

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions  
of  
**NICHOLAS LANDOLFI**  
for Revision of Determinations or for Refund of Sales  
and Use Taxes under Articles 28 and 29 of the Tax Law  
for the Periods September 1, 2013 through  
November 30, 2013 and June 1, 2014 through  
November 30, 2014.

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DETERMINATION  
DTA NO. 827631

Petitioner, Nicholas Landolfi, 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 September 1, 2013 through November 30, 2013, and June 1, 2014 through November 30, 2014.

On June 23, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the petition did not appear to be timely with respect to the statutory notice being petitioned. After being afforded a series of extensions within which to file responses, the final due date was set at March 6, 2017. On August 9, 2016, the Division of Taxation by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), submitted an affidavit and accompanying documents in support of dismissal of the petition. On March 2, 2017, petitioner, appearing by Joseph A. Marra, Esq., filed an affirmation in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on March 6, 2017. 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 filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued the following notices of determination, each dated April 15, 2015, to petitioner, Nicholas Landolfli:

Assessment ID Number	Tax Period Ended	Tax	Interest	Penalty
L-042712455-2	11/30/14	\$5,747.76	\$266.23	\$747.18
L-042712456-1	8/31/14	\$5,871.04	\$498.03	\$939.36
L-042712457-9	11/30/13	\$7,194.29	\$1,514.49	\$1,798.52

The foregoing notices were issued to petitioner upon the Division’s assertion that he was a person under a duty to collect, account for and remit sales and use taxes on behalf of Bella Luna Restaurant, Inc., for the periods specified in the notices.

2. Petitioner challenged the foregoing notices by electronically filing a request for conciliation conference (Request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS) on October 21, 2015. A field on the online Request form inquired if the address that the notices were sent to was the correct address. The field was checked “Yes”.

3. By a Conciliation Order Dismissing Request (CMS No. 269344) dated November 6, 2015 (Dismissal Order), BCMS dismissed petitioner’s Request as not timely filed, stating:

“[t]he 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 April 15, 2015, but the request was not received until October 21, 2015, or in excess of 90 days, the request is late filed.”

4. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax Appeals. The petition is dated as signed on March 17, 2016 and was sent to the Division of Tax Appeals via Federal Express Overnight Delivery on such date.

5. On June 23, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the petition was filed in protest of a conciliation order dismissing request issued to petitioner more than 90 days prior to the petition being filed in this matter.

6. In response to the issuance of the notice of intent to dismiss petition the Division submitted: (i) an affidavit, dated July 28, 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 "1", "59" and "242" of a "Certified Record for Presort Mail - Assessments Receivable" (CMR); (iii) an affidavit, dated August 1, 2016, of Bruce Peltier, a supervisor in the Division's mail room; (iv) an affidavit, dated August 1, 2016, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel; and (v) a copy of a representation of petitioner's 2014 electronically filed Form IT-370, application for automatic six-month extension of time to file his resident income tax return for the year 2014, which lists the same address for petitioner as that listed on the subject notices and on the petition filed herein. The IT-370 was the last application filed with the Division by petitioner prior to the issuance of the notices.

7. The affidavit of Ms. 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 pages of the CMR, in this case April 15, 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 United States Postal Service (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 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."

9. The CMR for the batch of notices to be issued on April 15, 2015, including the notices addressed to petitioner, allegedly consists of 242 cut sheet pages. However, the Division's submission in response to the notice of intent to dismiss petition includes only pages "1," "59," and "242." Each of the pages provided includes, in its upper left corner, the preprinted

year/day/time “run” listing of “20150981700”. Appearing in the upper right corner of the CMR on pages numbered “1” and “242” is the handwritten date “4/15/15,” indicating the manually inserted date of actual mailing. Each of the three pages bear a USPS postmark of April 15, 2015.

10. In this instance, certified control numbers 7104 1002 9730 0448 1368, 7104 1002 9730 0448 1375 and 7104 1002 9730 0448 1382, were assigned reference (i.e., assessment) numbers L-042712455, L-042712456 and L-042712457, respectively, and were to be mailed to petitioner at his Bronx, New York, address. This information appears on the three notices and on the respective cover sheets associated therewith, and also appears at page 59 of the CMR.<sup>1</sup>

11. Appearing below the seven entries on page 242 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 2658, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “2658” is handwritten. Appearing at the lower right area of page 242 is 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 and to the right of this stamped instruction reflects the aforementioned April 15, 2015 USPS postmark as well as initials affixed by the postal clerk.

12. The affidavit of Mr. 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.

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<sup>1</sup> The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

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 Mail Processing 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. As detailed above, the USPS employee complied with this request by writing the number of pieces received as well as initialing same. According to the Peltier affidavit, copies of the respective notices were mailed on the date indicated as claimed.

13. The affidavit of Ms. Corina describes the Division’s request to the USPS for delivery information on the April 15, 2015 notices of determination. Specifically, using a separate PS Form 3811-A for each notice, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 0448 1368, 7104 1002 9730 0448 1375 and 7104 1002 9730 0448 1382, addressed to petitioner at his Bronx, New York, address. The USPS responses to the requests indicates the notices were delivered to petitioner at

his Bronx, New York, address on April 21, 2015.

14. Because the Division's response to the notice of intent to dismiss petition did not address the timeliness of the petition as measured from issuance of the Dismissing Request, instead focusing on the timeliness of the petitioner's request for a conciliation conference, the parties were notified that the Division's response was being treated a motion for summary determination pursuant to 20 NYCRR 3000.9(a)(2), and petitioner was afforded additional time to respond.

15. Petitioner's response to the Division's papers does not dispute either the timeliness of the petition or the request for conciliation conference, but challenges the Division's determination that petitioner was a responsible person of the Bella Luna Restaurant, Inc.

#### ***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 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 statutory time limit for filing either a petition or a Request is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *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).

B. In this case, petitioner chose to file a Request, rather than a petition with the Division of Tax Appeals, in the first instance. In turn, BCMS dismissed petitioner's Request as not timely filed. Petitioner thereafter challenged the BCMS Dismissal Order by filing a petition with the Division of Tax Appeals. At issue is whether a timely request for a conciliation conference was filed, not whether a timely petition was filed. As such, the Division's papers in response to the notice of intent to dismiss petition are being treated a motion for summary determination.

C. 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).

D. Where, as here, 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 notices 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 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*).

E. 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). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

F. Here, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, such a properly completed CMR is missing from the record as the record contains only three pages of what purports to be a longer multi-page computer-generated CMR. Unlike the procedure described in the Nagengast affidavit, the three pages of the CMR are not physically connected; the certified mail numbers run consecutively on each page but not from page to page; and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 242 has been changed to December 14, 2009, but remains unchanged on page 59. Pages 1 and 242, therefore, bear a different date than page 59. As a result, the partial CMR 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).

G. Such a flaw 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 USPS delivery information accompanying the Corina affidavit shows that copies of the notice at issue, addressed to petitioner, which was also listed on the CMR, were delivered as addressed on April 21, 2015. This other evidence of mailing is sufficient to overcome the incomplete CMR and establishes the fact of mailing of the subject notices and their subsequent receipt by petitioner (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010). If mailing is insufficient, as here, the Corina affidavit and USPS 3811-A can, as here, establish delivery and start the time for

petitioner's challenge to the notice from the date of delivery, or April 21, 2015 (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

H. Petitioner's address on the notice, the corresponding mail cover sheet and the CMR conforms with the address reported on petitioner's 2014 IT-370, which was the last application filed by petitioner before the notices were issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1). Furthermore, petitioner's request for conciliation conference and petition list this same address.

I. Petitioner's request for conciliation conference was filed on October 21, 2015. This date falls well 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]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

J. The Division's motion for summary determination is hereby granted, the November 6, 2015 Conciliation Order Dismissing Request is sustained, and the petition of Nicholas Landolfi is denied.

DATED: Albany, New York  
June 1, 2017

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/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE