

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**MARIO PUGLIESE** :

DETERMINATION  
DTA NO. 827843

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, 2005 through August 31, 2009. :

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Petitioner, Mario Pugliese, 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, 2005 through August 31, 2009.

The Division of Taxation, appearing by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion dated March 10, 2017, seeking dismissal of the petition, or in the alternative, summary determination in its favor pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion is an affidavit of Robert A. Maslyn, Esq., dated March 10, 2017, and annexed exhibits. Petitioner, appearing by Duke, Holzman, Photiadis & Gresens LLP (Gary M. Kanaley, Esq., of counsel), filed his affirmation in opposition to the motion, on March 31, 2017, with an affidavit of Gary M. Kanaley, Esq., and annexed exhibits. The Division of Taxation was granted permission to submit a response to petitioner's affirmation in opposition to its motion by May 4, 2017, which date began the 90-day period for the issuance of this determination. After due consideration of the motion papers and pleadings filed in this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the petition.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued Notice of Determination, L-041450142, dated June 11, 2014, to petitioner, Mario Pugliese, as a responsible officer for The Ridge, Inc., assessing additional sales and use taxes in the amount of \$58,800.11, plus penalties and interest for the period March 1, 2005 through August 31, 2009.

2. Additionally, the notice of determination asserted fraud penalties against petitioner pursuant to Tax Law § 1145(a)(2).

3. In support of its motion and to prove mailing of the notice of determination, the Division submitted, among other documents, the following: (i) the affidavit of Robert A. Maslyn, Esq., dated March 10, 2017; (ii) an affidavit, dated March 6, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessment Receivable" (CMR) postmarked June 11, 2014; and (iv) an affidavit, dated March 7, 2017, of Melissa Kate Koslow, a Head Mail & Supply Clerk in the Division's mail room.

4. The Division states that there was no record of petitioner ever filing a New York State Personal Income Tax Return, Form IT-201, or any other application other than the refund that is the subject of this proceeding. The Division affirms that the address provided for petitioner, during the audit of the corporation, is the same address as is listed in the petition herein, as well as the address listed for petitioner on the Power of Attorney form. Petitioner does not dispute that this address is the correct address.

5. The affidavit of Mary Ellen 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 page of the CMR. 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.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the 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."

7. The June 11, 2014 CMR consists of 30 pages and lists 319 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating

to other taxpayers. A USPS employee affixed a USPS postmark dated June 11, 2014 to each page of the CMR and also wrote his or her initials on each page thereof. Page 27 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0245 1127 and assessment number L-041450142, was mailed to petitioner at the Lewiston, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since April 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 sheet 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 USPS employee initialed each page of the CMR and affixed a postmark to each page. 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. A review of the June 11, 2014 CMR indicates that the USPS employee complied with this request by circling the number of pieces received.

9. According to the Koslow affidavit, the subject notice was mailed to petitioner on June 11, 2014, as claimed.

10. Petitioner failed to timely request a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or to timely file a petition with the Division of Tax Appeals with respect to the notice.

11. On or about January of 2016, the amount of \$212.82 was paid and applied to the outstanding liability of unpaid sales tax determined to be due. The amount of \$212.82 represents the tax assessed against petitioner for the sales tax quarter ending August 31, 2009.

12. Petitioner then filed a claim for refund in the amount of \$212.82. Such refund claim was denied by letter dated June 2, 2016. The Division denied the refund claim because it concluded that petitioner failed to exhaust his administrative remedies for contesting the notice of determination issued to him for the audit period.

13. Petitioner filed a request for a conciliation conference with BCMS contesting the refund denial. A Conciliation Order Dismissing Request, CMS No. 271302, dated August 12, 2016, dismissed the request for a conciliation conference for being untimely filed. The conciliation order dismissing request stated that the notice of determination was issued on June 11, 2014, but the request for conciliation conference was not filed until July 28, 2016, which was in excess of the 30 days required.

14. Petitioner timely filed his petition with the Division of Tax Appeals, on September 6, 2016, contesting the conciliation order dismissing request.

### **CONCLUSIONS OF LAW**

A. There is a 30-day statutory limitation for filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals following the issuance of a notice of determination that asserts a fraud penalty (Tax Law §§ 170[3-a][h][iii]; 2008[2][a][iii]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late filed request for conciliation conference or petition (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a petition or request for a conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified 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). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice. The CMR has been properly completed and, thus, it constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Moreover, petitioner does not dispute that he failed to timely file a petition or a request for a conciliation conference with respect to the notice of determination issued to him on June 11, 2014.

D. Petitioner argues, in his petition, that the focus of this proceeding falls squarely on whether he is entitled to a hearing on the refund denial of his payment of the tax due for the quarter ending August 31, 2009, as listed on the assessment L-041450142. In other words, petitioner chose to pay the tax due for a single sales tax quarter. Petitioner asserts that he filed a timely claim for refund of this amount within two years of its payment and, as such, he is entitled to a hearing on the merits of the entire notice of determination that was issued to him on June 11, 2014, which was for additional tax due for the period March 1, 2005 through August 31, 2009.

E. Tax Law § 1139(c) provides that a claim for refund may be made within two years from the time *the tax* was paid - not a portion of the tax. Petitioner was required to pay the full amount of the tax assessed on the notice of determination. The Tax Appeals Tribunal emphasized this when it stated that a “taxpayer may protest by payment of the amount assessed and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof” (*see Matter of SICA Electrical & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998; *see also Matter of Brewsky’s Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001).

Petitioner does not dispute that he only paid \$212.82 of the \$58,800.11 assessed by the notice of determination. Tax Law § 1139(c) clearly requires that an application for refund must be made within two years of payment of the full tax assessed. Since petitioner has not made payment of the tax assessed, the conciliation order dismissing request was properly issued. Accordingly, it is determined that the Division of Tax Appeals lacks jurisdiction to entertain the merits of the petition.

F. The Division of Taxation's motion for summary determination is granted and the petition of Mario Pugliese is denied.

DATED: Albany, New York  
July 20, 2017

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE