

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**E CARS USA INC.** : **DETERMINATION**  
 : **DTA NO. 850665**  
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 September 1, 2013 through :  
November 30, 2015. :  
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Petitioner, E Cars USA Inc., 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 September 1, 2013 through November 30, 2015.<sup>1</sup>

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), brought a motion, dated March 5, 2024, seeking an order dismissing the petition or, in the alternative, 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. The motion was originally filed on March 7, 2024, and was refiled and served on May 31, 2024.<sup>2</sup> Petitioner, appearing by LRC GP LLC (Lawrence Cole, CPA), filed a response by the extended due date of July 8, 2024, which date began the 90-day period for the issuance of this determination. Based upon the motion papers and all pleadings and documents submitted in

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<sup>1</sup> The petition listed L-057813403 and L-057784422 as the notice/assessment ID numbers being challenged. The protest for notice of determination L-057813403 was assigned DTA number 850664 and will proceed separately. This determination addresses notice of determination L-057784422 only.

<sup>2</sup> The Division refiled and served the motion because petitioner's representative stated that he did not receive the initial motion.

connection with this matter, Barbara J. Russo, 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 petitioner's protest of a notice of determination, dated March 15, 2023, and bearing assessment identification number L-057784422 (notice). The notice was addressed to petitioner, E Cars USA Inc., at a Farmingdale, New York, address. The notice asserted fraud penalties against petitioner pursuant to Tax Law § 1145 (a) (2).

2. Petitioner filed a request for conciliation conference, signed and dated September 6, 2023, with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.<sup>3</sup>

3. On September 22, 2023, BCMS issued a conciliation order dismissing request, CMS No. 000355056 (conciliation order), to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within thirty days from the date of the statutory notice. Since the notice(s) was issued on 3/15/2023, but the request was not received until 9/7/2023, or in excess of 30 days, the request is late filed.”<sup>4</sup>

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<sup>3</sup> The postmark on the copy of the envelope for the request for conciliation conference is illegible but the envelope bears a stamp from BCMS indicating a receipt date of September 11, 2023.

<sup>4</sup> There is no explanation why the conciliation order states that the request for conciliation conference was received on September 7, 2023, but the envelope for the request was stamped as received by BCMS on September 11, 2023.

4. On September 29, 2023, petitioner filed a 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 Bruce D. Lennard, Esq., dated March 5, 2024, submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division, sworn to on January 23, 2024; (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR), postmarked March 15, 2023; (iii) a copy of the notice mailed to petitioner with the associated mailing cover sheet; (iv) an affidavit of Susan Ramundo, a manager of the Division’s mail room, sworn to on January 25, 2024; (v) a copy of the conciliation order issued by BCMS on September 22, 2023; (vi) a copy of petitioner’s request for conciliation conference, dated September 6, 2023; and (vii) a copy of petitioner’s quarterly sales tax return for the quarter June 1, 2015 through August 31, 2015 (sales tax return), listing the same Farmingdale, New York, address for petitioner as is listed on the notice.

6. Mr. Lennard asserts in his affirmation that the Farmingdale, New York, address appearing on the sales tax return was petitioner’s last known address when the notice was issued.

7. Marianna Denier has served as the Director of MAPS since July 2022. Prior to that, she was a 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 electronic 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 practices and procedures for generating and issuing statutory notices.

8. 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 assistance information on the back. 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.

9. 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 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.

10. Here, the CMR for the statutory notices issued by the Division on March 15, 2023, including the notice herein, consists of 21 pages with 221 certified control numbers and

corresponding assessment numbers, names, and addresses. Each page consists of 11 entries with the exception of page 21, which contains 1 entry. 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.

11. Each page of the CMR listed 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 to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "3/15/23." 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 21, corresponding to "Total Pieces and Amounts" is the preprinted number "221." A USPS representative affixed a postmark, dated March 15, 2023, to each page of the CMR, wrote "221" on page 21 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed or signed page 21.

12. Page 18 of the CMR indicates that a notice with certified control number 9207 1041 0029 7300 7282 00 and reference number L 057784422, was mailed to petitioner at its Farmingdale, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit "B," bear this certified control number and petitioner's name and address as stated above.

13. Ms. Denier states that the notice was mailed on March 15, 2023, as indicated by the CMR, as well as the USPS postmark on each of the 21 pages of the CMR.

14. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on March 15, 2023.

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

16. 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.

17. 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.

18. Ms. Ramundo avers that each page of the CMR in exhibit “A” of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 21 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s initials or signature indicate that all 221 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on March 15, 2023.

19. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on March 15, 2023, an employee of the mail room delivered one piece of certified mail addressed to petitioner at its Farmingdale, New York, address in a sealed postpaid envelope for delivery by certified mail. Ms. Ramundo 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 March 15, 2023.

20. Petitioner’s response to the Division’s motion includes a “Response Brief and Motions.” There is no notice of motion, affidavits or affirmations included with the response. Petitioner’s response contains arguments regarding the related responsible officer assessment, which is not a part of this determination (*see* footnote 1). The response does not include any arguments or evidence addressing the timeliness of petitioner’s protest.

### ***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). As the petition in this matter was

filed within 30 days of the conciliation order (*see* findings of fact 3 and 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

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. 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, 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 at 562).

D. There is a 30-day statutory limitation for filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals following the issuance of a notice of determination that asserts a fraud penalty (Tax Law §§ 170 [3- a] [h] [iii]; 2008 [2] [a] [iii]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late filed request for conciliation conference or petition (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a request for a conciliation conference is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioner'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 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).

F. Petitioner's response includes only arguments regarding the merits of the assessment and the separate responsible officer assessment which is not a part of this proceeding. Petitioner has presented no evidence to rebut the facts alleged in the Lennard affirmation and Denier and Ramundo affidavits and supporting documents regarding the timeliness of petitioner's protest. As such, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

G. The Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on March 15, 2023. 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 sales tax return, which satisfies the "last known address" requirement in Tax Law § 1147 (a) (1). Petitioner has not presented any evidence or argument to rebut this.

H. It is thus concluded that the Division properly mailed the notice to petitioner on March 15, 2023, and the statutory 30-day time limit to either file 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] [h] [iii]; 2008 [2] [a] [iii]). Petitioner's request for a conciliation conference was dated September 6, 2023, and received by BCMS on either September 7 or 11, 2023. While the postmark on the envelope for petitioner's request for conciliation conference is not legible, viewing the facts in a light most favorable to the nonmoving party (*see Vickers v Parcels*, 198 AD3d 1160, 1161 [3d Dept 2021]), and assuming the request was mailed on the date it was signed (i.e. September 6, 2023), such date falls well after the 30-day period of limitations for the filing of such a request. Consequently, the request was untimely and the same was properly dismissed by the September 22, 2023, conciliation order issued by BCMS.

I. To the extent that petitioner's response included a paragraph labeled "motion," such motion failed to include a proper notice of motion as required by the Rules (*see* 20 NYCRR

3000.5). “[T]he absence of a notice of motion renders the motion invalid (*Matter of Silvestri*, Tax Appeals Tribunal, March 17, 2022; *see also* Siegel, NY Prac § 247 at 372 [2nd ed 1991]).

As such, petitioner’s motion is denied.

J. The Division of Taxation’s motion for summary determination is granted, petitioner’s motion is denied, the petition of E Cars USA Inc. is denied, and the conciliation order dismissing petitioner’s request, dated September 22, 2023, is sustained.

DATED: Albany, New York  
August 8, 2024

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE