

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELLO BALAN	:	ORDER
	:	DTA NO. 826224
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Article 28 and 29 of the Tax Law	:	
for the Periods June 1, 2001 through August 31, 2002;	:	
December 1, 2006 through February 28, 2007; June 1,	:	
2007 through February 29, 2008 and December 1, 2008	:	
through August 31, 2009.	:	

Petitioner, Nello Balan, 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 June 1, 2001 through August 31, 2002; December 1, 2006 through February 28, 2007; June 1, 2007 through February 29, 2008 and December 1, 2008 through August 31, 2009.

On May 30, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the petition did not appear to be timely with respect to the statutory notices being petitioned. By request of the parties, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to September 30, 2014. On September 15, 2014, the Division of Taxation by Amanda Hiller, Esq. (Leo Gabovich, Law Clerk) submitted a letter, together with affidavits and accompanying documents in support of dismissal of certain of the notices. On September 30, 2014, petitioner, appearing by Buxbaum Sales Tax Consulting, LLC (Stewart Buxbaum, CPA) filed a letter in opposition to the dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day

period for issuance of this determination commenced on September 30, 2014, the date petitioner's response was due. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of determination and notices of estimated determination.

FINDINGS OF FACT

1. On April 4, 2014, the Division of Tax Appeals received a petition from petitioner, Nello Balan, which protested the following notices of determination and notices of estimated determination:

Notice #	Period Ending	Notice date
L-032425365	2/28/07	8/24/09
L-032425364	8/31/07	8/24/09
L-032425363	11/30/07	8/24/09
L-034985393	2/28/09	11/08/10
L-034985392	5/31/09	11/08/10
L-034985391	8/31/09	11/08/10
L-031117485	2/28/07	12/01/08
L-030698080	11/30/07	9/29/08
L-030698078	2/29/08	9/29/08
L-033143491	8/31/09	1/04/10
L-022525966	8/31/01	6/23/03
L-022525965	11/30/01	6/23/03

L-022525962	2/28/02	6/23/03
L-022525964	5/31/02	6/23/03
L-022525963	8/31/02	6/23/03

2. The petition is dated April 3, 2014 and signed by petitioner's representative, Stewart Buxbaum. The petition was delivered via United Parcel Service and is date stamped as received by the Division of Tax Appeals on April 4, 2014.

3. The petition alleges that the notices were never sent to petitioner's last known address and that petitioner only became aware of the notices as a result of collection efforts undertaken by the Division of Taxation (Division).

4. On May 30, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of notices of determination and notices of estimated determination issued to petitioner more than 90 days prior to the petition being filed in this matter.

5. In response to the issuance of the Notice of Intent to Dismiss Petition the Division indicated that it was only seeking to establish the timeliness of notices L-031117485, L-030698080, L-030698078 and L-033143491 and offered no proof with respect to the other eleven notices. The Division submitted, among other documents, an affidavit of Leo Gabovich, a law clerk employed in the Office of Counsel of the Division, dated September 11, 2014 with attachments including a copy of petitioner's 2005 New York State resident income tax dated April 6, 2006. Said return bears the same Garden City, New York, address as listed on the four notices of determination described above.

6. To show proof of proper mailing of notices of determination L-030698080 and L-030698078, both dated September 29, 2008, the Division provided the following: (i) an affidavit, dated September 5, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked September 29, 2008; (iii) an affidavit, dated September 8, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's mail room.

7. To show proof of proper mailing of Notice of Determination L-031117485, dated December 1, 2008, the Division provided the following: (i) a second affidavit, dated September 5, 2014, of Mary Ellen Nagengast; (ii) a CMR postmarked December 1, 2008; and (iii) a second affidavit, dated September 8, 2014, of Bruce Peltier.

8. To show proof of proper mailing of Notice of Determination L-033143491, dated January 4, 2010, the Division provided the following: (i) a third affidavit, dated September 5, 2014, of Mary Ellen Nagengast; (ii) a CMR postmarked January 4, 2010; and (iii) a third affidavit, dated September 8, 2014, of Bruce Peltier.

9. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 is manually changed on the first and last page of the CMR. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. 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. Notices that are targeted for manual review are printed in one printing run, and each unit that has notices selected for manual review receives a separate and complete CMR for their notices. With the exception of the January 4, 2010 notice (L-033143491), the remaining notices at issue (L-030698080, L-030698078 and L-031117485) were targeted for manual review by the Civil Enforcement DO High Value unit of the Division; the respective CMR's for these notices consist of one page.

10. 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 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."

11. The one-page September 29, 2008 CMR indicates that notices of determination with certified control numbers 7104 1002 9730 0859 6983 and 7104 1002 9730 0859 7003 and assessment identification numbers L-030698078 and L-030698080, respectively, were mailed to "Balan-Nello" at the Garden City, New York, address listed on the September 29, 2008 notices

of determination. A USPS employee affixed a USPS postmark dated September 29, 2008 to the CMR and also wrote his or her initials thereon. The corresponding mailing cover sheets bear these certified control numbers and the name, "Balan-Nello," and the Garden City, New York, address.

12. The one-page December 1, 2008 CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1085 5580 and assessment identification number L-031117485 was mailed to "Balan-Nello" at the Garden City, New York, address listed on the December 1, 2008 notices of determination. A USPS employee affixed a USPS postmark dated December 1, 2008 to the CMR and also wrote his or her initials thereon. The corresponding mailing cover sheets bear these certified control numbers and the name, "Balan-Nello," and the Garden City, New York, address.

13. The January 4, 2010 CMR consists of 46 pages and lists 505 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated January 4, 2010 to each page of the CMR and also wrote his or her initials on each page thereof. Page 21 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1707 2690 and assessment number L-033143491, was mailed to petitioner at the Garden City, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

14. Page 10 of the January 4, 2010 CMR also indicates that a copy of Notice of Determination with certified control number 7104 1002 9730 1707 1419 and assessment ID

number L-033143491 was sent to “P Tong, L Rosen and MM Clemente CPAS.” An enclosure with the notice states that a copy of the notice was forwarded to the above-referenced individuals because the Division’s records indicate that a power of attorney was on file for the tax matters at issue in the notice.

15. Each of the three affidavits of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. Each of the CMRs has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed each page of the respective CMRs and affixed a postmark to each page of the respective CMRs. The Center 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. A review of the September 29, 2008 and December 1, 2008 CMR’s indicate that the USPS employee complied with this request by circling the number of

pieces received.¹ The January 4, 2010 CMR reveals that the USPS employee complied with this request by both writing in the number received and by circling same.

16. According to the Peltier affidavits, a copies of the respective notices were mailed on the date indicated as claimed.

CONCLUSIONS OF LAW

A. 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]). 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; *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 merits of the protest (*see* Tax Law § 1138 [a] [1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 1138 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax

¹The respective affidavits of Bruce Peltier state that the Postal Service employee wrote the total number of pieces received rather than circled the number of pieces listed. It is determined that this error was merely an oversight in providing a description of the relevant CMRs.

Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices. The CMRs have 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). Petitioner contends that since the Postal Service employee did not write in the number of pieces delivered to the post office, the September 29, 2008 and the December 1, 2008 CMRs were not properly completed. Petitioner's argument is without merit. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMRs and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A review of the mailing documents and affidavits indicate proper mailing of the notices of determination was established in accordance with the Division's articulated policies. Contrary to petitioner's assertions, *Matter of Rakusin*, does not stand for the proposition that the Postal Service employee must, under all circumstances, write the number of pieces of mail delivered to the post office on the certified mail record. The Division's policy, as articulated in the Peltier affidavits is that the Postal Service employee may circle the number of pieces listed on the CMR

to indicate the same were received.²

D. Finally, although not raised in petitioner's response to the notice of intent to dismiss, it should be noted that the Division has shouldered its burden of establishing the notices were sent to petitioner's last known address. The address on the mailing cover sheets and CMRs is the same as contained on petitioner's 2005 personal income tax return, which satisfies the last known address requirements. Petitioner has offered no evidence that his address changed since the filing of the 2005 return or that the Division was notified of any such change.

E. Since the petition was not filed until April 13, 2014, or well in excess of 90 days from the issuance of notices of determination L-031117485, L-030698080, L-030698078 and L-033143491, the petition is untimely and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of these notices.

F. With respect to the remaining eleven notices of determination and estimated determination as detailed in Findings of Fact 1 and 5, the Division has admitted that it was unable to provide proof of proper mailing at this time. Therefore, it cannot be concluded that the petition is untimely with respect to these notices and the Notice of Intent to Dismiss Petition is hereby rescinded as to these eleven notices.

²Petitioner also seizes on the misstatement of Bruce Peltier contained in his two affidavits (*see* Finding of Fact 15) that describe how the Postal Service employee indicated receipt of the pieces of mail listed on the September 29, 2008 and December 1, 2008 CMRs. These misstatements have no bearing on whether the Postal Service Employee actually filled out the respective CMRs or whether the CMRs were filled out in compliance with the Division's articulated policies.

G. The petition of Nello Balan is hereby dismissed to the extent indicated in Conclusion of Law E, the Notice of Intent to Dismiss Petition is rescinded to the extent of Conclusion of Law F, and the Division will have 75 days from the date of this order to file its Answer with respect to such notices.

DATED: Albany, New York
December 18, 2014

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE