

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEPH D. SCICCHITANO** :  
 : DETERMINATION  
 : DTA NO. 830069  
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 2017 and 2018. :  
:

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Petitioner, Joseph D. Scicchitano, 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 2017 and 2018. Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated March 15, 2021, 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, upon extension, until June 1, 2021 to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Eric Gee, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Shane and Firkel, P.C. (J. Michael Shane, Esq.), did not submit a response by June 1, 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, Joseph D. Scicchitano, an estimated notice of determination, dated March 8, 2019, bearing assessment number L-049519285 assessing sales and use taxes for the period ending November 30, 2018, and three notices of determination assessing sales and use taxes, each dated March 8, 2019, and bearing assessment numbers: (i) L-049519288 for the period ending May 31, 2017; (ii) L-049519287 for the period ending August 31, 2017; and (iii) L-049519286 for the period ending February 28, 2018.

2. Petitioner filed a petition that was received by the Division of Tax Appeals on September 28, 2020. The envelope containing the petition does not bear a United States Postal Service postmark indicating when the petition was mailed.

3. On March 15, 2021, 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, 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 March 8, 2019, but the petition was not filed until on or about September 28, 2020, or in excess of 90 days later.

4. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated May 20, 2021, of Eric Gee, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated May 4, 2021, 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 May 5, 2021, 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 March 8, 2019; (v) copies of the notices of determination, dated March 8, 2019 together with associated mailing cover sheets; and (vi) a copy of the petitioner’s form IT-201 for the tax year 2010 filed on April 22, 2015.

5. 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 March 8, 2019. 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 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.”

7. The March 8, 2019 CMR consists of 24 pages and lists 256 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 24 which contain 3 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 March 8, 2019 to each page of the CMR, wrote the number "256" next to the heading "Total Pieces Received at Post Office" on page 24, and initialed or signed the first and last page of the CMR.

8. Page 22 of the CMR indicates that four notices with references numbers L-049519285, L-049519286, L-049519287, and L-049519288 and certified control numbers 7104 1002 9730 0352 3939, 7104 1002 9730 0352 3946, 7104 1002 9730 0352 3953 and 7104 1002 9730 0352 3960 were mailed to petitioner at 1722 OLEAN PORTVILLE RD, OLEAN, NY 14670-9501. 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.

9. 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 March 8, 2019. 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 indicate that all 256 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on March 8, 2019.

10. According to the Picard and Saccocio affidavits, the notices were mailed to petitioner on March 8, 2019, as claimed.

11. 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 March 8, 2019. 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 2010 filed on April 22, 2015. 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 March 8, 2019, 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-049519285, L-049519286, L-049519287, and L-049519288 were properly mailed to petitioner at his last known address on March 8, 2019. 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. In this case, the envelope bearing the petition is missing a postmark. Under such circumstances, the document must be received by the Division of Tax Appeals at its address not later than the time when an envelope which is properly addressed, mailed and sent by the same class of mail "would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)" (*see 20 NYCRR 3000.22 [a] [2] [3]; [b] [1] [2]*). In *Matter of Harron's Electric*

*Service, Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal adopted the rule that five days for mailing would be an ordinary time span for delivery of mail under these circumstances. Here, the petition was date-stamped as received by the Division of Tax Appeals on September 28, 2020. If five days are allowed for mailing, as required by the mailing rules previously set forth and *Matter of Harron's Electric Service, Inc.*, then it must be concluded that the petition was mailed well after expiration of the 90-day prescribed period for filing, i.e., June 6, 2019. 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 Joseph D. Scicchitano is dismissed.

DATED: Albany, New York  
August 26, 2021

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