

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSHUA FREUND** : DETERMINATION  
for Revision of Determinations or for Refund of New York : DTA NO. 830050  
State Sales and Use Taxes Under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 2009 through :  
November 30, 2010. :  
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Petitioner, Joshua Freund, 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 September 1, 2009 through November 30, 2010.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion dated March 16, 2021, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Issac Sternheim & Co. (Issac Sternheim, CPA), did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on April 15, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner timely filed a petition with the Division of Tax Appeals following the

issuance of notices of determination for the period September 1, 2009 through November 30, 2010.

***FINDINGS OF FACT***

1. On September 10, 2020, petitioner, Joshua Freund, filed a petition with the Division of Tax Appeals challenging notices of determination numbers L-036211026, L-036211027, L-036211028, L-036211029, and L-036211030, dated June 3, 2011, issued by the Division of Taxation (Division) for the period September 1, 2009 through November 30, 2010 (notices).

2. The Division filed an answer on November 18, 2020.

3. The Division filed a motion on March 16, 2021 seeking dismissal of the petition, or in the alternative, summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of the notices. The notices are addressed to petitioner, Joshua Freund, at an address in Brooklyn, New York.

4. In support of its motion and to show proof of proper mailing of the notices, the Division provided the following with its motion papers, among other documents, (i) an affidavit of Adam Roberts, a senior attorney employed in the Office of Counsel of the Division, dated March 16, 2021; (ii) an affidavit, dated December 15, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 3, 2011; (iv) an affidavit, dated December 23, 2020, of Susan Saccocio, the manager of the Division's mail room; (v) copies of the notices, dated June 3, 2011, with associated mailing cover sheets; and (vi) a copy of petitioner's resident income tax return for the year 2009, dated April 9, 2011. According to the affidavit of Mr. Roberts, the 2009 return was filed on May 31, 2011 and was the last return filed with the Division by

petitioner before the notices were issued. Petitioner's 2009 return lists the same Brooklyn, New York, address for petitioner as that listed on the subject notices.

5. The affidavit 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 of "6/3/11." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and 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.”

7. The June 3, 2011 CMR consists of 36 pages and lists 387 certified control numbers along with corresponding assessment numbers, names and addresses. 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 June 3, 2011 to each page of the CMR, initialed and circled the number “387” on the last page next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.”

8. Page 12 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0616 2067 and assessment ID number L-036211026 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. Page 13 of the CMR indicates that notices of determination with certified control numbers 7104 1002 9730 0616 2074, 7104 1002 9730 0616 2081, 7104 1002 9730 0616 2098, and 7104 1002 9730 0616 2104 and assessment ID numbers L-036211027, L-036211028, L-036211029 and L-036211030, respectively, were mailed to petitioner at the Brooklyn, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

9. The affidavit of Susan Saccocio describes the general operations and procedures of the Division’s mail room. Ms. Saccocio has been a manager in the mail room since 2017 and has been employed there since 2012, 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. Ms. Saccocio 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 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 CMR and affixed a postmark to each page of the 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 June 3, 2011 CMR indicates that the USPS employee complied with this request by circling the number of pieces received on the CMR.

10. According to the affidavits submitted, copies of the notices were properly mailed to petitioner at his Brooklyn, New York, address on the date indicated as claimed.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (*see* 20 NYCRR 3000.9 [a] [1] [ii]). 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]).

Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“Inasmuch 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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel 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 Picard, Saccocio or Roberts affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

C. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the notice at issue here (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]; 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; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice or conciliation order 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 (*id.*). The Division may meet this burden by 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).

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).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on June 3, 2011. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and CMR conforms with the address listed on petitioner's 2009 resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on June 3, 2011, 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]).

Petitioner did not request a conciliation conference. Instead, petitioner filed a petition with Division of Tax Appeals protesting the notices on September 10, 2020. This date falls well after the 90-day period of limitations for filing a petition. As such, the Division of Tax Appeals lacks jurisdiction over the petition.

G. As noted above, the Division brought the present matter as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). The standard of review for both such motions is the same (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). As discussed above,



the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition and the Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (20 NYCRR 3000.9 [a] [ii]). Accordingly, the Division's motion to dismiss is granted, and the motion for summary determination is thereby rendered moot (*Matter of Urrego; Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

H. The Division's motion to dismiss is hereby granted, the notices of determination dated June 3, 2011 are sustained, and the petition is denied.

DATED: Albany, New York  
July 08, 2021

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE