

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DENIS ABRAMOWITZ** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 828095  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period June 1, 2009 through February 29, 2012. :

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Petitioner, Denis Abramowitz, 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 June 1, 2009 through February 29, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion, dated May 22, 2017, 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)(ii) 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, Catherine M. Bennett, 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 a notice of determination for the period June 1, 2009 through February 29, 2012.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of determination dated November 20, 2013, bearing notice number L-040429709-5. The notice was addressed to petitioner, Denis L. Abramowitz, at 23 Wallace St, Unit 307, Red Bank, NJ 07701-6621.

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the November 20, 2013 notice of determination. The request was mailed to BCMS on January 30, 2017, and received by BCMS on February 2, 2017.<sup>1</sup>

3. BCMS issued a conciliation order dismissing request to petitioner dated February 17, 2017. The order determined that petitioner's protest of the subject notice 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 November 20, 2013, but the request was not mailed until January 31, 2017, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on February 22, 2017.

5. To show proof of proper mailing of the November 20, 2013 notice of determination, the Division provided the following with its motion papers: (i) an affidavit, dated April 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) all 30 pages of the “Certified

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<sup>1</sup> The copy of the envelope in which the request was mailed has a metered postage date stamp of January 30, 2017. The envelope also contained a certified mail label which, although difficult to read, appears to be date-stamped January 30, 2017.

Record for Presort Mail - Assessments Receivable” (CMR), each legibly postmarked November 20, 2013; (iii) an affidavit, dated April 5, 2017, of Melissa Kate Koslow, a supervisor in the Division’s mail room; (iv) a copy of the November 20, 2013 notice of determination with the associated mailing cover sheet; (v) petitioner’s request for conciliation conference, dated and mailed January 30, 2017 (*see* Footnote 1); (vi) a copy of the conciliation order issued to petitioner (CMS No. 273506); and (vii) a copy of petitioner’s electronically filed Form IT-203, nonresident and part-year resident income tax return for the year 2012, filed on or about October 15, 2013, which lists petitioner’s name as “Denis L. Abramowitz” and address as 23 Wallace Street, 307, Red Bank, NJ 07701.<sup>2</sup>

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 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 “11/20/13.” 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

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<sup>2</sup> The return was filed jointly with Barbara Abramowitz, who was not named in the petition filed in this matter.

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 30 pages. Each of the pages consists of 11 entries, with the exception of page 27, which contains 10 entries, with one of the original 11 entries crossed out, and page 30, which contains 6 entries. 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 "324" on page 30, and initialed or signed page 30. Attached to the Nagengast affidavit, as exhibit "A," is a copy of all 30 pages of the CMR.

9. Page 2 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0100 2450 and assessment ID number L-040429709 was mailed to "ABRAMOWITZ-DENIS L, 23 WALLACE ST UNIT 307, RED BANK, NJ 07701-6621." The corresponding mailing cover sheet, attached to the Nagengast affidavit, bears this certified control number and petitioner's name and address as noted.

10. Page 5 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0100 2849 and assessment ID number 040429709 was mailed to petitioner's representative "DON GILBERT, EA, PO BOX 090122, STATEN ISLAND, NY 10309."

11. 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.

12. Each of the 30 pages of the CMR attached to the Nagengast affidavit contains a USPS postmark of November 20, 2013. On page 30, corresponding to "Total Pieces Received at Post Office," the USPS employee crossed out the number "325," wrote and circled the number "324," 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 324 of the 325 articles

of mail listed on the CMR, including the article addressed to petitioner and his representative, were received by the USPS on November 20, 2013. The number 324 reflects the fact that one piece of certified mail, unrelated to the item associated with petitioner, had been pulled from the mailing record, and ultimately a total of 324 pieces of mail listed were delivered to the USPS.

13. According to both the Nagengast and Koslow affidavits, an item of certified mail was delivered to the USPS bearing addresses for petitioner and his representative on November 20, 2013, as claimed.

14. Petitioner's address on the petition, CMR, notice of determination and its cover sheet, and request for conciliation conference matches the Red Bank, New Jersey, address listed on petitioner's 2012 personal nonresident and part-year resident income tax return (Form IT-203). According to the Division's records, the IT-203 for 2012 was the last return filed with the Division by petitioner before the notice was issued.

### ***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. 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 and Koslow affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mary Ellen Nagengast and Melissa Kate Koslow, Division employees involved in and possessing knowledge of the process. Moreover, it is observed that



the CMR in this matter was properly completed and, as such, constitutes highly probative documentary evidence of the mailing of the subject notices to the address listed and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits, together with the properly completed CMR, establish that such procedures were followed in the present matter. The Division has thus established that it mailed copies of the subject notice to the addresses listed on the CMR for petitioner and his representative on November 20, 2013. Additionally, petitioner's Red Bank, New Jersey, address as listed on the CMR and the notice conforms with the address reported on the last return filed with the Division prior to the issuance of the subject statutory notice. Having offered nothing further, petitioner is deemed to have admitted that his last known address was the one asserted by the Division, and used in the mailing of the notice in issue (*see Kuehne & Nagel*). Accordingly, the Division has satisfied the "last known address" requirement in Tax Law § 1138(a)(1).

G. As the Division has established that it properly mailed the subject notice on November 20, 2013, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170[3-a][a]; 1138[a][1]). Petitioner's request was filed on January 31, 2017, which 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][a]). Accordingly, the Division has established a prima facie case warranting a determination in its favor and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

H. The Division's motion for summary determination is hereby granted, the petition of Denis Abramowitz is denied and the February 17, 2017 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York  
September 14, 2017

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE