

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MICHAEL WEINER** : DETERMINATION  
for Revision of Determinations or for Refund of : DTA NO. 827794  
Sales and Use Taxes under Articles 28 and 29 of :  
the Tax Law for the Period March 1, 2013 through :  
November 30, 2013. :  
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Petitioner, Michael Weiner, 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, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel), brought a motion, dated April 10, 2017, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On April 18, 2017, petitioner, appearing by Lawrence Price, E.A., filed a letter in opposition to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, petitioner's response in opposition, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, 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 three notices of determination assessing sales and use taxes for the period March 1, 2013 through November 30, 2013.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of three notices of determination, each dated April 20, 2015. The notices bear assessment identification numbers L-042733285-8, L-042733286-7, and L-042733287-6, pertain, respectively, to the sales tax quarterly periods ended November 30, 2013, August 31, 2013, and May 31, 2013, and assess tax in the respective amounts of \$2,113.67, \$3,113.44 and \$3,303.63, plus penalty and interest. The notices are addressed to petitioner, Michael Weiner, at 225 Century Way, Manalapan, New Jersey, 07726.

2. Petitioner filed a request for conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the April 20, 2015 notices. The Request is dated as signed by petitioner on July 22, 2016, and is date stamped as received by BCMS on July 22, 2016.

3. On August 5, 2016, BCMS issued a conciliation order dismissing request (Dismissal Order) bearing CMS No. 271234 to petitioner. The Dismissal Order determined that petitioner's protest of the subject notice 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 April 20, 2016, but the request was not mailed until July 22, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner timely filed a petition with the Division of Tax Appeals in protest of the Dismissal Order. The petition was mailed, via United States Postal Service (USPS) Priority Mail 2 Day service, on August 10, 2016.

5. To show proof of proper mailing of the April 20, 2015 notices, the Division provided the following with its motion papers: (i) an affidavit, dated March 4, 2017, 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; (iii) an affidavit, dated March 5, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room; (iv) a copy of the April 20, 2015 notices with the associated mailing cover sheets; and (v) a copy of petitioner's filed form IT-203, (Nonresident and Part-Year Resident Income Tax Return) for the year 2014, filed March 2, 2015, which lists petitioner's address as 225 Century Way, Manalapan, New Jersey, 07726. The IT-203 for 2014 was the last return filed with the Division by petitioner before the notices were issued.

6. The March 4, 2017 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 was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "4/20/15." 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 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.

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. The CMR in the present matter consists of 30 pages and lists 324 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 entries. Ms. Nagengast notes that the copy 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. A USPS representative affixed a postmark dated April 20, 2015, to each page of the CMR, wrote the number "324" on page 37 next to the heading "Total Pieces Received At Post Office" and initialed or signed page 30. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 324.

9. Page 1 of the CMR indicates that a notice of determination with the certified control number 7104 1002 9730 0452 7974 and reference number L-042733285, a notice of determination with the certified control number 7104 1002 9730 0452 7981 and reference number L-042733286, and a notice of determination with the certified control number 7104 1002 9730 0452 7998 and reference number L-042733287, were mailed to petitioner at the Manalapan,

New Jersey, address listed on each of such subject notices of determination. The mailing cover sheets corresponding to each of such notices, attached to the Nagengast affidavit as exhibit “B,” bear such certified control numbers and petitioner’s name and address as noted.

10. The affidavit of Melissa Kate Koslow, dated March 5, 2017, describes the Division’s mail room’s general operations and procedures. The mailroom 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 receives 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 are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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 signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed each page of the CMR and affixed a postmark dated April 20, 2015, to each page of the CMR.

11. 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. Here, the USPS employee complied with this request by writing the number “324” on the last page of the CMR next to the heading “Total Pieces Received at Post Office.” The affixation of the postmarks and the USPS employee’s initials, together with the written number indicate that a total of 324 articles of mail listed on the CMR were delivered to the USPS on April 20, 2015.

12. According to both the Nagengast and Koslow affidavits, the subject notices were mailed to petitioner on April 20, 2015, as claimed.

13. Petitioner states, in response to the subject motion, that the request for conference was filed late due to difficulties associated with an ongoing serious illness of a member of his appointed representative's family.<sup>1</sup>

### ***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 of fact is presented” (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Rules of Practice and Procedure 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. Vil. 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

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<sup>1</sup> Petitioner states that the request for conference was filed only two days late. This claim is apparently premised on the fact that the Dismissal Order indicates the notices were issued on April 20, **2016** (*see* Finding of Fact 3). In fact, the Division’s proof of mailing in this case establishes that the notices were issued on April 20, **2015** (*see* Conclusion of Law D), such that the request for conference was actually filed one-year and two days late. It is thus apparent that the April 20, **2016** date listed on the Dismissal Order is a typographical error.

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*).

B. 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 e.g. 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 deficiency 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).

C. 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 (*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).

D. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on April 20, 2015. 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 affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002).

E. As noted, the notice must be sent 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 Rest.*, Tax Appeals Tribunal, March 14, 1996). Here, petitioner's last known address, as indicated on petitioner's 2014 Form IT-203, was 225 Century Way, Manalapan, New Jersey, 07726. This is the same address that appears on the subject notices, cover sheets, and CMR. Accordingly, the Division has established that the notice was properly sent to petitioner's last known address.

F. Petitioner has presented no evidence to contest the facts alleged in the Nagengast and Koslow affidavits; consequently, those facts are deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*). As noted, a protest against the subject notices had to have been filed within 90-days after their issuance. Since the notices were issued on April 20, 2015,

petitioner's protest had to have been filed on or before July 20, 2015. Petitioner's Request was not filed until July 22, 2016, and was therefore not timely.

G. The Division's motion for summary determination is hereby granted, the April 20, 2015 notices of determination are sustained, and the petition is denied.

DATED: Albany, New York  
August 3, 2017

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE