

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**FARUQ IBRAHIM** : ORDER  
for Revisions of Determinations or for Refund of Sales and : DTA NO. 830547  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period September 1, 2018 through February 28, 2019. :

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Petitioner, Faruq Ibrahim, filed a petition for revisions of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2018 through February 28, 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel), brought a motion on March 7, 2023, seeking summary determination or, in the alternative, dismissing the petition 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. Petitioner, appearing by Isaac Sternheim, CPA, submitted his response to the motion by April 12, 2023, which date commenced the 90-day period for the 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, Donna M. Gardiner, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of notices of determination, dated May 21, 2020, and bearing assessment identification numbers L-051448417 and L-051448418 (notices). The notices were addressed to petitioner, Faruq Ibrahim, at an address in Jamaica, New York.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. The request was received by BCMS on May 19, 2021.

3. On July 9, 2021, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 330471, to petitioner. The conciliation order determined that petitioner's protest of the notices was untimely and stated, in part, that:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was [sic] issued on May 21, 2020, but the request was not received until May 19, 2021, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on July 21, 2021.

5. To show proof of proper mailing of the notices, the Division, by affirmation of Brandon Batch, Esq., dated March 6, 2023, submitted the following with its motion papers: (i) an affidavit, dated February 16, 2023, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR), postmarked May 21, 2020; (iii) a copy of two notices, dated May 21, 2020, with the associated mailing cover sheets; (iv) an affidavit, dated February 17, 2023, of Susan Ramundo, a manager in the Division's mail room; (v) a copy of the conciliation order issued to petitioner on July 9, 2021; and (vi) a copy of

petitioner's form IT-201, resident income tax return for the year 2015, dated October 14, 2016, which lists the same address for petitioner as was listed on the notices. The 2015 income tax return was the last return filed with the Division by petitioner before the notices were issued.

6. The affidavit of Marianna Denier, who has been in her current position since August of 2022, and has worked as a supervisor in MAPS since October of 2004, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier is the Director of MAPS, which is responsible for the receipt and storage of CMRs. She is familiar with the Division's Case and Resource Tracking System (CARTS) as well as 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 was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "5-21." In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

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 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 CMR in the present matter consists of 40 pages and lists 431 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 2 entries. Ms. Denier 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 May 21, 2020 to each page of the CMR, wrote the number “431” on page 40, next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 40.

9. Page 25 of the CMR indicates that notices of determination with certified control number 7104 1002 9730 0148 7059 and assessment ID number L-051448418 and certified control number 7104 1002 9730 0148 7066 and assessment ID number L-051448419 were mailed to petitioner at the Jamaica, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Denier affidavit as exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

10. The notice bearing assessment ID number L-051448417, dated May 21, 2020, as referenced in the conciliation order, petition, answer and attached to the notice of motion as exhibit 3, was not addressed by Ms. Denier in her affidavit and is not listed anywhere in the CMR dated May 21, 2020. Although the Division has introduced a notice issued to petitioner, bearing assessment ID number L-051448419, petitioner did not file a protest to this notice.

11. The affidavit of Susan Ramundo describes the mail room's general operations and procedures. Ms. Ramundo has been a manager in the mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Ramundo 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces 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 and also 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.

12. Each of the 40 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark of May 21, 2020. On page 40, corresponding to "Total Pieces and Amounts," is the preprinted number 431 and next to "Total Pieces Received at Post Office," the USPS employee wrote the number "431," wrote his or her initials or a signature, and affixed a postmark. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials or signature indicate that all of the 431 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on May 21, 2020.

13. According to both the Denier and Ramundo affidavits, copies of the notices were mailed to petitioner on May 21, 2020, as claimed.

14. Petitioner submitted an affidavit in response to the motion. Petitioner states that he has been residing in New Jersey, since 2017, and that he never received the notices dated May 21, 2020, until he obtained a copy of a consolidated statement of tax liabilities, dated May 10, 2021. The consolidated statement of tax liabilities was issued to petitioner at the Jamaica, New York, address listed on the notices.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Since the petition was timely filed within 90 days of the issuance of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition. Accordingly, a motion for summary determination is the proper vehicle to consider petitioner's challenge.

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]).

B. Section 3000.9 (c) of the Rules 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 [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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [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 [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*).

C. 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 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 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).

D. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating both the fact and date of the mailing of the notices to petitioner's last known address (*see* Tax Law § 1147 [a] [1]; *see also Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, 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 Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. With respect to the notice numbered L-051448418, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on May 21, 2020. 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 CMR conforms with the address listed on petitioner's 2015 resident income tax return, which satisfies the "last known address" requirement.

If a notice is properly mailed to a taxpayer at his last known address, a presumption of receipt is created. Petitioner argues that he resided in New Jersey when the notice was issued to him. However, the Division presented sufficient evidence to establish that the notice was mailed to petitioner at his last known address, even though such address may not have been his

actual address at the time that the notice was mailed. The Division is entitled to rely upon the address on the last return filed by the taxpayer, unless the taxpayer clearly informs the Division that he wishes the address of record to be changed (*see Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003). Petitioner did not claim to notify the Division of any address change.

It is thus concluded that the Division properly mailed the notice numbered L-051448418, 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]).

F. Petitioner's request for a conciliation conference was filed on May 19, 2021. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely filed (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [b]) with respect to the notice numbered L-051448418 and, thus, was properly dismissed by the July 9, 2021, conciliation order issued by BCMS.

G. In contrast, the notice numbered L-051448417 was not addressed by Ms. Denier in her affidavit nor was such notice listed in the CMR or a copy of such notice attached to her affidavit. Without proof of the date on which the notice was issued to petitioner, the 90-day period for challenging the notice is tolled until actual notice of the assessment is received by the taxpayer (*see Matter of Reuben*, Tax Appeals Tribunal, August 27, 2019; *Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). Petitioner became aware of his sales tax liabilities after receipt of the consolidated statement of tax liabilities dated May 10, 2021. Here, petitioner filed his request for conciliation conference on May 19, 2021, which is within 90 days of actual receipt of the notice. Therefore, his request for a conciliation conference is deemed timely filed.

H. The Division of Taxation's motion for summary determination is granted to the extent indicated in conclusion of law F, that notice of determination, number L-051448418, is sustained, but the motion is otherwise denied, and the hearing in this matter with regard to notice of determination, number L-051448417, will be scheduled in due course.

DATED: Albany, New York  
July 06, 2023

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE