

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID ROBINOV</b>	:	<b>DETERMINATION</b>
for Revision of Determinations or for Refund of Sales	:	<b>DTA NO. 830507</b>
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Periods September 1, 2017 through	:	
November 30, 2017 and March 1, 2018 through August	:	
31, 2018.	:	

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Petitioner, David Robinov, 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 periods September 1, 2017 through November 30, 2017 and March 1, 2018 through August 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), brought a motion on January 10, 2024, seeking an order dismissing the petition or, in the alternative, for 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 pro se, did not file a response. The 90-day period for the issuance of this determination commenced on February 9, 2024. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

### ***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of three notices of determination, dated January 14, 2019, and bearing assessment identification numbers L-049361265, L-049361266 and L-049361268 (notices). The notices were addressed to David Robinov, at a New York, New York, address.

2. On March 19, 2021, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On April 2, 2021, BCMS issued a conciliation order dismissing request, CMS No. 000328337 (conciliation order), to petitioner. The conciliation order determined that petitioner's protest of the notices was 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 January 14, 2019, but the request was not received until March 19, 2021, or in excess of 90 days, the request is late filed.”

4. On June 21, 2021, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notices, the Division, by affirmation of Karry L. Culihan, Esq., dated January 9, 2024,<sup>1</sup> submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Management Analysis and Project Services Bureau (MAPS), sworn to on December 21, 2023; (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR), postmarked January 14, 2019; (iii) copies of the notices mailed to petitioner with the associated mailing cover sheets; (iv) an affidavit of Susan Ramundo, a manager of the Division's mail room, sworn to on

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<sup>1</sup>The affirmation is dated January 9, 2023, which is deemed a typographical error. The motion was filed on January 10, 2024.

December 21, 2023; (v) a copy of the conciliation order issued by BCMS on April 2, 2021; (vi) a copy of petitioner's request for conciliation conference filed with BCMS on March 19, 2021; and (vii) a copy of petitioner's 2017 electronically filed New York State resident income tax return, filed on October 12, 2018 (2017 return), listing the same New York, New York, address for petitioner as is listed on the notices.

6. Ms. Culihan asserts in her affirmation that the New York, New York, address was petitioner's last known address when the notices were issued.

7. Marianna Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of determination. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

8. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with

accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading entitled "Certified No." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

All pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. 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. Here, the CMR for the statutory notices issued by the Division on January 14, 2019, including the three notices herein, consists of 24 pages with 256 certified control numbers and corresponding assessment numbers, names, and addresses. Each page consists of 11 entries with the exception of page 9, which contains 10 entries (1 of the original 11 entries is crossed out) and page 24, which contains 4 entries. Ms. Denier 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.

11. Each page of the CMR listed 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 to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "1/14/19." This was done

to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS). On page 24, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number “257” with a line through it and the handwritten number 256. A USPS representative affixed a postmark, dated January 14, 2019, to each page of the CMR. A USPS representative wrote “256” on page 24 under the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed or signed page 24.

12. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0323 4163 and reference number L 049361265, was mailed to petitioner at his New York, New York, address. Page 6 of the CMR indicates that a notice with certified control number 7104 1002 9730 0323 4170 and reference number L 049361266 and a notice with certified control number 7104 1002 9730 0323 4194 and reference number L 049361268, were mailed to petitioner at his New York, New York, address. The corresponding mailing cover sheets, attached to the Denier affidavit with the copies of the notices as exhibit “B,” bear these certified control numbers and petitioner’s name and address as stated above.

13. Ms. Denier states that the notices were mailed on January 14, 2019, as indicated by the CMR, as well as the USPS postmark on each of the 24 pages of the CMR.

14. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on January 14, 2019.

15. Susan Ramundo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in her affidavit as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to

statutory notices. Ms. Ramundo's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the USPS.

16. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed 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.

17. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail pulled is segregated from the remaining group of items being mailed, as to allow for correction or issuance at another time. When a notice is pulled, the clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

18. The CMR in this case reflects that one piece of mail was pulled from the run, and this deletion is reflected in the change to the listing for total pieces received at the post office. The specific pulled item appears on page 9, and a line has been drawn through the entry on the CMR for this item to indicate that it was pulled from the run. There is no such line drawn on or near the CMR listings that pertain to petitioner. The preprinted number "257" as appearing next

to the heading "TOTAL PIECES AND AMOUNTS," on the last page of the CMR was crossed out and replaced with the handwritten number "256" next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" to reflect the piece of mail pulled from the run.

19. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

20. Ms. Ramundo avers that each page of the CMR in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 24 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

21. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on January 14, 2019, an employee of the mail room delivered three pieces of certified mail addressed to petitioner at his New York, New York, address in sealed postpaid envelopes for delivery by certified mail. She also stated the CMR delivered to the USPS on January 14, 2019, was returned to the Division. Ms. Ramundo attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on January 14, 2019.

22. Petitioner did not file a response 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 Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* findings of fact 3 and 4), 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 request for conciliation conference. This determination shall address the instant motion as such.

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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should



not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “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 v City of New York*, 49 NY2d at 562).

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 the date of mailing of such notice (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice of determination 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]). 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 date 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 met its burden of demonstrating the fact and date of mailing of the notice 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. Tax Law § 1147 (a) (1) provides that the proper mailing of a notice of determination “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” Receipt is thus “a part of the procedural equation [in sales tax cases] and by characterizing mailing as only ‘presumptive evidence’ establishes the taxpayer’s right to rebut the presumption” (*Matter of Ruggerite v State Tax Commn.*, 64 NY2d 688, 690 [1984]). However, a successful rebuttal “must consist of more than a mere denial of receipt” (*Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [ed Dept 1986]).

G. Petitioner did not respond to the Division’s motion. As such, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]; *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Furthermore, as petitioner has presented no evidence to rebut the facts alleged in the Denier and Ramundo affidavits and supporting documents, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

H. The Division has offered proof sufficient to establish the mailing of the notices to petitioner’s last known address on January 14, 2019. 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 the CMR conform with the address listed on petitioner's 2017 return, which satisfies the "last known address" requirement in Tax Law § 1138 (a) (1). The mailing of a notice of determination to an individual at the address given in the last New York personal income tax return filed by that individual at the time of such issuance generally fulfills this requirement (*see Matter of Garitta, Tax Appeals Tribunal*, February 21, 2017).

I. It is thus concluded that the Division properly mailed the notices to petitioner on January 14, 2019, and the statutory 90-day time limit to either file a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Petitioner's request for conciliation conference was filed on March 19, 2021. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely and the same was properly dismissed by the April 2, 2021, conciliation order issued by BCMS.

J. The Division of Taxation's motion for summary determination is granted, the petition of David Robinov is denied, and the conciliation order dismissing request, dated April 2, 2021, is sustained.

DATED: Albany, New York  
May 09, 2024

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE