

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AHMED NAGI AHMED</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 827803</b>
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, 2013	:	
through May 31, 2015.	:	

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Petitioner, Ahmed Nagi Ahmed, 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 March 1, 2013 through May 31, 2015.

On October 13, 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 December 6, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), having been granted an extension to do so, submitted affidavits and additional documents in support of dismissal. On October 26, 2016 and December 13, 2016, petitioner, appearing by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel), submitted affidavits and additional documents 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 (as extended) began on December 29, 2016. After due consideration of the affidavits and additional documents submitted in response to the Notice of Intent to Dismiss Petition, and upon all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

**ISSUE**

Whether petitioner filed a timely protest against the Division of Taxation's assessment of tax and interest against him.

**FINDINGS OF FACT**

1. Petitioner, Ahmed Nagi Ahmed, by his duly appointed representative, Jacqueline S. Kafedjian, Esq., filed a petition with the Division of Tax Appeals. The petition is dated as signed on August 17, 2016, was mailed by United States Postal Service (USPS) certified mail, and the envelope in which the petition was mailed bears a USPS postmark dated August 17, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on August 22, 2016. Petitioner lists his address on the petition as "4624 Avenue D, Brooklyn, NY, 11203."

2. The petition specifically identifies the assessment at issue as Assessment ID # L-044649192-4, and further specifies that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was "not held."<sup>1</sup> In addition to setting forth the substantive argument that petitioner was not a person responsible or required to collect and remit sales and use taxes on behalf of Uncle Grocery, Deli & 99 Plus Corp. (Uncle Grocery), the petition also alleges that a notice of determination representing the specified assessment was never served on petitioner.

3. Attached to the petition was:

a) a Statement of Proposed Audit Change for Sales and Use Tax, dated March 10, 2016 and proposing a tax liability in the amount of \$24,403.20, against Uncle Grocery for the period

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<sup>1</sup> There is no claim, indication or evidence that a conciliation conference was requested by petitioner or his representative. Hence, it appears that such a conference was "not held" because one was not requested.

spanning September 1, 2012 through May 31, 2015, plus interest. The lower portion of this statement includes an area wherein a taxpayer may, by the “Signature of Owner, Partner, or Corporate Officer or Authorized Representative,” consent to the proposed liability. This area reflects, under the title “president,” an illegible signature and the date “Mar 21/16.”

b) a Notice and Demand for Payment of Tax Due, dated August 8, 2016, against petitioner, Ahmed N. Ahmed, listing the same Assessment ID number (L-044649192-4; *see* Finding of Fact 2) and address for petitioner as are specified above (*see* Finding of Fact 1). The computation section attached to this notice and demand reflects tax due for the period spanning March 1, 2013 through May 31, 2015 in the amount of \$20,017.71, plus interest, and states that petitioner is liable, as an officer/responsible person, per Tax Law § 1138(a), § 1131(1) and § 1133, for the taxes owed by Uncle Grocery. It is noted that the period specified in the notice and demand does not include the earliest two sales tax quarterly periods set forth on the statement of proposed audit change pertaining to Uncle Grocery.

4. On October 13, 2016, Daniel J. Ranalli, then-Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing to petitioner, to petitioner’s current representative, and to the Division of Taxation (Division), a notice of intent to dismiss petition (Notice of Intent). The Notice of Intent provides as follows:

“In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested. Petitioner did not include the required notice of determination, and therefore the petition does not appear to have been timely filed.”

Under the Notice of Intent, petitioner was afforded a period of thirty days within which to file a

corrected petition (i.e., provide the requisite statutory document conferring the right to a hearing), and to provide written comments on the proposed dismissal of the petition.

5. In response to the Notice of Intent, petitioner admits that he executed a consent for the tax liability pertaining to the corporate entity, Uncle Grocery (presumably referring to the consent and illegible signature referenced in Finding of Fact 3-a), but did not execute a consent for himself personally. He maintains that while he received the Notice and Demand referenced above (*see* Finding of Fact 3-b), he never received a notice of determination assessing tax against him personally and asserts that the same was never issued against him.

6. On October 18, 2016, petitioner's representative requested a copy of the Notice of Determination allegedly issued in this matter. In response, on October 19, 2016, the Division provided a copy of the (admittedly received) Notice and Demand, dated August 8, 2016 and addressed to petitioner (described above), as well as a copy of a Notice of Determination, dated April 22, 2016 and addressed to petitioner (described hereafter).

7. The Notice of Determination, dated April 22, 2016, bearing assessment ID L-044649192-4, and addressed to petitioner, assesses sales tax due for the period spanning March 1, 2013 through May 31, 2015, in the amount of \$20,017.71, plus interest. In order to prove proper mailing of the foregoing Notice of Determination to petitioner, and to petitioner's representative, as claimed on April 22, 2016, the Division provided the following documents: (i) an affidavit, dated December 6, 2016 of Adam Roberts, Esq.; (ii) an affidavit, dated November 17, 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 November 22, 2016, of Bruce Peltier, a stores and mail operations supervisor in the Division's

mail room; (iv) a 14-page “Certified Record for Presort Mail - Assessments Receivable” (CMR); (v) a copy of the Notice of Determination dated April 22, 2016, together with its associated mailing cover sheet; and (vi) a copy of petitioner’s Form IT-201 (New York State Resident Income Tax Return) for the year 2011, filed February 20, 2012, listing petitioner’s address as that set forth above, and representing petitioner’s last filed return and last known address prior to the claimed date of issuance of the Notice of Determination at issue.

8. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of determination such as that at issue herein, and other such notices during the period here in question, involves the use of the Division’s electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page Mailing Cover Sheet (Form DTF-997) generated for each such notice, and that sheet bears 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 generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

9. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled “Certified No.” The assessment numbers for the notices appear under the second columnar heading, entitled

“Reference No.,” and the names and addresses of the taxpayers are listed under the third columnar heading entitled “Name of Addressee, Street and P.O. Address.” Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are 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 appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

10. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is 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 sets 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,” is to be manually changed by personnel in the Division’s mail room to reflect that the preprinted date on the CMR conforms 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).

11. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the Division’s mail room in an area designated for “Outgoing Certified Mail.” Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated

documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs 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 delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is 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 is 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 is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

12. The CMR for the batch of notices to be issued on April 22, 2016, including the Notice of Determination addressed to petitioner and the copy thereof addressed to petitioner's representative, consists of 14 cut sheet pages. Each of the pages includes, in its upper left corner, the preprinted year/day/time "run" listing of "20161061700" (*see* Finding of Fact 10). Appearing in the upper right corner of the CMR on pages numbered "1" and "14" is the handwritten date "4/22/16," indicating the manually inserted date of actual mailing (*see* Finding of Fact 10). Each of the CMR pages submitted includes a legible USPS postmark of the Colonie Center branch office of the USPS, dated April 22, 2016 and listing zip code "12205." All pages of the CMR

include 11 entries for pieces of mail, with the exception of page 14 (the final page), which includes 7 entries for pieces of mail, thus resulting in a total of 150 pieces of mail listed on the CMR as originally printed.

13. In this case, the printed entry for the piece of mail listed on page six of the CMR and bearing certified control number 7104 1002 9730 0820 4932 was assigned to the reference (i.e., assessment) number L-044649192, and was to be mailed to petitioner at 4624 Avenue D, Brooklyn, NY 11203-5816. This information agrees with such information as appearing on the Notice of Determination and on the cover sheet associated therewith. Further, certified control number 7104 1002 9730 0820 5168 was also assigned to reference (i.e., assessment) number L-044649192, and was to be mailed to petitioner's representative, Jacqueline S. Kafedjian, at 62-26 Myrtle Avenue, Suite 105, Glendale, NY 11385.<sup>2</sup>

14. Appearing below the seven entries on page 14 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 150, 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 150 is handwritten and circled. Appearing at the lower right area of page 14 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

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<sup>2</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.



instruction reflects the aforementioned April 22, 2016 USPS postmark as well as the initials affixed by the postal clerk.

15. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division's MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division's mail room (*see* Finding of Fact 7), and upon review of the CMR submitted by the Division. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

16. Petitioner initially responded to the Notice of Intent to Dismiss Petition on October 26, 2016, and filed a supplemental response on December 13, 2016. In his initial response, petitioner maintained that a notice of determination was never issued against him in his own name and assessing personal liability against him for the sales taxes consented to and owed by Uncle Grocery (*see* Finding of Fact 5). On October 18, 2016, petitioner's representative requested (by facsimile to the Division) that the Division provide a copy of any such notice of determination. Petitioner initially maintained that he only received in response a copy of the Notice and Demand referenced above (*see* Finding of Fact 3-b).

17. Petitioner's supplemental response notes that the Division included a copy of the notice of determination assessing tax against him in his own name as part of its December 7, 2016 response to the Notice of Intent. Petitioner maintains that this was the first time that he, or his representative received a copy of the Notice of Determination, maintains that the period of limitations within which to protest such notice should properly be tolled until December 7, 2016,

and that his petition should therefore either be deemed timely, or that the notice should be cancelled (at least in part) presumably because it was not issued within the period of limitations on assessment.

18. As part of his supplemental response, petitioner provided a USPS tracking information printout, obtained by petitioner's representative from the USPS website (usps.com), for each of the items of mail allegedly issued by the Division based upon their respective tracking numbers (the certified mailing control numbers specified in Finding of Fact 13). Review of these printouts reveals that each of the two items of certified mail arrived at the USPS facility in Albany, New York, on April 22, 2016, at 9:16 p.m. In turn, the tracking information for the item bearing the tracking number pertaining to petitioner (7104 1002 9730 0820 4932) indicates that delivery of the item was initially refused on April 25, 2016, but that the item was thereafter delivered by individual pick up at the USPS facility on May 17, 2016 at 9:18 a.m. The tracking information for the item bearing the tracking number pertaining to petitioner's representative (7104 1002 9730 0820 5168) indicates that delivery of the item was initially not made ("no authorized recipient available") on April 25, 2016, but that the item was thereafter delivered on May 20, 2016 at 8:54 a.m. Notwithstanding the foregoing, petitioner continues to assert that the Notice of Determination in question was not received by either petitioner or his representative.

19. Finally, the record includes a copy of the Division's response to petitioner's representative's October 18, 2016 request (by facsimile) for a copy of the Notice of Determination at issue (*see* Finding of Fact 6). This October 19, 2016 response by the Division (included as Exhibit F attached to petitioner's October 26, 2016 initial response to the subject Notice of Intent) consists of seven pages. Contrary to petitioner's claim that he only received in

such response a copy of the Notice and Demand, the Division's full seven-page response dated October 19, 2016 (i.e., one day after petitioner's representative's facsimile request), references "Notes: Copy of *Notices* for Ahmed N. Ahmed," (italics added) and clearly includes therein both the Notice and Demand, at pages six and seven, and the Notice of Determination, at pages three, four and five, with each addressed to petitioner. By contrast, and concerning petitioner's claim that he only received the Notice and Demand in response to his representative's facsimile request, Exhibit E (also attached to petitioner's October 26, 2016 initial response to the Notice of Intent) only includes pages one, two, six and seven thereof, and not pages three, four and five, on which the Notice of Determination is set forth.

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

A. This matter proceeds by way of a notice of intent to dismiss petition upon the premise that the petition did not include a copy of any statutory document giving rise to the right to a hearing, such that it was not possible to determine whether the petition was timely filed, i.e., filed within the applicable period of time after issuance of the relevant statutory document giving rise to the right to protest an assessment of tax. In *Matter of Victory Bagel Time, Inc.*, (Tax Appeals Tribunal, September 13, 2012) the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination, and this matter shall proceed under that standard.

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]).

C. In this case, petitioner initially alleged that he only received the Notice and Demand dated August 8, 2016 (*see* Findings of Fact 2, 3-b), claimed that never received the Notice of Determination dated April 22, 2016, and maintained that such Notice was never issued against him personally. However, after the petition was filed, and in connection with its December 7, 2016 response to the subject Notice of Intent, the Division provided to petitioner a copy of the Notice of Determination dated April 22, 2016, together with its evidence that the same was issued to petitioner, and to his representative, by certified mail on April 22, 2016. Given that the petition as filed did not include a copy of the Notice of Determination, the responding submission by the Division, together with its evidence concerning issuance of the Notice of Determination in question, is fully consistent with the holding in *Matter of Marin* (Tax Appeals Tribunal, December 11, 2015), and serves to address any express or implied claim of non-issuance or non-receipt of such document and the timeliness issues attendant thereto. In the face of such response and submission of the Notice of Determination, as described, petitioner now asserts that this was his (and his representative's) first actual receipt of such Notice of Determination, claims that the same was not properly issued by the Division, and that the petition should therefore be deemed timely filed or that the Notice of Determination should be cancelled (*see* Finding of Fact 17).

D. First, the right to a hearing is specifically denied with respect to a notice and demand issued on or after December 1, 2004 (Tax Law § 173-a[3][c]). Accordingly, petitioner is not entitled to a hearing with respect to the Notice and Demand dated August 8, 2016 and admittedly received by petitioner (*see* Finding of Fact 3[b]). In contrast, however, 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 a notice (Tax Law §§ 1138[a]; 2006[4]). Alternatively, a taxpayer may protest a notice of determination by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). Since a copy of the Notice of Determination allegedly issued to petitioner has been provided, and since a request for a BCMS conference was not made, the issue on this Notice of Intent devolves to whether petitioner’s challenge was timely made via his petition filed on August 17, 2016.

E. It is well established that statutory time limits for filing either a petition or a request for a conciliation conference are 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 statutory notice, to which protest rights attach, becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). It is also well established that where the timeliness of a taxpayer’s protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice being protested (*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 notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*). In the case of a notice of determination, proper mailing requires mailing of the notice by registered

or certified mail (Tax Law § 1138[a][1]), and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

F. The Division may meet its burden of proving proper mailing by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The mailing evidence is two-fold, and to prove the fact and 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*).

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]).

G. 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*). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed by

certified mail addressed to petitioner, and to petitioner's representative, respectively, on April 22, 2016.<sup>3</sup> That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the Notice of Determination at issue. Petitioner's name and address, as well as his representative's name and address, and the numerical information on the Notice of Determination, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of April 22, 2016. There are 150 certified mail control numbers listed on the CMR for April 22, 2016, and the USPS employee who initialed the CMR indicated, by writing and initialing the number "150," that 150 items were received for mailing. The Notice of Determination was issued to petitioner at the address set forth on his resident income tax return filed on February 20, 2012. This was the last return filed and last known address for petitioner prior to the issuance of the Notice of Determination (*see* Finding of Fact 7), and the record includes no claim or evidence that the Division was notified of any new or changed address for petitioner replacing the Brooklyn address specified herein. The CMR has thus 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

H. With respect to the issuance of notices of determination, Tax Law § 1138(a)(1) provides, in pertinent part, that:

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<sup>3</sup> While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Here, the record establishes that the Division properly served petitioner's representative, Ms. Kafedjian, with a copy of the Notice.

“[n]otice of such determination shall be mailed to the person or persons liable for the collection or payment of the tax. A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

Tax Law § 1147(a)(1) further provides:

“Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article 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. A notice of determination shall be mailed promptly by registered or certified mail. *The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.* Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice” (italics added).

I. As concluded above, the Division has established proper issuance of the Notice of Determination to petitioner and to his representative. Establishing proper issuance serves to toll the generally applicable three-year period of limitations (i.e., absent instances of nonfiling of a return) within which the Division may issue an assessment (Tax Law § 1147[b]), and in turn to trigger the 90-day period within which a taxpayer may challenge such a notice by filing a petition (Tax Law § 1138[a][1]) for a hearing before the Division of Tax Appeals, or a request for a conciliation conference (Tax Law § 170[3-a][a]) with BCMS. The Division’s proper issuance of a notice of determination by mailing also gives rise to a rebuttable presumption that the assessment made by the notice was received by the taxpayer in due course (Tax Law § 1147[a][1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Shanghai*



*Pavilion, Inc.*, Tax Appeals Tribunal, June 10, 2010; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002).<sup>4</sup>

J. In this case, petitioner has argued for cancellation upon the basis that neither he, nor his representative received the Notice of Determination. However, petitioner has not rebutted the applicable presumption of receipt that attaches to a properly issued notice of determination. Petitioner's challenge thus simply amounts to a bare claim of such nonreceipt to be juxtaposed against the Division's proof of proper issuance by mail. Such a bare assertion is unavailing in the face of the evidence of proper mailing produced by the Division (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]). Under such circumstances of proper issuance with no rebuttal of the presumed receipt of the notice thereafter, petitioner had

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<sup>4</sup> The applicable statute in *Sugranes* was Tax Law § 1138(a)(1) (as amended by L 1996, ch 267). Such amendment, which became effective for tax years beginning January 1, 1997, provides for the "mailing," rather than the former "giving" of notices of determination of tax due to persons responsible for collection or payment thereof (*see* Tax Law former § 1138[a][1]). The language of this amendment and its legislative history indicate an intent to bring the notice provisions of the sales tax law into conformity with those of the personal income tax law where receipt of a notice of deficiency is not a part of the service requirement (*compare* Tax Law § 681; *see Matter of Malpica*, *see* June 26, 1996 letter to Governor Pataki in support from Owen Johnson, Vice President Pro Tempore ["The legislation conforms the service requirements for sales tax to those required for income tax."]; *see also* Senate Memorandum in Support ["The bill provides that service by proper mailing is sufficient to assess tax."]). Significantly, however, the legislation did not amend Tax Law § 1147(a)(1), which, as noted above, provides that the mailing of a notice of determination shall be "presumptive evidence of receipt." The Division of Budget's Budget Report on the bill, dated June 25, 1996, noted the changes to Tax Law § 1138 and the lack of any amendment to Tax Law § 1147 and commented "if this bill were to become law it would be unclear as to which rules apply."

In *Matter of Ruggerite, Inc. v. State Tax Commn.*, a case decided under Tax Law former § 1138[a][1], the Court of Appeals found that the language of Tax Law § 1147(a)(1) "makes 'receipt' part of the procedural equation, and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption" (*id.* at 690). The Court in *Ruggerite* held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received. Under this reasoning, where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference with BCMS or a hearing before the Division of Tax Appeals is not triggered, and a petitioner would be entitled to a conference or a hearing (*Matter of Ruggerite, Inc. v. State Tax Commn.*; *Matter of Karolight, Ltd.*, Tax Appeals Tribunal, February 8, 1990). In addition, and under this reasoning, where it cannot be established that notice was properly given prior to expiration of the period of limitations on assessment, the assessment must be canceled as untimely. (*Id.*) Given this holding, the Tribunal properly found a rebuttable presumption of receipt in *Sugranes*, notwithstanding the amendments to Tax Law § 1138(a)(1) enacted by Laws of 1996 (ch 267) (*accord Matter of Azzato; Matter of Shanghai Pavilion, Inc.*).

90 days from the date of issuance (April 22, 2016) within which to file either a petition or a request for a conciliation conference to challenge such notice (Tax Law §§ 1138[a][1]; 170[3-a][a]).<sup>5</sup> The petition filed in this matter did not fall within such time period and was, therefore, properly subject to dismissal.

K. Petitioner's claim of support for his argument based upon the USPS tracking information has been considered and rejected. As an initial matter, the two allegedly supporting documents lack any foundational affidavit or evidentiary explanation whatsoever. More to the point, review of such documents provides support for the Division's position herein. That is, the tracking information supports the fact of delivery of the two specified items of mail to the USPS on April 22, 2016, and further supports delivery of such items thereafter by the USPS to petitioner and to petitioner's representative in due course (*see* Finding of Fact 18).<sup>6</sup> Finally, petitioner's claim that he never received a the Notice of Determination prior to the Division's response to the Notice of Intent is entirely belied by the Division's October 19, 2016 response to petitioner's representative's October 18, 2016 request for a copy of such Notice of Determination (*see* Finding of Fact 19). While the Division's October 19, 2016 response clearly included a copy of the Notice of Determination (at pages three, four and five thereof), petitioner's initial

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<sup>5</sup> In *Matter of American Cars "R" Us, Inc. v. Chu* (147 AD2d 797 [3d Dept 1989]), the taxpayer was unable to rebut the presumption of receipt of the notice where certified mail was returned to the taxing authority marked "Refused," and the evidence indicated that the USPS had followed proper procedures, but the taxpayer's manager refused to accept delivery. The Court held that a taxpayer cannot deliberately avoid service of a statutory notice.

<sup>6</sup> Given proper issuance of the Notice of Determination, the indicated delays in delivery resulting from "refused" (as to the item to be delivered to petitioner) and "no authorized recipient available" (as to the item to be delivered to petitioner's representative) affords petitioner no relief (*see Matter of Henry Street Superior Deli Corporation and Naifahmed Abad*, Tax Appeals Tribunal, February 21, 2017, citing *Matter of American Cars "R" Us*).

submission in response to the Notice of Intent on October 26, 2016 failed, for some unexplained reason, to include those specific pages.

L. Given the foregoing, the Notice of Determination in question was properly issued by the Division to petitioner, with a copy thereof properly issued to petitioner's then-representative, on April 22, 2016, and in order to be considered timely, petitioner's protest had to have been filed within 90 days thereafter. In turn, 90 days after the April 22, 2016 date of issuance of the Notice of Determination was July 21, 2016, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Here, the petition was not filed until August 17, 2016 (*see* Finding of Fact 1), a date that clearly falls far beyond the statutory period within which a timely protest had to have been filed. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Modica; Matter of Lukacs; Matter of Sak Smoke Shop*).

M. The petition of Ahmed Nagi Ahmed is hereby dismissed.

DATED: Albany, New York  
March 23, 2017

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE