

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>STEVE KOBERNITSKI</b>	:	DETERMINATION DTA NO. 830712
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 2013 through 2018.	:	

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Petitioner, Steve Kobernitski, 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 2013 through 2018. Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated January 24, 2022, 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 April 11, 2022, to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Aliza J. Keen, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing by GJM Business Center, Inc. (George J. Mousouris, CPA), did not submit a response by April 11, 2022, 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, Steve Kobernitski, seven notices of determination, each dated January 16, 2019, assessing sales and use and bearing assessment numbers: (i) L-049364669 for the period ending May 31, 2018; (ii) L-049364670 for the period ending November 30, 2016; (iii) L-049364671 for the period ending August 31, 2019; (iv) L-049364672 for period ending May 31, 2016; (v) L-049364673 for period ending February 29, 2016; (vi) L-049364674 for period ending November 30, 2015; and (vii) L-049364675 for period ending August 31, 2015.

2. Petitioner filed a petition that was received by the Division of Tax Appeals on September 20, 2021. The envelope containing the petition bears a United States Postal Service postmark indicating the petition was mailed September 18, 2021.

3. The petition does include a conciliation order dismissing request dated July 23, 2021, CMS No. 000331018, that pertains to assessment numbers L-049364668, L-049364667, L-049364666, L-049364665, L-049364664, L-049364663, L-049364662, L-049364661, L-049364660, L-049364659, L-049364658, L-049364657, and L-049364656. This order is being addressed in a different matter under DTA number 830665.

4. On January 24, 2022, 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 January 16, 2019, but the petition was not filed until September 18, 2021, or in excess of 90 days later.

5. In response to the issuance of the notice of intent, the Division submitted among other documents: (i) an affirmation, dated March 22, 2022, of Aliza Keen, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated March 17, 2022, 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 March 17, 2022, of Susan Ramundo, Manager of the Mail Room of the Department of Taxation and Finance; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked January 16, 2019; (v) copies of the notices of determination, dated January 16, 2019 together with associated mailing cover sheets; (vi) a copy of the petitioner’s request for conciliation conference filed on June 21, 2021 and conciliation order dismissing request issued on July 23, 2021;<sup>1</sup> and (vii) a copy of petitioner’s summary from the Division’s e-EMPIRE database showing petitioner’s last known address prior to the issuance of the notices.

6. 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

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<sup>1</sup> The conciliation order dismissing request dated July 23, 2021 submitted by the Division for notice numbers L -049364669, L-049364670, L-049364671, L-049364672, L-049364673, L-049364674 and L-049364675 for tax periods June 1, 2015 through November 30, 2016 was not attached to the petition. The Division of Tax Appeals had no knowledge on the order prior to the issuance of the notice of intent to dismiss.

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 16, 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.

7. 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 Addressee, Street, and PO Address."

8. The January 16, 2019 CMR consists of 40 pages and lists 430 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 40 which contains 1 entry. 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 16, 2019 to each page of the CMR, wrote the number "430" next to the heading "Total Pieces Received at Post Office" on page 40, and initialed or signed the first and last page of the CMR.

9. Page 9 of the CMR indicates that seven notices with reference numbers , L-049364669, L-049364670, L-049364671, L-049364672, L-049364673, L-049364674 and L-049364675, and certified control numbers 7104 1002 9730 0324 1239, 7104 1002 9730 0324 1246, 7104 1002 9730 0324 1253, 7104 1002 9730 0324 1260, 7104 1002 9730 0324 1277, 7104 1002 9730 0324 1284 and 7104 1002 9730 0324 1291 were mailed to petitioner at 100 DANFORTH AVE APT 205 DOBBS FERRY NY 10522-2654. 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.

10. The affidavit of Susan Ramundo, 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 16, 2019. In addition, she attests that the USPS employee's initials, or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 430 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 16, 2019.

11. According to the Picard and Ramundo affidavits, the notices were mailed to petitioner and his representative on January 16, 2019, as claimed.

12. 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 seven 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. Ramundo, 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 16, 2019. Petitioner's address on the subject notices of determination, the corresponding mailing cover sheets and the CMR all conform with the address listed on petitioner's summary from the Division's e-EMPIRE database that shows the address 100 Danforth Ave, Apt. 205, Dobs Ferry, NY 10522-2654. The United States Postal Service National Change of Address (NOA) shows that the aforementioned address was updated as of August 18, 2018 and this was petitioner's last known address prior to the issuance of the notices. It is thus concluded that the Division properly mailed the notices of determination on January 16, 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-049364669, L-049364670, L-049364671, L-049364672, L-049364673, L-049364674 and L-049364675 were properly mailed to petitioner at his last known addresses on January 16, 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. However, the petition was not filed until on September 18, 2021, a date that falls beyond 90 days

after the date of issuance of the notices of determination. 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 Steve Kobernitski is dismissed.

DATED: Albany, New York  
July 07, 2022

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