

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**BALASUBRAMANI PRATHIBAN** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 829201  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
period September 1, 2014 through May 31, 2017. :  

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Petitioner, Balasubramani Prathiban, filed a petition for a revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2014 through May 31, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel), filed a motion on July 30, 2019, seeking a dismissal of the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA), did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on November 5, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of determination number L-048383837.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of the notice of determination, dated June 19, 2018, and bearing assessment identification number L-048383837 (notice). The notice is addressed to petitioner, Balasubramani Prathiban, at "13777 45TH AVE APT 2C FLUSHING, NY 11355-4079."

2. On February 1, 2019, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 306087, to petitioner, dismissing the request for a conciliation conference as not timely filed. The BCMS conciliation order indicated that petitioner's request for a BCMS conciliation conference was not mailed until January 3, 2019, a date that is more than 90 days after the notice issuance date of June 19, 2018.

3. Petitioner filed a petition that was mailed to the Division of Tax Appeals on February 15, 2019; accordingly, the petition was timely filed within 90 days of the BCMS conciliation order. In the petition, petitioner represents his address as "13777 45th Ave. Apt. 2c, Flushing, NY 11355" and asserts, in part, that he never received the original notice.

4. The Division filed an answer which was received by the Division of Tax Appeals on May 9, 2019. In its answer, the Division asserts that petitioner failed to timely protest the notice with BCMS or file a petition with the Division of Tax Appeals within 90 days of issuance of the notice.

5. On July 30, 2019, the Division filed a motion to dismiss the petition, asserting that

petitioner failed to timely protest the notice with BCMS within 90 days of issuance of the notice. On October 22, 2019, the undersigned, pursuant to section 3000.9 (a) (2) (i) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) indicated that the motion to dismiss would be treated as a motion for summary determination and gave the parties until November 5, 2019 to respond.

6. To show proof of the proper mailing of the notice, the Division submitted with its motion to dismiss, among other documents: (i) the affirmation of M. Greg Jones, Esq., an attorney employed in the Office of Counsel of the Division; (ii) copies of the notice with the associated mailing cover sheet addressed to petitioner at the 13777 45th Avenue, Apt. 2C, Flushing, New York, address; (iii) an affidavit, dated June 5, 2019, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS) of the Division; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked June 19, 2018; (v) an affidavit, dated June 10, 2019, of Fred Ramundo, a supervisor of the Division’s mail room; and (vi) a copy of petitioner’s request for a BCMS conciliation conference, which provided petitioner’s address as “13777 45th Ave. Apt. 2C, Flushing, NY 11355” and was executed on January 3, 2019, and stamped as received by BCMS on January 7, 2019;<sup>1</sup> and, (vii) a copy of petitioner’s electronically filed 2017 New York State resident income tax return (form IT-201), which provided petitioner’s address as “137-77 45TH AVE Apt 2-C FLUSHING, NY 11355” and, according to Mr. Jones’ affirmation, was filed on April 16, 2018, and was the last return filed by petitioner prior to the issuance of the

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<sup>1</sup> The copy of the United States Postal Service (USPS) certified mail envelope that contained petitioner’s BCMS conciliation conference request is not completely legible; however, the USPS stamp on the envelope appears to show a mailing date of January 7, 2019. Since that date is after the date BCMS deemed the request as filed, it has no bearing on the outcome of this determination.

notice at issue.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and 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 and time 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 to the actual mailing date; in the present case the actual mailing date of "6/19" was noted on the first and last page of the CMR. 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.

8. 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 Division's 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 Addressee, Street, and P.O. Address."

9. The June 19, 2018 CMR consists of 20 pages and lists 210 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 20, which contains 1 entry. 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 June 19, 2018 to each page of the CMR, wrote the number "210" and his or her initial on the final page next to the stamp "Hand write total # of pieces and initial" on page 20, and initialed or signed each page of the CMR.

10. Page 7 of the CMR indicates that the notice with certified control number 7104 1002 9730 0257 0170 with reference number L-048383837, was mailed to petitioner at the same, 13777, 45th Avenue, Apt. 2C, Flushing, New York address as listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears the same certified control number and petitioner's name and address.

11. Fred Ramundo has been a supervisor in the mail room of the Division since December of 2013 and is currently a stores and mail operations supervisor. Mr. Ramundo attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He attested that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then checks the first and last pieces and performs a random review of 30 or less pieces of certified mail listed on the certified mail record against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. He also attested that the CMR was delivered to and accepted by the USPS on June 19, 2018 and a postal employee affixed a postmark to each page of the CMR and wrote

“210” to indicate the total number of pieces of certified mail received by the USPS.

12. Mr. Ramundo stated that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail.

13. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto, the CMR, and his own personal knowledge of the procedures of the mail room, Mr. Ramundo avers that on June 19, 2018, an employee of the mail room delivered to a branch of the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail, one item of certified mail addressed to petitioner at his 13777 45th Avenue, Apt. 2C, Flushing, New York address. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the mail room in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail on June 19, 2018.

14. Petitioner’s “13777 45th Ave. Apt. 2C Flushing, New York 11355” address is the same address as provided on the petitioner’s BCMS conciliation conference request form and petitioner’s power of attorney form.

15. Petitioner did not file a response in opposition to the Division’s motion.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules. As the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 3), the Division of Tax Appeals has jurisdiction over the petition. Instead of a motion to dismiss the petition, 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 a conciliation conference. 20 NYCRR 3000.9 (a) (2) (i) provides:

“Either party may submit any evidence that could properly be considered on a motion for summary determination. Whether or not issue has been joined, the administrative law judge, after adequate notice to the parties, may treat the motion as a motion for summary determination.”

Based upon the documents submitted, the undersigned deemed that the Division’s motion to dismiss should be treated as a motion for summary determination under section 3000.9 (a) (2) (i) of the Rules.

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 (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 Civil Practice Laws and Rules § 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]). “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*). Conclusory statements alone are insufficient to defeat a motion for summary judgement (*see New York Nat. Bank v Harris*, 182 AD2d 680 [2d Dept 1992], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

D. A taxpayer may contest a statutory 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]). 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 the mailing of such notice (Tax Law § 1138 [a] [1]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a BCMS conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a 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)

E. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice 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).

F. Petitioner contends that he did not receive the notice. In this case, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's "13777 45<sup>th</sup> Ave Apt 2C, Flushing, NY 11355-4079" address on June 19, 2018. 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). Petitioner's address on the mailing cover sheet and CMR vary slightly from the address listed on petitioner's electronically filed 2017 New York State resident income tax return (form IT-201), which was the last return filed by petitioner before the notice was mailed, and thus satisfies the "last known address" requirement for the June 19, 2018 notice mailing. First, the Division added an additional four digits to petitioner's five digit zip code.<sup>2</sup> However, the addition of these digits does not invalidate the notice at issue (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001). Next, the Division removed two hyphens from the address provided on petitioner's electronically filed 2017 New York State resident income tax return. However, the removal of these two hyphens brought the address utilized by the Division to mirror petitioner's street number and apartment number designations as provided by petitioner in its BCMS conciliation conference request form, the petition itself, and petitioner's power of attorney form submitted. This leads to the conclusion that the amended address utilized by the Division was probably the more accurate address for petitioner than that provided on the tax return. The removal of the hyphens was also an inconsequential deviation (*see Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). The United States Tax Court has held that a deviation in the address used in mailing a notice "is inconsequential where the error is so minor that it would not prevent delivery of the notice (citations omitted)" (*see Lee v C.I.R.*, T.C. Memo 2011-129 [2011]). The

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<sup>2</sup> The United States Postal Service website indicates that the additional four zip code digits added were the correct additional digits for petitioner's address.

deviations between the address the notice was mailed to as compared to the address provided on the 2017 tax return petitioner filed are inconsequential.

G. It is thus concluded that the Division properly mailed the notice on June 19, 2018, 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 (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). The relevant BCMS order indicates that petitioner's BCMS conciliation conference request was not filed with BCMS until January 3, 2018 which would be beyond the 90 day period in which a protest must be filed in order to be timely.

H. When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at its last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Khayer Kayumi*, Tax Appeals Tribunal, June 27, 2019, citing *Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). It is noted that petitioner has not raised an issue with respect to the address used by the Division or whether the Division followed its standard mailing procedures.

I. As noted, the BCMS order indicates that petitioner's request for a conciliation conference was not filed until January 3, 2019. Since this date falls after the 90-day period of limitations for the filing of such a request, the request was untimely (*see* Tax Law §§ 1138 [a] [1], 170 [3-a] [b]) and the same was properly dismissed by the February 1, 2019 order issued by BCMS. Petitioner has offered insufficient evidence to meet his burden to prove that a timely protest was filed before the 90-day period of limitations for challenging the notice expired (*see Matter of Accidental Husband Intermediary, Inc.*, Tax Appeals Tribunal, April 11, 2019).

J. The motion for summary determination is hereby granted, the petition is denied, and the February 1, 2019 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York  
January 30, 2020

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE