

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**ALPHONSE PESCE** :

ORDER  
DTA NO. 825583

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, 2007 through :  
February 28, 2010. :

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Petitioner, Alphonse Pesce, 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, 2007 through February 28, 2010.

On April 18, 2013, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were subsequently granted an extension, until July 5, 2013, to respond to said Notice. On June 25, 2013, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel) submitted an affidavit and documents in support of dismissal. On July 2, 2013, petitioner, appearing by Stephen P. Silberling, Esq., submitted an affidavit and documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced July 2, 2013. After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

**ISSUE**

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued to petitioner, Alphonse Pesce, at a St. James, New York, address, a Notice of Determination, numbered L-037915734, and dated May 29, 2012, which assessed sales and use taxes due in the amount of \$25,591.79 for the period March 1, 2007 through February 28, 2010, plus penalty and interest. Petitioner filed a petition with the Division of Tax Appeals on March 26, 2013.

2. On April 18, 2013, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Determination issued to petitioner on May 29, 2012 and that the petition was not filed until March 28, 2013, or 303 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination under protest the Division provided the following in addition to the Matthews affidavit: (i) an affidavit, dated June 19, 2013, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center; (ii) an affidavit, dated June 19, 2013, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) the 29- page "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 29, 2012; (iv) a copy of the May 29, 2012 Notice of

Determination with the associated mailing cover sheet addressed to petitioner; and (v) petitioner's resident income tax return for the year 2011, which lists the same address for petitioner as that listed on the subject notice. According to the Matthews affidavit, this income tax return was the last return filed with the Division by petitioner before the notice was issued.

4. The petition filed in this matter reports the same St. James, New York, address for petitioner as that indicated on the subject Notice of Determination.

5. The affidavit of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced (or run) approximately 10 days in advance of the anticipated date of mailing and the date (and time) of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "5/29/12." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, 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 "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 CMR relevant to the Notice of Determination under protest consists of 29 pages and lists 309 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR relevant to this matter have been redacted to preserve the confidentiality of information relating to taxpayers and representatives who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated May 29, 2012 to each page of the CMR and also wrote his or her initials on each page thereof.

8. Page 22 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1114 9633 and assessment number L-037915734, was mailed to petitioner at the St. James, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against

the information contained on the CMR. A member of the Center 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 also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 309. Below the preprinted number, this number is handwritten and circled, and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date May 29, 2012, confirming that the notices were mailed on that date.

10. Petitioner's St. James, New York, address on the CMR and Mailing Cover Sheet matches the address listed on petitioner's income tax return for the year 2011, and also is the same address listed on petitioner's petition.

11. Attached to the petition filed is a copy of a power of attorney running from petitioner to Stephen P. Silberling, Esq., dated February 1, 2012. The power of attorney bears a date stamp of February 6, 2012 from the Division's Suffolk County sales tax office. The power of attorney indicates that Mr. Silberling is representing petitioner with regard to a sales tax matter covering the years 2007 through 2010. Mr. Silberling has since been listed as petitioner's representative on the petition. A copy of such power of attorney is also attached to the affidavits submitted by the parties in response to the notice of intent to dismiss.

12. The Matthews affidavit makes no mention of mailing of a copy of the Notice of Determination to petitioner's representative at any time. Similarly, neither the CMR, Peltier affidavit nor Maney affidavit indicate or establish any such mailing to Mr. Silberling.

13. Attached to petitioner's opposition to the instant motion is the affidavit of Stephen P. Silberling, Esq. In his affidavit, Mr. Silberling asserts that there is no assertion in the Division's affidavit or documents that the subject notice was mailed to him and that his power of attorney was on file with the Division prior to the issuance of the notice of determination at issue herein. Petitioner also denies receipt of the notice in its petition.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138[a][1]). The deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996 [petition filed *one* day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). A notice of determination thus becomes an assessment subject to collection unless the taxpayer files a timely petition with the Division of Tax Appeals (Tax Law § 1138[a][1]). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. “The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination” (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

C. As provided in section 3000.9(b)(1) of the Rules, 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.”

D. Section 3000.9(c) of the Rules of Practice and Procedure 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, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [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, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879 [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, 448-449, 582 NYS2d 170, 173 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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). That is, 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 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 notice on May 29, 2012 to petitioner at his last known address. The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant mailing record 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 CMR conforms with the address listed on petitioner’s income tax return for 2011, which satisfies the “last known address” requirement in Tax Law § 1138(a)(1).

G. The Division has established, as noted above, that the notice was properly mailed to petitioner. At the same time, the information provided by both parties reflects that petitioner has



been represented since February 1, 2012 in this matter by Mr. Silberling, yet there is no evidence of the date or even of the actual mailing of a copy of the notice to petitioner's representative. The CMR does not show any such mailing, and the three affidavits submitted by the Division make no mention of the provision of the notice to petitioner's representative. While the Tax Law does not specifically mandate the service of the notice on a taxpayer's representative, case law has clearly established that the 90-day period for filing a petition or a request for conference is tolled if the taxpayer's representative is not served with a copy of the statutory notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). Since there is no evidence establishing that a copy of the notice was provided to petitioner's representative, as required, the 90-day statutory period within which a request for conference or a petition had to have been filed was tolled. (*Id.*) Thus, the petition may not be dismissed as untimely.

H. The Division of Tax Appeals' Notice of Intent to Dismiss Petition is withdrawn, and the Division will have 75 days from the date of this order to file its answer to the petition.

DATED: Albany, New York

SEP 05 2013

  
ADMINISTRATIVE LAW JUDGE