

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>JUAN NOBOA</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 850870</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period March 1, 2010 through November	:	
30, 2012.	:	

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Petitioner, Juan Noboa, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2012.

On April 14, 2025, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (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 May 14, 2025.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings submitted in this matter, Winifred M. Maloney, 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 a notice of determination.

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

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a protest of a notice of determination, dated June 6, 2013, and bearing assessment ID number L-039510335 (notice) by petitioner, Juan Noboa. The notice asserted sales and use taxes for the period March 1, 2010 through November 30, 2012. It was issued to petitioner as an officer or responsible person of CJ Bar & Restaurant Inc. The notice is addressed to “NOBOA-JUAN” at a Bronx, New York, address. The mailing cover sheet of this notice bears certified control number 7104 1002 9730 1572 4027.

2. On or about January 12, 2024, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notice L-039510335.<sup>1</sup> The request was stamped received by BCMS on January 24, 2024.

3. On February 9, 2024, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. Bearing CMS No. 000358406 and referencing notice number “L-039510335-9,” the conciliation order dismissed the request, and stated in part:

“The notice at issue, by law, shall not be construed as a notice which gives a person rights to a hearing. If the notice is full paid and a timely refund filed, denial of such refund may afford rights.

Therefore, [BCMS] is precluded from making a determination on the merits of this case.

The request filed for a Conciliation Conference is dismissed.”

4. On May 8, 2024, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notice, the Division, by affirmation of Brian Evans, Esq., dated April 8, 2025, submitted the following with its motion papers: (i) an affidavit

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<sup>1</sup> The request was jointly filed with the petitioner in DTA No. 850871 who protested another notice.

of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on December 17, 2024; (ii) a copy of a "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR), postmarked June 6, 2013; (iii) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (iv) an affidavit of Justin Lombardo, a manager of the Division's mail room, sworn to December 17, 2024; (v) a copy of petitioner's request for conciliation conference and the conciliation order issued by BCMS on February 9, 2024; and (vi) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2012, electronically filed on February 21, 2013, which lists the same Bronx, New York, address for petitioner as that listed on the notice, except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code. This was petitioner's last known address prior to the issuance of notice.

6. Ms. Denier has served as the Director of MAPS since July 2022. Prior to that, she was 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 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 practice and procedure for processing statutory notices.

7. 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 information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

8. 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 on the CMR 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.

9. The CMR in the present matter consists of 32 pages and lists 342 certified control numbers along with corresponding assessment numbers, names and addresses. Each page includes 11 such entries with the exception of page 32 which contains one entry. Ms. Denier notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in the proceeding.

10. The CMR was produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and listed an initial (run date) in its

upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case “20131501700.” Following the Division’s general practice, the date was manually changed on the first and last page of the CMR in the present case to “6/6/13.” 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 32, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 342. A USPS employee initialed or signed and affixed a postmark, dated June 6, 2013, of the Colonie Center, New York, branch of the USPS to each page of the CMR and wrote and circled the number “342” on page 32 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed or signed the last page of the CMR.

11. Page 8 of the CMR indicates that a notice with certified control number 7104 1002 9730 1572 4027 and reference number L 039510335 was mailed to petitioner, “NOBOA-JUAN” at the Bronx, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

12. Mr. Lombardo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in his affidavit as they relate to statutory notices. Mr. Lombardo has been a manager of the mail room since 2016. As a mail room manager, Mr. Lombardo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Mr. Lombardo’s official title is Associate Administrative Analyst, and his duties include managing the staff that delivers mail to branch offices of the USPS.

13. The mail room receives statutory notices that are ready for mailing in an “Outgoing Certified Mail” area. Each notice in the batch is preceded by its mailing cover sheet and is

accompanied by any required enclosures, and each batch includes its accompanying CMR. A staff member receives the notices and associated documents and operates a machine that puts each notice and associated documents in a windowed envelope so that the addresses and certified number from the mailing cover sheet shows through the windows. That staff member then weighs, seals and places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail against the information contained on the CMR. Then the clerk performs 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 in the Albany, New York, area. 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.

14. Each of the 32 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark, dated June 6, 2013. On page 32, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 342 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten and circled entry "342," indicating 342 pieces of certified mail were received by the USPS. There is a signature or initials on page 32. According to the

Denier and Lombardo affidavits, a copy of the notice was mailed to petitioner on June 6, 2013, as claimed.

15. Petitioner did not file a response to the Division's motion.

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

A. A motion for summary determination "shall be granted if, upon all 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]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules 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 562).

C. Petitioner did not respond to the Division's motion. Accordingly, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Denier and Lombardo affidavits or the Evans affirmation; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d at 544; *Whelan v GTE Sylvania*, 182 AD2d at 449).

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 (*see* Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice 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 day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). 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 carried its burden of demonstrating the fact and date of



the mailing to petitioner's last known address (*see* Tax Law § 1147 [a] [1]; *see also Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). A properly mailed notice creates the rebuttable presumption that the notice was delivered in the normal course of the mail (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). 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.*).

F. To meet its burden of demonstrating proper mailing, 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 New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. Here, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on June 6, 2013. 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 sheet and the CMR conform with the address listed on petitioner's 2012 resident income

tax return filed, which satisfies the “last known address” requirement. While it is noted that the Division added four additional zip code digits to petitioner’s zip code as reflected on his 2012 resident income tax return, such difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

H. It is therefore concluded that the Division properly mailed the notice on June 6, 2013 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 §§ 170 [3-a] [a]; 1138 [a] [1]). Petitioner’s request for conciliation conference was filed on or about January 12, 2024, and was stamped received by BCMS on January 24, 2024. Both these dates fall long after the 90-day period of limitations for filing of such a request and was properly dismissed by BCMS.

I. The Division of Taxation’s motion for summary determination is granted, the petition of Juan Noboa is denied and the conciliation order dismissing request, dated February 9, 2024, is sustained.

DATED: Albany, New York  
July 31, 2025

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE