject notices of determination. Specifically, using USPS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 0427 7817, 7104 1002 9730 0427 7824, 7104 1002 9730 0427 7831, 7104 1002 9730 0427 7848, 7104 1002 9730 0427 7855,<sup>4</sup> 7104 1002 9730 0427 7862, and 7104 1002 9730 0427 7879.

16. The USPS responses to the requests indicate that the articles bearing certified control numbers 7104 1002 9730 0427 7817, 7104 1002 9730 0427 7824, 7104 1002 9730 0427 7831, 7104 1002 9730 0427 7848, 7104 1002 9730 0427 7855, 7104 1002 9730 0427 7862, and 7104 1002 9730 0427 7879, and addressed to petitioner were delivered to an address in Port Chester, New York, on March 25, 2015. Attached to the Corina affidavit as exhibit "A" are the Division's "Request For Delivery Information" for article numbers 7104 1002 9730 0427 7817, 7104 1002 9730 0427 7824, 7104 1002 9730 0427 7831, 7104 1002 9730 0427 7848, 7104 1002 9730 0427 7855, 7104 1002 9730 0427 7862, and 7104 1002 9730 0427 7879. Exhibit "B" attached to the Corina affidavit is the USPS response to the Division's request. The responses for article numbers 7104 1002 9730 0427 7817, 7104 1002 9730 0427 7824, 7104 1002 9730 0427 7831, 7104 1002 9730 0427 7848, 7104 1002 9730 0427 7855, 7104 1002 9730 0427 7862, and 7104 1002 9730 0427 7879 indicate delivery of the same articles on March 25, 2015 to "315 Westchester A" in Port Chester, New York.

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<sup>4</sup> The Corina affidavit lists this certified control number as "71041002973004277845," however, the corresponding request for delivery information lists the certified control number as "7104 1002 9730 0427 7855." As the actual request for delivery information shows the same certified control number as that listed on the related notice and CMR, the certified control number as stated in the Corina affidavit ending in "7845" is determined to be a typographical error.

### **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). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

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]).

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 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [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*).

C. 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a request for conciliation conference or petition 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 (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

E. Here, the Nagengast and Koslow affidavits establish the Division's current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notices. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Exhibit "A" of the Nagengast affidavit contains four pages of what purports to be a longer, multi-page computer-generated CMR. Unlike in the procedure described in the Nagengast affidavit, the four pages in exhibit "A" are not physically connected, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 1,231 has been changed to March 23, 2015, but remains unchanged on pages 331 and 332. Pages 1 and 1,231, therefore, bear a different date than pages 331 and 332. As a result, the partial CMR submitted as exhibit "A" of the Nagengast affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. These flaws may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly show that copies of the subject notices, addressed to petitioner at his last known address, which were also listed on the CMR, were delivered to petitioner at his Port Chester, New York, address on March 25, 2015. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the requests for delivery information, and the USPS responses that the subject notices were properly

delivered to petitioner and received on March 25, 2015 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, June 10, 2010).

The Division has also established that the notices were delivered to petitioner's last known address. The phrase "last known address," for purposes of the Division's issuance of statutory notices carrying with them the right to a hearing, has been defined and consistently interpreted to mean the address given in the last return filed by the taxpayer 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 (*see Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012; *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). Here, petitioner's last known address, as indicated on petitioner's 2013 Form IT-201, was "c/o Lenat Co 315 Westchester A," Port Chester, New York. This is the same address that appears on the subject notices, cover sheets, and CMR, and USPS delivery information. Accordingly, the Division has established that the notices were properly sent to petitioner's last known address.

G. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Nagengast, Koslow, and Corina affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

H. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970

[3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notices commenced to run on the date of such actual receipt of the notices by petitioner, i.e., March 25, 2015, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Comm. of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioner's request for conciliation conference was not filed until March 16, 2016. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]).<sup>5</sup> As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*).

I. The Division's motion for summary determination is hereby granted, the April 8, 2016 conciliation order dismissing petitioner's request is sustained, and the petition is denied.

DATED: Albany, New York  
April 20, 2017

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE

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<sup>5</sup> As noted in footnote 2, the envelope in which the request was mailed has a metered postage date stamp of March 15, 2016 and a certified mail date that appears to be March 16, 2016. Even using the earlier date of March 15, 2016, petitioner's request would still be untimely.