

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CECIL P. JOSEPH : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 828813
and Use Taxes Under Articles 28 and 29 of the Tax Law :
for the Period December 1, 2015 through February 29, :
2016.

Petitioner, Cecil P. Joseph, 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 December 1, 2015 through February 29, 2016.

On March 8, 2019, 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 be timely filed and that the Division of Tax Appeals lacked jurisdiction to hear the merits of the petition. By letter dated April 1, 2019, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to May 23, 2019. On May 17, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel), submitted affidavits and documents in support of dismissal. On April 29, 2019, petitioner, appearing pro se, submitted a letter and documents in opposition to dismissal.

After due consideration of the documents presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

1. Petitioner, Cecil P. Joseph, filed a petition challenging an assessment bearing assessment ID No. L-046392313. The petition is dated as signed by petitioner on July 19, 2018. The petition was filed via United States Postal Service (USPS) certified mail, and the envelope in which the petition was mailed bears a USPS postmark dated July 20, 2018. The petition is stamped as received by the Division of Tax Appeals on July 24, 2018.

2. The petition indicates the amount of tax determined as \$190,623.83, and the amount contested as “penalty and interest portion.” The petition states that a conciliation conference was requested with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division), and that a conciliation order was issued on April 20, 2018. Attached to the petition was one page (page 16) from Division form 871, addressed to petitioner and advising that assessment ID No. L-046392313, pertaining to the tax period ended August 31, 2016, had been cancelled by the Division, but further stating that petitioner had additional unpaid tax notices totaling \$190,623.83.¹ The attached page of form 871 is dated June 13, 2017. It does not provide any further specifics regarding the referenced additional unpaid tax notices.

3. Also attached to the petition was a conciliation order dismissing request, CMS Number 000302302, dated April 20, 2018 and pertaining to assessment number L-047017974. This order states as follows:

¹ The page attached to the petition is numbered page 16 of what is apparently a multi-page document. The other pages were not attached to the petition, and are not otherwise included as part of the record.

“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 September 8, 2017, but the request was not received until March 21, 2018, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is dismissed.”

4. On March 8, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition (notice of intent) on the basis that the petition did not appear to have been timely filed and that the Division of Tax Appeals lacked jurisdiction to address the merits thereof. The notice of intent addressed itself to two notices of determination and four notices of estimated determination, as well as the above-referenced notice of cancellation (*see* finding of fact 2), as follows:

Tax Type	Assessment ID No. ²	Date	Tax Period Ended	Tax Amount ³
sales and use	L-047017974	09/08/17	02/20/16	\$26,252.42
sales and use	L-047017973	09/08/17	02/20/16	\$23,526.48
sales and use	L-045896934	01/03/17	02/20/16	\$14,427.74
sales and use	L-046392314	05/05/17	02/20/16	\$30,754.80
sales and use	L-045896933	01/03/17	02/20/16	\$28,309.12
sales and use	L-045646196	11/02/16	02/20/16	\$32,964.50

5. The notice of intent states that the petition was filed on July 20, 2018, a date that falls more than 90 days after the dates of issuance listed on the foregoing notices, thus leaving the Division of Tax Appeals without jurisdiction to address the merits of the assessments and

² The first two assessments listed are notices of determination, while the remaining four assessments are notices of estimated determination. Copies of the assessments, as well as a one-page Consolidated Statement of Tax Liabilities, dated August 29, 2018 and addressed to petitioner, are included as part of the record herein.

³ The amounts shown reflect tax only, and do not include penalty or interest, each of which was also assessed on each of the notices, or payments or credits applied in reduction of the amounts assessed on the notices.

requiring dismissal of the petition. The notice of intent further states that, to the extent the petition challenges the BCMS conciliation order pertaining specifically to assessment ID No. L-047017974, the same was not filed within 90 days after the listed April 20, 2018 date of issuance of the conciliation order, and must likewise be dismissed for lack of jurisdiction. Finally, the notice of intent states that a consolidated statement of tax liabilities is not a statutory notice sufficient to confer jurisdiction upon the Division of Tax Appeals, so as to allow consideration of the merits of the underlying assessments listed thereon.

Assessment ID Nos. L-045646196, L-145896933, L-046896934 and L-046392314

6. In response to the notice of intent, and with respect to the four estimated assessments identified above, the Division submitted: (i) an affidavit, dated May 16, 2019, of Brian D. Evans, Esq., an attorney in the Office of Counsel of the Division; (ii) an affidavit, dated May 14, 2019, of Shelby Jacobsen, Taxpayer Services Specialist 3 and Team Lead of the Electronic Communication Unit of the Division; (iii) a copy of the Division's "Online Services (OLS) Account Terms and Conditions for Individuals;" (iv) a screenshot of petitioner's OLS account summary to "Manage Email;" (v) a screenshot of petitioner's OLS "View Online Services Account;" (vi) correspondence dated July 12, 2013 from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) copies of the subject notices of estimated deficiency dated as specified above (*see* finding of fact 4, n. 2); (ix) a copy of petitioner's "Event Management Transaction Log" within the "e-Manages Process for an Integrated Revenue Enterprise" (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; and (xi) the Division's printout of "Delivery Details by Template ID," including the Division's printout of electronic message

delivery status.

7. The affidavit of Shelby Jacobsen sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications including electronic statutory notices. Ms. Jacobsen has held the position of Taxpayer Services Specialist 3 and Team Lead of the Division's Electronic Communication Unit since May 2018, and is knowledgeable of the practices and procedures for the delivery of statutory notices via taxpayer specific electronic communication. As part of Ms. Jacobsen's duties, she manages the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices.

8. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

9. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related

documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

10. The Division's Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z Retrieve View Data (RVD) program. The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and the billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

11. When a statutory notice is scheduled to be issued to a taxpayer, the AFP system generates a mail file of the electronic statutory notice. The AFP system stores the file of the electronic statutory notice and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS Message Center. The email alerts are delivered through a third-party vendor, formerly named GOVDelivery, and now known as Granicus. Granicus provides the Division delivery status information that the Division stores and reports, advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

12. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayer in his or her message center upon logging in to the OLS. The statutory notice is viewable in the message center section of the taxpayer's OLS account.

13. Petitioner opened an OLS account with the Division on July 9, 2013, under his name, taxpayer identification number “xxx-xx-xx31”, username “p*****1” and an email address of “*****1@***.com.”⁴ Petitioner’s OLS account for this user identification number and email address remains active to date.

14. In the Manage Email section of petitioner’s OLS account, petitioner indicated “yes” under “receive emails” in response to “Bills and Related Notices,” “Get emails about your Bills” “Other Notifications,” and “Get emails about refunds, filings, payments, account adjustments, etc.”

15. On July 12, 2013, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on July 9, 2013, as described above.

16. In the present case, on November 2, 2016, January 3, 2017 and May 5, 2017, the Division posted messages stating, “You have a new liability” to petitioner’s OLS account and sent corresponding email alerts to petitioner’s email address. The Division posted the estimated notices of determination L-045646196, L-045896933, L-045896934, and L-046392314, to petitioner’s OLS account on the above-noted dates, which were stored in his OLS message center.

17. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address on November 2, 2016, with APL Tracking ID MG110220161276938, on January 3, 2017, with APL Tracking ID

⁴ Petitioner’s taxpayer identification number, username, and email address have been partially redacted herein for privacy purposes.

MG010320172332982 and MG103020172333009, and on May 5, 2017 with APL Tracking ID MG050520176351534, MG050520176351636, and MG050520176351637. The Delivery Details indicate the status of all of the foregoing emails sent to petitioner on all of the foregoing dates as “D” (delivered).

18. Findings of fact 7 through 17 were established through the affidavit of Ms. Jacobsen, as well as the documentary evidence presented by the Division. Ms. Jacobsen’s affidavit avers that she is knowledgeable of the general practice and procedure for her delivery of electronic statutory notices, and that the procedures followed and described in his affidavit were the normal and regular procedures of the Division’s Electronic Communication Unit on the dates shown on the documents and specified in her affidavit.

Assessment ID No. L-047017973

19. In response to the notice of intent, and with respect to assessment ID No. L047017973, the Division submitted: (i) an affidavit, dated May 16, 2019, of Brian D. Evans, Esq., attorney in the Division’s Office of Counsel; (ii) an affidavit, dated April 18, 2019, of Deena Picard, the Division’s Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated April 19, 2019, of Fred Ramundo, the Division’s Stores and Mail Operations Supervisor; (iv) a copy of notice of determination L-047017973; (v) a copy of a “Certified Record for Presort Mail” (CMR); and a copy of form IT-370 (Application for Automatic Six-Month Extension of Time to File for Individuals) dated April 17, 2017.

20. The affidavit of Deena Picard, the Acting Director of MAPS, sets forth the Division’s general practice and procedure for processing statutory notices. Notices of determination, such as the one at issue herein (L-047017973), were computer-generated by the Division’s

Computerized Case and Resource Tracking System (CARTS) Control Unit. The computer preparation of such notices also included the preparation of a CMR. The CMR lists those taxpayers to whom notices of determination were being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other (fan-folded) before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

21. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the columnar heading "Certified No." The next columnar heading on the CMR, entitled "Reference No.," lists the assessment number assigned to each notice listed on the CMR. The third columnar heading, entitled "Name of Addressee, Street and P.O. Address" lists the names and addresses of the taxpayers to whom the notices are being issued. The remaining columns list the postage and fee amounts for the notices being mailed. The CMR also lists an initial date (the date of its printing) in its upper left corner, set forth in numbers listing the particular year, Julian day of the year and military time of day when such CMR was produced which, in this case, was "20172431700." The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel, in order to conform to the actual date of mailing.

22. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one page "Mailing Cover Sheet" (Form DTF-997) that is

generated by CARTS for each notice. Each mailing cover sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division. The reverse side of each mailing cover sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its mailing cover sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

23. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a windowed envelope so that the addresses and certified number from the mailing cover sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information set forth on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark, or his signature or initials, or both, to the CMR. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

24. Here, the CMR was an 11-page, fan-folded (connected) computer-generated

document entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE.” All pages were connected when the document was delivered into the possession of the USPS, and remained connected when the postmarked document was returned after mailing. This CMR lists 118 certified control numbers. Each such certified control number is assigned to an item of mail listed on the 11 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains 11 entries, with the exception page 11 which contains 8 entries, for a total of 118 entries.

25. Information regarding the notices of determination issued to petitioner, and to petitioner’s then-representative, James Bohl, CPA, is set forth on pages four and eight of the CMR. Petitioner’s name, and his Mosholu Avenue, Bronx, New York, address appears on page four, and petitioner’s representative’s name, and his Johnson Avenue, Ronkonkoma, New York, address appears on page eight.

26. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated September 8, 2017, and the initials of a postal employee, verifying the receipt of items. The upper right corner of the first and last pages of the CMR include the handwritten date “9/8/17,” a change made to show conformity of the preprinted date to the actual date of mailing, per the Division’s standard mailing procedure (*see* finding of fact 21).

27. The last page of the CMR, page “11,” contains a preprinted entry of “118” corresponding to the heading “Total Pieces and Amounts Listed.” Appearing directly beneath this preprinted entry is the handwritten number “118,” to the right of which appears the aforementioned September 8, 2017 postmark of the Colonie Center Branch of the USPS, and the

initials of the USPS employee accepting receipt of the items listed on the CMR.

28. The handwritten number 118, the affixation of the USPS postmarks, and the initials of the USPS employee, indicate that all 118 pieces of the CMR were received at the post office.

29. In the ordinary course of business, the CMR is returned to the Division's CARTS unit, and the Division generally does not request, demand or retain return receipts from registered or certified mail.

30. Findings of fact through 19 through 29 were established through the affidavits of Deena Picard and Fred Ramundo, together with the documentary evidence presented by the Division. Each of the affiants aver that they are knowledgeable of the general practice and procedures for the generation and issuance, by mailing, of documents, including statutory notices of determination, and that the procedures followed and described in their affidavits were the normal and regular procedures of the Division with respect thereto.

Assessment ID No. L-047017974 and Conciliation Order No. 000302302

31. In response to the notice of intent, and with respect to assessment ID No. L047017973 and conciliation order number 000302302, the Division submitted: (i) an affidavit, dated May 16, 2019, of Brian D. Evans, Esq., an attorney in the Division's Office of Counsel; (ii) an affidavit, dated April 29, 2019, of Robert Farrelly, the Division's BCMS Supervisor of Tax Conferences; (iii) an affidavit, dated April 29, 2019, of Fred Ramundo, the Division's Stores and Mail Operations Supervisor; (iv) an affidavit, dated May 9, 2019, of Heidi Corina, a legal assistant 2 in the Division's Office of Counsel; (v) a copy of notice of determination L-047017974; (vi) a copy of a "Certified Record for Manual Mail" (CMR); (vii) a copy of form IT-370 (Application for Automatic Six-Month Extension of Time to File for Individuals) dated

April 17, 2017; (viii) a copy of the Request for Conciliation Conference date November 3, 2017; (ix) a copy of a subsequent letter from petitioner, dated March 21, 2018, requesting that a conference be scheduled; and (x) a copy of conciliation order number 000302302, dated April 20, 2018.

32. The affidavit of Robert Farrelly, sets forth the general practice and procedure for the preparation and issuance, by mailing, of conciliation orders. The procedure culminates in the mailing of conciliation orders by the USPS, via certified mail, with confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

33. Conciliation orders, such as the one at issue herein (CMS No. 000302302), and accompanying cover letters, are computer-generated by the BCMS Date Management Services Unit. The computer generated orders and letters, predated with their intended date of mailing, are forwarded to the conciliation conferee issuing the order, for review, approval, and signature, and thereafter are forwarded to the conference supervisor for final approval.

34. The name, mailing address, order date, and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

35. The AFP Unit produces a computer-generated CMR entitled "Certified Record for Manual Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day.

36. Each computer-generated conciliation order is pre-dated with its anticipated mailing

date, and each is assigned a separate certified control number. This number is recorded on the CMR under the columnar heading “Certified No.” The next columnar heading, entitled “Reference No.,” lists the order number assigned to each order listed on the CMR. The following columnar heading is reserved for the names and addresses of the taxpayers, and their representatives (if any) to whom the orders are being issued. The AFP Unit sends the CMR, cover sheets and cover letters to a printer located in BCMS, and these documents, along with the conciliation orders, are delivered to the BCMS clerk assigned to process conciliation orders.

37. The BCMS clerk’s regular duties include associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of taxpayers (and their representatives, if any) listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer (or representative, if any) appear.

38. It is the general office practice that the BCMS clerk stamps “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the bottom left corner of the last page of the CMR. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. The CMR, together with the envelopes containing the cover sheets, cover letters, and conciliation orders, are picked up from BCMS by an employee of the Division’s Mail Processing Center, and placed in the “Outgoing Certified Mail” basket in the Mail Processing Center.

39. After a conciliation order, as packaged above, is placed in the outgoing mail basket, a staff member in the Mail Processing Center retrieves, weighs, and seals each envelope, and

affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies the names and certified mail numbers thereon against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area, where a postal employee accepts the envelopes into the custody of the USPS, and affixes a dated postmark and/or his or her signature or initials, or both, to the CMR. In the ordinary course of business, a Mail Processing Center employee picks up the CMR at the post office on the day following its initial delivery, and returns the same to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

40. The CMR here is a three-page, computer-generated document entitled "CERTIFIED RECORD FOR MANUAL MAIL - CMS-37-BCMS Order." This CMR lists 32 certified control numbers. Each such certified control number is assigned to an item of mail listed on the 3 pages of the CMR. Specifically, corresponding to each listed certified control number is an order number, and the name and address of the addressee to whom the order is to be mailed. Page 1 of the CMR contains 11 entries, page two contains 12 entries, and page three contains 9 entries, for a total of 32 entries.

41. Information regarding the conciliation order issued to petitioner, and to petitioner's then-representative, Stephen Lombardo, EA, is set forth, respectively, on pages one and three of the CMR. Petitioner's name, and his Mosholu Avenue, Bronx, New York, address appears on page one, and petitioner's representative's name, and his Wolverine Street, Staten Island, New York, address appears on page three. The CMR shows that certified number 7104 1002 9735 4211 1918 was used for the order mailed to petitioner, and certified number 7104 1002 9735

4211 2151 was used for the copy of the order mailed to Mr. Lombardo.

42. The last page of the CMR bears the postmark of the Stuyvesant Plaza Branch of the USPS, dated September 8, 2017, and the initials of a postal employee, verifying receipt of the items listed on the CMR. The upper right corner of each of the three pages of the CMR include the handwritten date "4/20/18," a change made to show conformity of the preprinted date on the CMR to the actual date of mailing, per the Division's standard mailing procedure. The last page of the CMR also contains a preprinted entry of "32," corresponding to the heading "Total Pieces and Amounts Listed." This preprinted entry is circled, and the same number, 32, appearing immediately to the left of the USPS postmark, is handwritten, circled and initialed.

43. The first page of the CMR reflects the notation next to petitioner's name: "Order ret./unclaim. Addr. Ok. Rемаiled (reg.) 6-6-18." On June 6, 2018, BCMS mailed a copy of the conciliation order to petitioner by regular mail, in accordance with its standard policy to remail by regular mail any orders returned by the USPS.

44. The Division also supplied the affidavit of Heidi Corina, detailing her actions in verifying delivery of the conciliation order at issue to petitioner and to his representative. Ms. Corina prepared, and delivered to the USPS, a separate USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with respect to each of the foregoing mailings to petitioner and to his representative, Mr. Lombardo, seeking information concerning delivery of the mailings from the USPS.

45. In response, the USPS verified that on May 22, 2018, certified mail number 7104 1002 9735 4211 1918 (the item addressed to petitioner) was delivered back to the Division. A copy of the envelope in which the piece of certified mail addressed to petitioner was enclosed

lists the same to be a “nixie, Return to Sender, Unclaimed, Unable to Forward.” The USPS verified that on May 24, 2018, certified mail number 7104 1002 9735 4211 2151 (the item addressed to petitioner’s representative) was delivered.

46. Findings of fact 32 through 45 were established through the affidavits of Robert Farrelly, Fred Ramundo, and Heidi Corina, together with the documentary evidence presented by the Division. Each of these affiants aver that they are knowledgeable of the general practice and procedures for the generation and issuance by mailing and delivery of documents, including conciliation orders, and that the procedures followed and described in their affidavits were the normal and regular procedures of the Division with respect thereto.

47. In response to the notice of intent, petitioner submitted a letter indicating that he accepted responsibility for the tax and statutory interest at issue, that he has entered into an installment payment agreement with the Division, and that he is current with his payments thereunder. Petitioner states that he did not receive the conciliation order at issue herein until June 11, 2018, and claims that this delay in receipt, in combination with certain health issues his representative faces, should excuse any lateness in responding. Ultimately, petitioner seeks a conciliation conference in order to explain that extenuating circumstances caused the initial delays in payments on the assessments and, thus, provide support for abatement of penalties and any interest in excess of the statutory amount that may be due.

CONCLUSIONS OF LAW

A. This matter proceeds as a notice of intent to dismiss petition under 20 NYCRR 3000.9 (a) (4). 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 (*id.*; *see* Tax Law § 3000.9 [b]).

B. 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]).

C. Section 3000.9 © 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, 441 [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 and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [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*).

D. Although petitioner responded to the notice of intent, he has not challenged any of the

facts asserted by the Division, or presented any evidence to show that the same are in contest. Accordingly, such facts are admitted, and petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227 [^{1ST} Dept 1984], *lv dismissed* 62 NY2d 942 [1984]; *Whelan v GTE Sylvania*).

E. 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 notice (*see* Tax Law §§ 1138 [a] [1]; 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 a hearing has not elapsed” (*see* Tax Law § 170 [3-a] [a]). Furthermore, where a taxpayer requests a conciliation conference, a taxpayer may protest the conciliation order issued as a consequence thereof by filing a petition for a hearing with the Division of Tax Appeals within 90 days after the conciliation order is issued (Tax Law § 170 [3-a] [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 Leibowitz*, Tax Appeals Tribunal, August 13, 2015; *Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *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 or a conciliation order 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 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).

F. 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 issuance of the statutory notice, including any conciliation order, being protested, so as to conclude that the taxpayer received proper notice (*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 statutory notice, including a conciliation order, 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 (*see 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 (*see* Tax Law § 1138 [a][1]). It is the Division's initial burden to demonstrate both the fact and date of any such mailing of any statutory notice carrying with it the right to file a protest and be heard, for it is from such date that the limitations period within which a protest may be filed is measured.

G. 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*).

H. This matter concerns challenges to: (a) four estimated notices of determination, each of which was electronically issued; (b) one notice of determination that was issued by certified mail; and (c) a conciliation order, issued by certified mail, that dismissed petitioner's challenge to another notice of determination. Each of these challenges will be addressed separately hereinafter.

Assessment ID Nos. L-045646196, L-145896933, L-046896934 and L-046392314

I. When a notice of determination 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 (*see* Tax Law §§ 1138 [a] [1]; 1147 [a] [1]), a presumption arises that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991), and the petitioner in turn bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, that presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests, in the first instance, with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commr.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).⁵

J. While Tax Law § 1138 (a) (1) requires the mailing of a notice of determination by certified or registered mail to the taxpayer's last known address, Tax Law § 35 provides for an alternative method of issuing a notice of determination by means of electronic communication.

⁵ There is no claim by petitioner, and no evidence in the record, that he was represented at the time the four above-referenced notices were issued. Hence, there is no basis upon which to conclude that the Division was under an obligation to issue a copy of such notices to any representative of petitioner (compare conclusion of law Q, n. 7).

Specifically, Tax Law § 35 provides as follows:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.⁶”

K. In accordance with Tax Law § 35, the Division furnished the four above-referenced notices of determination to petitioner by use of electronic means of communication. The Division has established that it obtained petitioner’s authorization, as an OLS account holder, to furnish such notices electronically. Specifically, the Division has proven, through the affidavit of Shelby Jacobsen, and the documentary evidence attached thereto, its standard procedure for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

L. The Division has also established through such affidavit and documentary evidence that the standard procedure for the furnishing of such notices was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). The evidence shows that petitioner established an OLS account, on July 9, 2013, under his name, identification number, username and email address (*see* findings of fact 13 through 15), as confirmed on July 12, 2013, when the Division sent an acknowledgment to petitioner, verifying his creation of such OLS account. The evidence further shows that petitioner authorized the Division to send notices

⁶ There are two sections 35 of the Tax Law. The relevant section herein is section 35, Use of electronic means of communication. The other section 35 contains provisions for the economic transformation and facility redevelopment program tax credit and is not relevant here.

electronically by checking “yes” in the box within his OLS account, Manage Email section, which indicates his agreement to receive email regarding bills, notices and other notifications. Pursuant to the Division’s OLS Account Terms and Conditions for Individuals, by providing electronic communication authorization, petitioner agreed to receive the indicated documents and communications electronically.

M. The Division has also offered proof sufficient to establish that the four statutory notices were furnished to petitioner by means of electronic communication on November 2, 2016 (L-045646196), January 3, 2017 (L-045896933 and L-046896934), and May 5, 2017 (L-046392314) to his OLS account, with alerts sent to his last known email address. The email alerts sent to petitioner’s email address advised him that “you have a new liability due,” alerting him to view the statutory notices posted in the Message Center of his OLS account. The Division’s records further show the delivery status of the emails as “D” (delivered). Based on the foregoing, it is determined that the Division has presented sufficient records to establish that it properly furnished the subject notices of determination to petitioner on the foregoing specified dates by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof. Given this conclusion of proper notice, it follows that 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 challenging such notices commenced on the above-noted dates (*see* Tax Law §§ 170 [3-a] [a]; 1138 [a]).

N. The record includes no claim or evidence that the four electronically issued notices of determination were not received. Further, petitioner has offered no claim or evidence to meet his

burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notices expired. The only evidence of the filing of any challenge by petitioner against the foregoing four notices of determination is the petition herein, filed on July 20, 2018. Such date falls well beyond the 90-day period of limitations for the filing of such a protest. Consequently, the petition was untimely with respect to such notices (*see* Tax Law §§ 1138 [a]; 170 [3-a] [b]), and the same is properly subject to dismissal.

Assessment ID No. L-047017973

O. The Division issued the above-referenced notice of determination to petitioner by certified mail, with respect to which, Tax Law § 1138 (a) (1) provides, in pertinent part, that:

“[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).

P. As set forth above, where the timeliness of a taxpayer’s protest against a notice of determination is in question, the initial inquiry is on the mailing of the notice by the Division (*see* conclusions of law F and G).

