

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RAY V. NOBLE** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 828780  
Sales and Use Taxes under Articles 28 and 29 of :  
the Tax Law for the Periods 1998, 1999, 2000 :  
and 2001. :

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Petitioner, Ray V. Noble, 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 periods 1998, 1999, 2000 and 2001.

On August 24, 2018, 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 basis that the petition did not appear to have been filed in a timely manner. The parties were given until November 8, 2018, to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel), submitted an affidavit and documentation in support of the dismissal. Petitioner, appearing by Edward Delli Paoli, Esq., submitted an affirmation and documentation opposing the dismissal. The 90-day period for issuance of this determination commenced on November 8, 2018. Based upon the affidavits and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals, following the issuance of notices of estimated determination and notices of determination.

***FINDINGS OF FACT***

1. Petitioner, Ray V. Noble, filed a petition that was received by the Division of Tax Appeals on June 29, 2018. The envelope containing the petition did not bear a United States Postal Service (USPS) postmark stamp indicating the date it was mailed.<sup>1</sup>

2. The petition protested the following notice of determination dated July 19, 2001, and notices of estimated determination and notices of determination dated September 17, 2001 (notices):<sup>2</sup>

Notice #	Tax Period Ended	Notice Date
L-019751295	11/30/1999 - 11/30/2000	July 19, 2001
L-020089370	02/28/2001	September 17, 2001
L-020089371	11/30/2000	September 17, 2001
L-020089372	02/29/2000	September 17, 2001
L-020089373	08/31/2000	September 17, 2001
L-020089374	05/31/2000	September 17, 2001
L-020089375	02/29/2000	September 17, 2001

3. On August 24, 2018, the Division of Tax Appeals issued to petitioner a notice of

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<sup>1</sup> Pursuant to 20 NYCRR 3000.22, the Division of Tax Appeals considers the date of mailing to be five (5) days prior to the date the petition was stamped as received, in this case June 23, 2018 (*see Matter of GRJH, Inc.*, Tax Appeals Tribunal, October 8, 2015; *Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988).

<sup>2</sup> An income execution notice (E-019751295) also accompanied the petition, however, petitioner's representative confirmed in the response to the notice of intent to dismiss petition that petitioner is not protesting this notice.

intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition had been filed in excess of ninety days after issuance of the notices, the petition was not timely filed.

4. In response to the issuance of the notice of intent and to prove mailing of the notices issued on September 17, 2001, the Division of Taxation (Division) provided the following: (i) an affidavit, dated November 5, 2018, of Stephanie M. Scalzo, an attorney employed by the Office of Counsel of the Division; (ii) copies of the notices with the associated mailing cover sheets addressed to petitioner; (iii) an affidavit, dated October 11, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iv) a “Certified Record for Non-Presort Mail” (CMR) postmarked September 17, 2001; (v) an affidavit, dated October 12, 2018, of Fred Ramundo, a supervisor of the Division’s mail room; and (vi) a copy of petitioner’s IT-201 New York State Resident Income Tax Return for the year 2000. This tax return lists the same address for petitioner as that listed on the notices, and was the last tax return filed by petitioner prior to the issuance of the subject notices.

5. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 their mailing. 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 page of the CMR in the present case to the actual mailing date of "9/17/01." 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 the 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 Address, Street, and PO Address."

7. The September 17, 2001 CMR consists of 31 pages and lists 340 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 31, which contains 10 entries. Ms. Picard 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 September 17, 2001 to each page of the CMR, circled the preprinted "340" next to the heading "Total Pieces and Amounts Listed," and initialed or signed page 31 of the CMR.

8. Pages 6 and 7 of the CMR indicate that the notices with certified control numbers 7104 1002 9739 0044 4610, 7104 1002 9739 0044 4627, 7104 1002 9739 0044 4634, 7104 1002

9739 0044 4641, 7104 1002 9739 0044 4658, and 7104 1002 9739 0044 4665 and reference numbers L-020089370, L-020089371, L-020089372, L-020089373, L-020089374, and L-020089375, were mailed to petitioner at the Staten Island, New York, address listed on the subject notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted.

9. The affidavit of Fred Ramundo describes the general operations and procedures within the Division's mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with both the present and past practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. 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, so that the address and certified number from the mailing cover sheet shows through the window. 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee 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 noted, the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark dated September 17, 2001. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials

indicates that all 340 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on September 17, 2001.

10. According to the Picard and Ramundo affidavits, the notices were mailed to petitioner on September 17, 2001, as claimed.

11. The Division did not provide any documentation, namely proof of proper mailing, in regard to notice of determination number L-019751295, issued on July 19, 2001.

12. In response to the issuance of the notice of intent, petitioner's representative provided affirmations of Mr. Paoli, dated November 7, 2018. Petitioner challenges the service of the notices, and claims that the tax liability should be dismissed due to a bankruptcy petition that was discharged in 2001.

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

A. 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.

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. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). 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 receipt of a notice and the consequent timeliness of a taxpayer's protest of a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

E. The evidence required of the Division in order to establish proper mailing is two-fold: 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 Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. Here, with respect to notices L-020089370, L-020089371, L-020089372, L-020089373, L-020089374, and L-020089375, the Division has offered proof sufficient to

establish the mailing of the statutory notices to petitioner's last known address on September 17, 2001. 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 DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and CMR conforms with the address listed on petitioner's last IT-201 New York State Resident Income Tax Return for the tax 2000, which satisfies the "last known address" requirement (*see* Tax Law § 1138 [a] [1]). It is thus concluded that the Division properly mailed the notices on September 17, 2001, and 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 (*see* Tax Law § 1138 [a] [1]).

G. The Division has established that the notices bearing assessment numbers L-020089370, L-020089371, L-020089372, L-020089373, L-020089374, and L-020089375, were properly mailed as addressed to petitioner at his last known address on September 17, 2001. Having established that the notices were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until June 23, 2018, and received on June 29, 2018, dates that fall beyond 90 days after the date of issuance of the notices. Petitioner has challenged the service of the notices at issue. However, a mere assertion of non-receipt is insufficient to rebut the presumption of receipt that attaches to a properly mailed notice of determination (*see Matter of*



*Ahmed Nagi Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Accordingly, the petition regarding the subject notices dated September 17, 2001 is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The same does not hold true, however, for notice of determination number L-019751295, issued on July 19, 2001. The Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notice. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Accordingly, the notice of intent is rescinded in respect of notice of determination number L-019751295, and petitioner's protest for this notice will be severed from this matter, and assigned a separate Division of Tax Appeals case number and proceed accordingly.

I. The notice of intent to dismiss petition is sustained and the petition of Ray V. Noble is dismissed with respect to the notices bearing assessment numbers L-020089370, L-020089371, L-020089372, L-020089373, L-020089374, and L-020089375, as indicated in conclusion of law G. However, the notice of intent to dismiss is rescinded with respect to notice of determination number L-019751295 and petitioner's protest of this notice will be assigned a separate Division of Tax Appeals case number as indicated in conclusion of law H.

DATED: Albany, New York  
January 31, 2019

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE

