

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

**TUCKER P. GRADY**

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, 2017 through August 31, 2017  
and December 1, 2017 through May 31, 2018.

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ORDER  
DTA NO. 829904

Petitioner, Tucker P. Grady, 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, 2017 through August 31, 2017 and December 1, 2017 through May 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), brought a motion on June 4, 2021, seeking 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 (Rules). Petitioner, appearing by Tenenbaum Law, P.C. (Stelios E. Karatzias, Esq.), was granted a 45-day extension to file his response to the motion, extending his time to respond to August 20, 2021, which date began the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

***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. Petitioner, Tucker P. Grady, filed a 2017 New York resident income tax return, form IT-201 (2017 return), on April 18, 2018, providing an address in Huntington, New York.

2. The Division of Taxation (Division) issued petitioner notices of determination, dated January 9, 2019, and bearing assessment identification numbers L-049349296, L-049349297, and L-049349299 (notices) for sales and use taxes for the tax periods June 1, 2017 through August 31, 2017 and December 1, 2017 through May 31, 2018, as a responsible person of 117 Farm Liquors Inc. The notices are addressed to petitioner at the same Huntington, New York, address.

3. On December 19, 2019, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. Petitioner provided the same Huntington, New York, address on his request as was on the notices.

4. On February 14, 2020, BCMS issued a conciliation order dismissing request (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 9, 2019, but the request was not received until December 19, 2019, or in excess of 90 days, the request is late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on March 24, 2020. In the petition, petitioner alleged that despite the fact the business was sold and transferred out of his name on May 11, 2017, the Division continued to send him tax bills and collection notices for debt that was incurred after the sale. He also asserted that “the concillation [sic] hearing statute of 90 days specifically applied to the date of

the last updated invoice which I am protesting, [sic] As the arrears due are constantly changing secondary to what the state perceives is my responsibility, I was always within the 90 day statute.”

6. On June 4, 2021, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3009 (a), and 3000.9 (b) of the Rules. In support of the motion and to show proof of proper mailing of the notices, the Division provided the following documents: (i) an affirmation of Karry L. Culihan, an attorney in the Office of Counsel of the Division, dated June 4, 2021; (ii) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Management Analysis and Project Services Bureau (MAPS), sworn to on May 20, 2021; (iii) a “Certified Record for Presort Mail – Assessments Receivable” (CMR) postmarked January 9, 2019; (iv) an affidavit of Susan Saccocio, a manager of the Division’s mail room, sworn to on May 27, 2021; (v) copies of the notices mailed to petitioner with the associated mailing cover sheets; (vi) a copy of the first page of petitioner’s request for conciliation conference dated December 18, 2019; (vii) a copy of the conciliation order dismissing request issued by BCMS on February 14, 2020; (viii) a copy of a consolidated statement of tax liabilities dated December 11, 2019 listing the notices as subject to collection; and (ix) a copy of petitioner’s 2017 return.

7. Ms. Culihan asserts in her affirmation that petitioner’s 2017 return was filed on April 18, 2018, and that this was the last return filed before the Division issued the notices. She also avers that the notices were issued to petitioner’s last known address in Huntington, New York.

8. Deena Picard has been the Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for

both positions, Ms. Picard has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of determination. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Picard's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

9. 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. 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.

10. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is 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 PO Address." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

11. 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.

12. The CMR for the notices issued by the Division on January 9, 2019, including the notices at issue herein, consists of 46 pages. Each page consists of 11 entries with the exception of page 46, which contains 2 entries. 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.

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 to the actual date of mailing. In the instant case, the actual mailing date as handwritten on the first and last page of the CMR was "1/9."

13. A USPS representative affixed a postmark, dated January 9, 2019 to each page of the CMR. Page 3 of the CMR also had a postmark of January 11, 2019, that was crossed out, two postmarks reflecting January 9, 2019 and an illegible signature or initial. All of the postmarks, including the one dated January 11, 2019 on page 3, included the following language: "USPS Colonie Center Albany NY 12205." Ms. Picard avers that the postmark of January 11, 2019 was incorrectly applied to page 3 of the certified mail record, that it was manually crossed out and the correct postmark was applied. The page numbers shown on the right margin on page three is consistent with the rest of the CMR and shows the same "run" date on the upper left margin as the rest of the CMR.

14. A USPS representative wrote "497" on page 46 next to the heading "Total Pieces Received at Post Office," and initialed or signed the page.

15. Page 36 of the CMR indicates that notice L-049349296 with certified control number 7104 1002 9730 0322 6137, notice L-049349297 with certified control number 7104 1002 9730 0322 6144, and notice L-049349299 with certified control number 7104 1002 9730 0322 6168

were mailed to petitioner at his Huntington, New York, address. The corresponding mailing cover sheets, attached to the Picard affidavit with the notices as exhibit "B," bears these certified control numbers, petitioner's name, and his address as stated above.

16. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on January 9, 2019.

17. Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures in her affidavit as they relate to statutory notices. Ms. Saccocio has been a manager in the mail room since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Post Office.

18. 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. A USPS employee affixes a postmark to each page and writes his or her initials or signature on the last page of 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.

19. Ms. Saccocio avers that each page of the CMR in exhibit "A" of the Picard affidavit contains a postmark, and that a USPS employee initialed or signed page 46 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

20. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on January 9, 2019, an employee of the mail room delivered three pieces of certified mail addressed to petitioner at his Huntington, New York, address in sealed postpaid envelopes for delivery. She also stated the CMR delivered to the USPS on January 9, 2019 was returned to the Division. Ms. Saccocio 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 9, 2019.

21. As stated above, there is a postmark on page 3 of the CMR with a date of January 11, 2019. This postmark is crossed out and there are two additional postmarks both with the date of January 9, 2019. Ms. Saccocio averred that when such an error occurs in the normal course of business, a post office employee may catch the mistake, or a member of the mail room staff may

catch the error and request that the mail log be corrected to properly and accurately reflect the date of mailing.

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

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules or 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 4 and 5), the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper motion for relief if petitioner's request for conciliation conference was untimely (*see Matter of Panco Equipment Corp.*, Tax Appeals Tribunal, May 24, 2021).

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. Under the Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). "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 whether a material issue of fact exists or if there is even arguably such an issue (*Bershaw v. Altman*, 100 AD2d 642, 643 [3rd Dept 1984]). 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 by motion (*Gerard v Inglese*, 11 AD2d 381, 383 [2nd 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,’ . . . ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

D. Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination to a person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see also* Tax law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id.*). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (*see* Tax Law § 1138 [a] [1]). A taxpayer also has the option of commencing an administrative challenge to such 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]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see e.g. Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

E. Where the timeliness of a taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’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 mailing procedure and that such

procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*).

F. Here, the Division has offered sufficient proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

G. However, the Division has not offered proof sufficient to establish that the standard procedure was followed in this case. The affidavits of Ms. Picard and Ms. Saccocio allege that the CMR is documentary evidence demonstrating that the Division followed its standard procedure here. They point to the fact that the certified control numbers assigned to the certified mail articles containing the notices and addressed to petitioner are found on page 36 of the CMR and that all 497 certified articles covered by the CMR were delivered into the possession of the USPS on January 9, 2019, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote "497" on that last page and initialed the page.

While the postal employee's initialing or signing of the last page of the CMR and noting the number of articles received indicates the total number of certified mail articles that were delivered to the USPS, whether any particular certified mail article on the CMR was actually delivered to the USPS depends on the Division's business practice of generating the CMR and the certified mail articles covered by that CMR at the same time and keeping the CMR and the covered certified mail articles together until their delivery to the USPS. The conflict in the postmarks appearing in the CMR bears on this procedure (*see* finding of fact 13).

Upon receiving the CMR and the accompanying certified mail articles, the postal employee is to postmark each page of the CMR (*see* USPS Domestic Mail Manual § 503

[5.1.1]). Here, however, as discussed above, page 3 of the CMR bears a postmark that varies from the postmark on the other pages of the CMR by showing a date two days after the CMR was to be received by the USPS. The presence of a postmark with a date of January 11, 2019 raises a question of fact as to when page 3 of the CMR was delivered to USPS. This issue suggests the Division may not have followed its standard procedure of keeping the CMR and the certified mailing together until delivered into the possession of the USPS (*see* finding of fact 11). The fact that the date and the consecutive numbering on the pages before and after page three as well as on page three itself are consistent with the rest of the CMR is some proof that the Division handled all the pages of the CMR as a single unit. However, the explanation given by the Division is not sufficient to explain the conflict in the postmark, leaving a material question of fact as to whether the certified mail articles covered by the CMR were all listed on and accompanied the CMR as delivered to the USPS on January 9, 2019, including the certified mail articles containing the notices issued to petitioner.

Ms. Saccocio, a manager in the Division's mailroom, avers that when an error occurs by using the wrong postmark in the normal course of business, a USPS employee may catch the mistake, or a member of the mail room staff may catch the error and request that the mail log be corrected to reflect the proper date of mailing. She does not then explain how the wrong postmark came to be on page 3 of the CMR in this case, or whether it was a USPS employee or employee in the mail room that caught the mistake. She also does not explain how this type of mistake can happen. Additionally, it is not clear how she has knowledge about how an error in the normal course of business at the USPS is handled as her position is as the manager of the mail room for the Division and she does not appear competent to assert what procedures take place at the USPS (*Cf. Matter of Madoff*, Tax Appeals Tribunal, April 19, 2012 [Where the Tax

Appeals Tribunal reversed the determination of the administrative law judge and denied a motion for summary determination in part because the affidavits made clear the affiants did not have personal knowledge regarding what they were attesting to]). Ms. Picard also asserts that the postmark of January 11, 2019 was incorrectly applied to page 3 of the CMR. She does not, however, explain how she knows that this was the incorrect postmark (*see id.*). Notably absent from the Division's motion is an affidavit from an employee of the USPS that may clarify this issue.

H. The Division's motion for summary determination is denied without prejudice and the petition of Tucker P. Grady shall proceed in due course.

DATED: Albany, New York  
November 18, 2021

/s/ Jessica DiFiore  
ADMINISTRATIVE LAW JUDGE