Q. In this instance, and with respect to the foregoing notice of determination, the

Division has met its initial burden of showing proper mailing of the same. Specifically, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, 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 then-representative, respectively, on September 8, 2017.⁷ 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 then-representative's name and address, and the numerical information on the notice of determination, appears on and corresponds to such information as set forth on the CMR, each page of which bears a USPS date stamp of September 8, 2017. There are 118 certified mail control numbers listed on the CMR for September 8, 2017, and the USPS employee who initialed the CMR indicated, by writing and initialing the number 118, that 118 items were received for mailing. The notice of determination was issued to petitioner at the address set forth on his application for an extension of time to file his 2017 return (form IT-370). This was the last application filed prior to the issuance of the notice at issue, was thus the last known address for petitioner at the time of the issuance of such notice of determination, and the record includes no claim or evidence that the Division was notified of any new or changed address for petitioner replacing the Mosholu

⁷ 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 then-representative, Mr. Bohl, with a copy of the notice.

Avenue, Bronx, New York, 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).

R. As concluded above, the Division has established proper issuance of the notice of determination to petitioner and to his then-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 (*see* 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 for a hearing before the Division of Tax Appeals (*see* Tax Law §§ 1138 [a] [1]; 2006 [4]), or a request for a conciliation conference with BCMS (*see* Tax Law § 170 [3-a] [a]). The Division's proper issuance of the notice of determination by mailing also gave rise to a rebuttable presumption that the assessment made by the notice was received by the taxpayer, and his then-representative, in due course (*see* conclusion of law I; 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).

S. The record includes no claim or evidence that the notice was not received, so as to call into question, much less rebut, the presumed receipt thereof. Furthermore, and as above, the only evidence of the filing of any challenge by petitioner against the foregoing notice of determination (L-047017973) is the petition herein, filed on July 20, 2018. Such date falls well beyond the 90-day period of limitations for the filing of such a protest. Consequently, the petition was untimely with respect to such notice (*see* Tax Law §§ 1138 [a]; 170 [3-a] [b]), and

the same is properly subject to dismissal.

Conciliation Order No. 000302302 and Assessment ID No. L-047017974

T. Finally, the petition challenges the BCMS order dismissing petitioner's request for a conciliation conference filed with respect to notice of determination L-047017974 (*see* finding of fact 3). Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As set forth above, the Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the applicable time limit (*see Matter of Victory Bagel Time, Inc.*).

U. Where the timeliness of a taxpayer's petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (*see* Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). A conciliation order is "issued," within the meaning of Tax Law § 170 (3-a) (e), at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato; Matter of DeWeese; Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, when an order is found to have been properly mailed by the Division to the

taxpayer's last known address by certified or registered mail, the petitioner bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

V. 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 such mailing. The evidence required of the Division in order to establish proper issuance by mailing of a conciliation order is the same as that set forth above, to wit, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and there must be proof that the standard procedure was followed in the particular instance in question (*see* conclusion of law G).

W. In this case, the Division has met its burden of establishing proper mailing of the conciliation order, with the accompanying cover sheet and cover letter. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address, and to mail a copy of the order to petitioner's then-representative, Mr. Lombardo. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue, along with the cover sheet, and cover letter were actually mailed to petitioner by certified mail on April 20, 2018, the date appearing on the CMR. The affidavits describe the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed

with respect to the conciliation order issued to petitioner and to Mr. Lombardo. Petitioner's and Mr. Lombardo's names and addresses, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of April 20, 2018. There are 32 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "32," that the post office received 32 items for mailing. In sum, the Division established that it properly mailed the order by certified mail on April 20, 2018.

X. The Division has established that the conciliation order was properly mailed on April 20, 2018, and it is this date that commenced the 90-day period within which a protest had to be filed. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer or by his or her representative. Specifically, that section provides that a conciliation order affirming a written notice described in Tax Law § 170 (3-a) is binding unless a petition is filed "within ninety days after the conciliation order is issued." Issuance, in this context, means mailing (*see Matter of Air Flex Custom Furniture*). Hence, the 90-day limitations period for the filing of a petition in this matter, with regard to the conciliation order, commenced as of the date of mailing, i.e., on April 20, 2018.

Y. The petition was filed on June 20, 2018, a date that falls 91 days after the issuance of the conciliation order. Accordingly, the petition challenging the conciliation order was untimely and the Division of Tax Appeals lacks jurisdiction to address the merits of the order or of the underlying notice of determination (*see* conclusion of law E, citing *Matter of Leibowitz*).

Z. The petition of Cecil P. Joseph is hereby dismissed.

DATED: Albany, New York
August 15, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE