

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DIANA BORTNIKOVA</b>	:	DETERMINATION
	:	DTA NO. 829559
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the period March 1, 2017 through	:	
February 28, 2018.	:	

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Petitioner, Diana Bortnikova, 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 March 1, 2017 through February 28, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion dated February 4, 2020 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by her spouse, Aleksei Koutin, CPA, did not respond to the Division of Taxation’s motion. The 90-day period for issuance of this determination commenced on March 9, 2020. Based upon the motion papers, the affidavits and the 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 notices of determination

assessment ID numbers L-048088315 and L-048088317, and notices of estimated determination assessment ID numbers L-048088316 and L-048088318.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner’s protest of the following two notices of determination and two notices of estimated determination (notices):

Notice #	Type of Notice	Period Ending	Notice date
L-048088318	Notice of Estimated Determination	05/31/17	05/15/18
L-048088317	Notice of Determination	11/30/17	05/15/18
L-048088316	Notice of Estimated Determination	08/31/17	05/15/18
L-048088315	Notice of Determination	02/28/18	05/15/18

2. All of the notices were addressed to petitioner at a Woodridge Run Dr., Tampa, Florida, address.

3. Petitioner filed two requests for conciliation conferences with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices (requests). The first request was filed in protest of notices L-048088315, L-048088316 and L-048088317; the second request was filed in protest of notice L-048088318. Both requests were postmarked August 14, 2019 and marked as received by BCMS on August 19, 2019.

4. On September 13, 2019, BCMS issued conciliation order CMS No. 000314092 to petitioner dismissing petitioner’s protest of notice L-048088318, and on September 13, 2019,

BCMS issued conciliation order CMS No. 000314094 to petitioner dismissing petitioner's protest of notices L-048088315, L-048088316 and L-048088317 (conciliation orders).

5. The conciliation orders indicated BCMS had determined that petitioner's protests of the notices were untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on May 15, 2018, but the request was not mailed until August 14, 2019, or in excess of 90 days, the request is late filed."

6. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation orders on September 24, 2019.

7. To show proof of proper mailing of the four notices at issue herein, the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated January 8, 2020; (ii) an affidavit of Fred Ramundo, a supervisor in the Division's mail room, dated January 14, 2020; (iii) a "CERTIFIED RECORD FOR PRESORT MAIL" (CMR) postmarked May 15, 2018; (iv) an affirmation of the Division's attorney, Anita K. Luckina, dated February 4, 2020; (v) a copy of each of the four notices with the associated mailing cover sheets addressed to petitioner; and, (vi) a copy of a printout from the Division's e-MPIRE database reflecting that petitioner's mailing address was the Woodridge Run Dr., Tampa, Florida, address.

8. According to the affirmation filed by the Division's attorney, Anita K. Luckina, petitioner's Woodridge Run Dr., Tampa, Florida, address reflected in the Division's e-MPIRE database was supplied by the United States Postal Service (USPS) national change of address

database and was the last known address the Division had for petitioner prior to issuance of the notices. Petitioner's Woodridge Run Dr., Tampa, Florida, address, as reflected in the Division's e-MPIRE database, is the same address as provided by petitioner on her requests for conciliation conferences and the petition, except that the Division's e-MPIRE database address for petitioner includes an additional four zip code digits to petitioner's five digit zip code as provided on her requests for conciliation conferences and the petition. A review of the USPS's website indicates that the additional four zip code digits found in the Division's e-MPIRE database for petitioner's address are in fact the correct additional four zip code digits for that address. Petitioner's address, as reflected in the Division's e-MPIRE database, is the same address for petitioner as provided on the notices.

9. The affidavits of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last page of the CMR to the actual date of mailing. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when

returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

10. 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 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."

11. The May 15, 2018 CMR consists of 55 pages and lists 595 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 55, which contains 1 entry. Ms. Picard notes that the copy of the CMR 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 May 15, 2018, to each page of the CMR, wrote the number "595" on page 55 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed page 55.

12. Page 52 of the May 15, 2018 CMR indicates that the four notices, with their respective certified control numbers, were mailed to "BORTNIKOVA-DIANA" at the Woodridge Run Dr., Tampa, FL address listed on the notices:

Notice #	Certified Control #
L-048088315	7104 1002 9730 0250 7817
L-048088316	7104 1002 9730 0250 7824
L-048088317	7104 1002 9730 0250 7831
L-048088318	7104 1002 9730 0250 7848

The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

13. The affidavit of Fred Ramundo describes the general operations and procedures of the Division's mail room. Mr. Ramundo has been a supervisor in the mail room since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed the last page of the respective CMR and affixed a postmark to each page of the

respective CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the May 15, 2018 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the last page of the CMR.

14. According to the affidavits and the affirmation submitted, copies of the respective notices were properly mailed to petitioner at her Woodridge Run Dr., Tampa, FL address on the dates indicated as claimed by the Division.

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

A. The Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Because the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's requests for conciliation conferences.

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 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, Inc. 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]). “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. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see 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 deficiency 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 to petitioner's last known address (*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. The petition protests four notices issued to petitioner and addressed in the conciliation orders. Petitioner did not respond to the Division's motion. Accordingly, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division's affidavits and affirmation; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden*, at 544).

G. The Division has offered sufficient proof to establish the mailing of the notices to petitioner's last known address on May 15, 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 and affirmation 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 sheet and CMR conforms with the address for petitioner as available from the USPS and according to the Division was the last known address the Division possessed for petitioner at the time the notices were mailed. This satisfies the “last known address” requirement for mailing of the notices. The Division’s inclusion of petitioner’s additional four zip code digits for the mailing of the subject notices was appropriate as such was the last known address the Division had for petitioner. It is concluded that the Division properly mailed the notices on May 15, 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]; 1138 [a] [1]). Since the BCMS conciliation conference request forms were not filed until August 14, 2019, or well in excess of 90 days from the issuance of the notices, the challenges are untimely, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of the notices.

H. The Division’s motion for summary determination is hereby granted. The petition of Diana Bortnikova is denied, and the September 13, 2019 conciliation orders dismissing petitioner's requests are sustained.

DATED: Albany, New York  
June 4, 2020

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE