

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DENNIS J. CONWAY</b>	:	
	:	DETERMINATION
	:	DTA NO. 829600
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Tax Periods ending February 29, 2016,	:	
May 31, 2016, February 28, 2017, and May 31, 2017.	:	

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Petitioner, Dennis J. Conway, filed a petition for the revision of determinations or for refund of sales and use tax under articles 28 and 29 of the Tax Law for the periods ending February 29, 2016, May 31, 2016, February 28, 2017, and May 31, 2017.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated November 17, 2020, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition did not appear to have been filed in a timely manner. The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until January 31, 2021 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Mary Humphrey, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing by Joseph E. Caiazzo, Esq., did not submit a response by January 31, 2021, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Dennis J. Conway, four notices of determination assessing sales and use taxes, each dated January 22, 2018, bearing assessment numbers: (i) L-047632764 for the period ending May 31, 2017; (ii) L-047632765 for the period ending February 28, 2017; (iii) L-047632766 for the period ending May 31, 2016; and (iv) L-047632767 for the period ending February 29, 2016.

2. In August 2019, petitioner filed a petition challenging notices of determination numbers L-049700208, L-049700209 and L-049700210. These notices assessed sales and use taxes for the periods ending November 30, 2017 through May 31, 2018. This petition was given DTA number 829499.

3. On October 2, 2019, petitioner filed an amended petition in DTA number 829499, adding a protest to assessment numbers L-047632764, L-047632765, L-047632766, and L-047632767, along with those referenced in finding of fact 2.

4. The addition of assessment numbers L-047632764, L-047632765, L-047632766, and L-047632767 appeared to be untimely. As a result, the notices referenced in finding of fact 2 were severed and retained DTA number 829499. That petition has since been withdrawn. The petition adding assessment numbers L-047632764, L-047632765, L-047632766, and L-047632767 was assigned DTA number 829600 and is the subject of this matter.

5. On November 17, 2020, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice

of intent) to petitioner and his representative, on the basis that the petition in this matter did not appear to be timely filed. The notice of intent indicated that the notices of determination were issued on January 22, 2018, but the petition was not filed until October 2, 2019, or in excess of 90 days later.

6. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated January 19, 2021, of Mary Humphrey, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated December 23, 2020, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated December 29, 2020, of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked February 19, 2019; (v) copies of the notices of determination, dated January 22, 2018 together with associated mailing cover sheets; and (vi) a copy of the petitioner’s IT-201 for the tax year 2016.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division’s Case and Resource Tracking System (CARTS), and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first and last

page of the CMR in the present case to the actual mailing date of January 22, 2018. 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 Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Address, Street, and PO Address."

9. The January 22, 2018 CMR consists of 15 pages and lists 162 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 5 where 1 of the 11 entries is crossed out, and page 15 which contain 9 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated January 22, 2018 to each page of the CMR, wrote the number "162" next to the heading "Total Pieces Received at Post Office" on page 15, and initialed or signed the first and last page of the CMR.

10. Page 8 of the CMR indicates that four notices with references numbers L-047632764, L-047632765, L-047632766, and L-047632767 and certified control numbers 7104 1002 9730 0216 4423, 7104 1002 9730 0216 4430, 7104 1002 9730 0216 4447 and 7104 1002

9730 0216 4454 were mailed to petitioner at 88-43 120 TH ST, APT A1, KEW GARDENS, NY 11415-3101. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit A, bears this certified control number and petitioner's name and address as noted.

11. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amount on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Picard affidavit as Exhibit A contains a USPS postmark dated January 22, 2018. In addition, she attests that the USPS employee's initials or signature appear on the last

page of the CMR. According to Mr. Saccocio, the affixation of the postmarks and the USPS employee's initials indicates that all 162 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 22, 2018.

12. According to the Picard and Saccocio affidavits, the notices were mailed to petitioner on January 22, 2018, as claimed.

13. Neither petitioner nor his representative submitted a response to the notice of intent.

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

A. The petition in this matter seeks review of four notices of determination. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment, and consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. 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.

C. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

D. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation conference creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR to establish that the notices of determination were mailed as addressed on January 22, 2018. Further, petitioner's address on the subject notices of determination, the corresponding mailing cover sheet and the CMR all conform with the address listed on

petitioner's IT-201 for the tax year 2016. This was the last return filed prior to the issuance of the notices. It is thus concluded that the Division properly mailed the notices of determination on January 22, 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 (*see* Tax Law § 1138 [a] [1]).

H. In sum, the Division has established the notices of determination L-047632764, L-047632765, L-047632766, and L-047632767 were properly mailed to petitioner at his last known address on January 22, 2018. Having established that the notices of determination were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until October 2, 2019, a date that falls beyond 90 days after the date of issuance of the notices of determination. Petitioner cannot cure this problem by adding the notices by amendment to a previously filed petition; in this case DTA number 829499 (*see* 20 NYCRR 3000.4 [d]). Accordingly, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Dennis J. Conway is dismissed.

DATED: Albany, New York  
April 29, 2021

/s/ Herbert M. Friedman, Jr.  
SUPERVISING ADMINISTRATIVE LAW JUDGE