

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>LYNN TILTON</b>	:	<b>DECISION</b>
	:	<b>DTA NO. 828369</b>
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period March 1, 2016 through	:	
August 31, 2016.	:	

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Petitioner, Lynn Tilton, filed an exception to the determination of the Administrative Law Judge issued on August 15, 2019. Petitioner appeared by Hodgson Russ, LLP (K. Craig Reilly, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard via teleconference, on July 23, 2020, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***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***

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 4, 5, and 11, which have been modified to more accurately reflect the record. We have also made additional findings of fact, numbered 12 and 13 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. The Division of Taxation (Division) brought a motion on March 6, 2019 for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of notices of determination, dated January 5, 2017, and bearing assessment identification numbers L-045919627 and L-045919628 (notices). The notices are addressed to petitioner, Lynn Tilton, at an address in Highland Beach, Florida.

2. On August 14, 2017, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On September 1, 2017, 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 5, 2017, but the request was not received until August 14, 2017, 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 September 15, 2017.

5. In support of the motion and to show proof of proper mailing of the notices, the Division provided, along with an affirmation of Anita K. Luckina, the following with its motion

papers: (i) an affidavit, dated December 11, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 5, 2017; (iii) an affidavit, dated December 14, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notices mailed to petitioner with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on August 14, 2017; (vi) a copy of the conciliation order issued by BCMS on September 1, 2017; and (vii) a copy of petitioner's 2015 New York State non-resident income tax return, form IT-203, dated October 15, 2016. The tax return dated October 15, 2016 was the last return filed with the Division by petitioner before the notices were issued.

6. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "1/5/17." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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 29 pages and lists 312 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 29, which contains four 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. A USPS representative affixed a postmark, dated January 5, 2017, to each page of the CMR, wrote the number "312" on page 29 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 29.

9. Page 26 of the CMR indicates that a notice with certified control number 7104 1002 9730 0069 3734 and reference number L-045919627 was mailed to petitioner at the Highland

Beach, Florida, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted. Page 27 of the CMR indicates that a notice with certified control number 7104 1002 9730 0069 3741 and reference number L-045919628 was mailed to petitioner at the Highland Beach, Florida, address listed on the notice. The corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 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. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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 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. Each page of the CMR in exhibit "A" of the

Picard affidavit contains a USPS postmark of January 5, 2017. On page 29, corresponding to “Total Pieces and Amounts,” is the preprinted number 312 and next to “Total Pieces Received At Post Office” is the handwritten entry “312.” There is a set of initials or signature on page 29. According to the Picard and Ramundo affidavits, copies of the notices were mailed to petitioner on January 5, 2017 as claimed.

11. In petitioner’s response in opposition to the Division’s motion, petitioner provided, along with the affirmation of K. Craig Reilly, the following: (i) a copy of a Freedom of Information Law (FOIL) request made to the Division’s Records Access Officer dated March 8, 2019; (ii) the Division’s reply to the FOIL request dated April 22, 2019; (iii) pages from the USPS’s Domestic Mail Manual from USPS.com; and (iv) an undated, USPS tracking sheet for certified control numbers 71041002973000693741 and 710410029973000693734. The USPS tracking sheet was obtained from the USPS website (www.usps.com) sometime between April 22, 2019 and May 20, 2019. This tracking sheet states:

“Label created, not yet in system.

A status update is not yet available on your package. It will be available when the shipper provides an update or the package is delivered to USPS. Check back soon.”

12. Also, in the affirmation of K. Craig Reilly, petitioner’s representative affirms that between the dates of April 22, 2019 and May 20, 2019, he called the USPS Customer Care Center and verbally requested tracking information for the same certified control numbers. The USPS automated telephone tracking system informed petitioner’s representative that “More information will be available when the US Postal Service actually receives the package . . . .”

13. In petitioner’s response in opposition to the Division’s motion, petitioner provided a

sworn affidavit indicating that she never received the notices by certified or registered mail.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began by reviewing the standards for granting a motion for summary determination. Next, the Administrative Law Judge reviewed the well-established rules to determine the timeliness of a request for conciliation conference or a petition. The Administrative Law Judge noted that when the timeliness of a request for conciliation conference or a petition is at issue, the Division has the burden to establish the fact and date of mailing of a notice or notices to petitioner's last known address. Upon review of the Division's evidence, the Administrative Law Judge concluded that the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on January 5, 2017. The Administrative Law Judge found that the Division proved its standard mailing procedure through the affidavits submitted by Ms. Picard and Mr. Ramundo. The Administrative Law Judge also found that those affidavits, along with the properly completed CMR, showed that such procedure was followed in this specific case. The Administrative Law Judge concluded that the statutory notices were properly mailed to petitioner's last known address; that is, the address listed on petitioner's 2015 New York income tax return.

The Administrative Law Judge next observed that the proper mailing of a notice of determination is presumptive evidence of receipt by the taxpayer. She further noted that a taxpayer has the right to rebut the presumption; however, any such rebuttal must consist of more than a mere denial of receipt. The Administrative Law Judge concluded that petitioner failed to produce evidence that establishes a material, arguable issue of fact regarding the Division's mailing of the notices in order to require a hearing.

The Administrative Law Judge rejected petitioner's allegation that the Division failed to properly mail the notices and concluded that the USPS tracking information submitted by petitioner in opposition to the motion lacked an evidentiary foundation. She found that the USPS tracking information does not raise a material question of fact regarding the Division's mailing of the statutory notices without information regarding the use of certified control numbers and an explanation of the statements included in the tracking information. She observed that certified control numbers are 20 digits in length and can be used more than once. She found that the tracking information produced by petitioner merely indicates that no delivery information was available for those particular certified control numbers at the time of petitioner's search.

Based on the issuance date of the notices mailed to petitioner and the filing date of the request for conciliation conference, the Administrative Law Judge determined that petitioner's conference request was untimely, and she granted the Division's motion for summary determination.

#### ***ARGUMENTS ON EXCEPTION***

As she did in the proceeding below, petitioner argues that the USPS tracking information she submitted constitutes relevant and material documentation establishing that the subject notices were not delivered to the USPS by the Division and that the USPS did not receive the certified mail packages containing the notices. Petitioner contends that this evidence controverts the Division's proof and raises a material question of fact as to whether the notices were properly mailed by the Division.



Petitioner next argues that she has also raised a material and triable issue of fact as to whether she received the notices. Petitioner contends that the Division has produced no evidence of actual receipt by petitioner and given that the issue of actual receipt remains in dispute, the motion must be denied. Petitioner contends that the Administrative Law Judge failed to give proper weight to her sworn affidavit and that courts may not weigh the credibility of affiants on a motion for summary judgment unless it appears the issues are not genuine. Petitioner asserts that affidavits that raise valid questions of fact are sufficient to defeat a motion for summary determination. Furthermore, petitioner maintains that under the rules for the conduct of hearings before administrative law judges, an evidentiary foundation is not required for the USPS tracking information that she has submitted. Nevertheless, although not required, petitioner contends that she has presented such a foundation through her affidavit, her attorney's affirmation and the other documents presented in the proceeding below. Petitioner objects to the Administrative Law Judge's conclusion that USPS certified control numbers can be used more than once. Petitioner argues that no evidence exists in the record to support that conclusion and the Division had made no such claim in its motion. Petitioner argues that the Administrative Law Judge and the Division rely on hypothetical justifications to dismiss petitioner's evidence when, in fact, the evidence in this matter must be viewed in a manner most favorable to petitioner as the party opposing a motion for summary determination. Petitioner argues that summary determination is not the proper forum for resolving unsettled issues regarding USPS record keeping or the potential reuse of certified control numbers.

In opposition to the exception, the Division argues that the Administrative Law Judge correctly determined that petitioner failed to timely file a request for a conciliation conference

with the Division's BCMS following the Division's proper issuance of notices to petitioner. It contends that the Administrative Law Judge correctly determined that petitioner did not rebut the statutory presumption of receipt.

The Division argues that it provided uncontroverted documentary proof that it delivered the notices to the USPS. In response to petitioner's assertions, the Division maintains that the tracking information obtained from the USPS by petitioner is not evidence of the Division's failure to deliver the notices to the USPS, but a function of the timing of petitioner's request for tracking information. The Division contends that USPS published policy is to maintain tracking information for certified and registered mail for only a period of two years. The Division asserts that the USPS tracking information submitted by petitioner was generated more than two years after the subject notices were issued. As such, it argues that, absent additional information from the USPS, it is unlikely that the tracking information submitted by petitioner is relevant to the subject notices. It asserts that questionable tracking information cannot raise material doubt as to whether the notices were delivered to the USPS when, as in this case, a USPS employee certified on the relevant mail log that they were received. It further contends that petitioner's affidavit merely denies receipt and, without more, is insufficient to rebut the presumption of receipt of the notices.

### ***OPINION***

We note that the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order dismissing petitioner's request for a conciliation conference and, as such, the Division of Tax Appeals has jurisdiction over the petition (*see* Tax

Law §§ 170 [3-a] [a], [e] and 2006 [4]; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991).

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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). Thus, the movant for summary determination “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]). 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] quoting *Zuckerman v City of New York*, 49 NY2d at 562).

The Tax Law provides that the Division may issue a notice of determination of sales and compensating use taxes 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 (Tax Law §§ 1138 [a] [1]; 1147 [a] [1]). The Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003; Tax Law § 1147 [a] [1]). 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 for hearing with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (Tax Law § 1138 [a] [1]). A person 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, Inc.* 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*).

Where, as here, the timeliness of a taxpayer’s protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating proper mailing of the relevant statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that 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*). The Division may meet its burden by producing affidavits

from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr., LLC* Tax Appeals Tribunal, March 3, 2011).

We find that the Division has established the existence of a standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue. We also find that the CMR was properly completed and, together with proof of the Division's standard mailing procedure, constitutes highly probative evidence of both the fact and date of mailing of the subject notices (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). Specifically, the CMR lists the certified mail control number corresponding to each notice's cover sheet, petitioner's name and address, an assessment ID corresponding to each notice, a dated postmark on each page and the initials of the postal employee accepting the articles of mail listed on the CMR. According to the CMR, there was a total of 312 items delivered into the possession of the USPS on January 5, 2017, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote "312" on the last page and initialed the page. Further, the address listed for petitioner on the mailing cover sheets and CMR entries is the same as the address listed on petitioner's 2015 filed New York State income tax return. This satisfies the last known address requirement in Tax Law § 1138 (a) (1).

Thus, we agree with the determination of the Administrative Law Judge that the Division has, through its moving papers, demonstrated proper mailing of the notices at issue, which, absent contrary evidence, raises a presumption of receipt by petitioner (*see* Tax Law § 1147 [a]

[1]; *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin., of State of N.Y.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]; *Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019). Petitioner is entitled to rebut that presumption by demonstrating that the standard mailing procedure was not followed or that the procedure was performed so carelessly that it would be unreasonable to assume that the notice was mailed (*see Matter of T.J. Gulf, Inc. v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]). Testimony that amounts to no more than a mere denial of receipt is insufficient to rebut the presumption of receipt (*id.*). Further, unsubstantiated allegations or assertions are insufficient to raise an issue of fact in response to a motion for summary determination (*see Zuckerman v City of New York*, citing *Alford & Swift v Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]; *American Cars 'R' Us, Inc. v Chu*, 147 AD2d 797, 799 [3d Dept 1989]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011).

Petitioner in this proceeding did not contend that the notices were improperly addressed or that her address is different than the address listed on her 2015 return. Further, petitioner did not allege any specific inadequacies with the Division's standard mailing procedure, nor did she demonstrate any deviation from that mailing procedure in this specific case. Instead, petitioner submitted a sworn affidavit in which she denied receipt or knowledge of the notices until copies were provided on August 1, 2017 by the legal representatives of the company for which she allegedly was a responsible officer. Also, in support of her allegation, petitioner submitted portions of the USPS Domestic Mail Manual related to delivery status and tracking information for certified mailings and an attorney affirmation detailing the steps followed to obtain USPS tracking information for the subject notices. Petitioner's attorney obtained and submitted a

document entitled “USPS Tracking” from the USPS website using the certified control number assigned to each of the notices mailed to petitioner. For each certified control number, the USPS tracking information indicates: This tracking sheet states:

“Label created, not yet in system.

A status update is not yet available on your package. It will be available when the shipper provides an update or the package is delivered to USPS. Check back soon.”

In addition to obtaining the track and confirm information from the USPS website, petitioner’s attorney also requested tracking information for the two notices by calling the USPS customer care center and using its automated telephone tracking system. Petitioner alleges that the automated telephone tracking system advised that: “More information will be available when the US Postal Service actually receives the package . . .”.<sup>1</sup> Petitioner contends that this evidence, along with petitioner’s affidavit of nonreceipt, raises material and triable issues of fact as to whether the notices were properly mailed by the Division and received by petitioner.

In response, the Division contends that it provided uncontroverted evidence that it delivered the notices to the USPS on January 5, 2017. The Division maintains that the tracking information obtained from the USPS website is not evidence of the Division’s failure to deliver the notices to the USPS, but a function of the timing of petitioner’s request for tracking information. The Division argues that USPS policy published on its website indicates that

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<sup>1</sup> Petitioner has also submitted USPS tracking information for two unrelated notices sent by the Division to petitioner in October 2017. The tracking information includes a detailed tracking history of the two notices and indicates that they were delivered to petitioner’s address. The information was submitted to demonstrate that USPS tracking information confirmed delivery for other notices that the Division mailed to petitioner. While the tracking information for those other notices might be relevant as to USPS policy on the retention and availability of tracking information, generally, we do not believe it has probative value in determining whether the subject notices here were properly mailed on January 5, 2017 or received by petitioner.

tracking information for certified and registered mail is maintained for only a period of two years. The Division asserts that petitioner generated the tracking information for the notices more than two years after the notices were issued and, thus, tracking information for the certified control numbers associated with the notices was no longer maintained. The Division argues that absent additional particularized information from the USPS, it is unknown whether, and unlikely that, this tracking information is relevant to the certified control numbers associated with the notices at issue. It asserts that questionable tracking information cannot raise a material doubt as to whether the notices were properly mailed when, as is the case here, a USPS employee certifies on the relevant mail log that they were received.

In granting the Division's motion, the Administrative Law Judge determined that petitioner failed to produce evidence to establish a material issue of fact to contest the Division's mailing of the notices. She found that no evidentiary foundation had been provided regarding the input of information that is set forth on the USPS tracking information printout and, thus, gave no weight to the tracking information submitted by petitioner. In addition, she concluded that USPS certified control numbers can be used more than once, and that petitioner failed to submit any information regarding the use of certified control numbers by the USPS or an explanation from the USPS on the meaning of the tracking information obtained from its website.

When making determinations about the admissibility of evidence, we are guided by the provisions of the State Administrative Procedures Act, which provide that agencies need not observe the rules of evidence observed by courts (*State Administrative Procedures Act* § 306 [1]). Further, the Tax Appeals Tribunal Rules of Practice and Procedure provide that “[t]echnical rules of evidence will be disregarded to the extent permitted by the decisions of the



courts of the State, provided the evidence offered appears to be relevant and material to the issues” (20 NYCRR 3000.15 [d] [1]). We observe that the US Tax Court has permitted the introduction of tracking information evidence obtained from the USPS website and the Internal Revenue Service (IRS) has used such tracking information as proof of proper mailing of a notice to a federal taxpayer (*see Kaebel v Commr*, 113 TCM 1162 [2017] [IRS settlement officer reviewed the tracking information for the mail corresponding to the certified mail article numbers on the notice of deficiency and verified through USPS website tracking that the article of mail was reported delivered].<sup>2</sup> The Tax Court has held that government websites are self-authenticating if government sponsorship can be verified by visiting the site (*see Cave Buttes, LLC v Commr*, 147 TC 338, 362 [2016]) and the postal service has been found to be an independent establishment of the executive branch of the Government of the United States (*see Dolan v United States Postal Service*, 546 US 481, 483-84 [2006]).

For the purposes of opposing the motion for summary determination, we find that petitioner has provided sufficient information to assure the Tribunal of the authenticity of the tracking information obtained from the USPS website and, therefore, we find that the tracking information constitutes “evidentiary proof in admissible form” (*Whelan v GTE Sylvania* 182 AD2d at 449; *see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [3d Dept 2006] [lack of authentication of IRS documents that were clearly relevant and material to establish taxpayer's deficiencies in payment of state income tax did not prevent their consideration in administrative deficiency proceeding]).

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<sup>2</sup> Note, footnote six where the Court observed that USPS tracking system stores certified mail records for up to two years.

The more pertinent question here is whether petitioner's evidence is relevant and sufficiently probative to raise a material and triable issue of fact that would tend to rebut the presumption of receipt and require a hearing. For the following reasons, we answer that question in the affirmative and remand this matter to the Administrative Law Judge for further proceedings as ordered below.

This is not the first time that USPS tracking information has been presented by a taxpayer in a Tax Appeals proceeding. Most recently, in *Matter of Oberlander* (Tax Appeals Tribunal, August 24, 2020), a personal income tax proceeding, the petitioner had submitted two USPS tracking print outs to demonstrate that the Division's notices were improperly addressed to him and his representative. The tracking information indicated that delivery of the notice addressed to petitioner's representative was attempted but undeliverable; it was eventually returned to the original sender in Albany, New York. The tracking information for the notice addressed to petitioner indicated that the certified mail item was returned to the original sender. We determined that the notices were properly mailed to the last known address for both petitioner and his representative and, as such, the tracking information did not raise a material issue of fact since actual receipt of the notices was unnecessary for purposes of the personal income tax statutory scheme (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

In *Matter of Ahmed* (Tax Appeals Tribunal, April 10, 2018), the Tribunal considered USPS tracking information for two notices of determination: one addressed to the petitioner that demonstrated the notice was offered for delivery and refused; the other addressed to the petitioner's representative that demonstrated that the notice was offered for delivery but was unclaimed. In denying petitioner's exception, we noted that a properly mailed notice may be

deemed constructively received and evidence of actual non-receipt would, therefore, be insufficient to rebut the presumption. We determined that the tracking information pertaining to both notices indicated constructive receipt and was thus insufficient to raise an issue of material fact.

In *Matter of Ahmed* (Tax Appeals Tribunal, June 29, 2017), the petitioner submitted an undated one-page printout entitled “USPS Tracking” that stated, “[t]he Postal Service could not locate the tracking information for your request. Please verify your tracking number and try again later.” The Tribunal determined that, as the tracking information merely indicated that no delivery information was available, it did not support petitioner’s allegation that the Division failed to mail the notice to the correct address and thus did not raise a material issue of fact regarding the Division’s mailing.

In each of the proceedings noted above, we considered the tracking information to determine its relevancy and materiality in the context of the specific proceeding. In the present proceeding, the Division, as the movant, bore the burden of tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*). The Division submitted evidence to establish the proper mailing of the notices including documentary evidence of receipt by the postal service. The Division, however, did not provide any direct or conclusive evidence of receipt of the notices by petitioner, instead relying on the presumption of receipt drawn from the proof of mailing. In contrast to the tracking information in the proceedings noted above, the USPS tracking information submitted here indicates that the notices with those certified control numbers were not delivered to the postal service and, as such, calls into question the handling of the notices after they were received by the post office, and

also raises a question as to whether the notices were received by petitioner as required by the Tax Law (*see Matter of Ruggerite, Inc. v State Tax Commn.*, 64 NY2d 688, 689 [1984] [receipt is part of the procedural equation in sales tax cases]). Evidence tending to show that the postal service failed to deliver the notices or follow its own regulations would serve to rebut the presumption of receipt and is, therefore, evidence that is material in this proceeding (*Matter of T.J. Gulf, Inc.*, citing *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin., of State of N.Y.* [presumption was rebutted where notice was returned to the Division as unclaimed, and taxpayer showed that post office failed to follow its own regulations]).

We also find that the tracking information, along with petitioner’s other evidence, is sufficiently probative to raise an issue of fact in opposition to the Division’s motion. Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts (*Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039, 1043 [2016]). The Division alleges that the USPS tracking information is questionable because it was obtained more than two years after the notices were mailed. It also alleges that the tracking information may not relate to the subject notices because certified control numbers can be used more than once. The Division, however, failed to counter petitioner’s tracking information evidence with evidence of its own regarding the USPS record retention policy and whether that policy would have impacted the tracking information for these notices.<sup>3</sup> Further, we find no evidence in the record to support the conclusion below that

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<sup>3</sup> Notwithstanding our conclusion here, we observe that the Tax Court has determined that the USPS maintains tracking information for certified and registered mail for only up to two years (*see e.g. Knudsen v Commr.*, 109 TCM 1374 [2015] [noting that the USPS “Track and Confirm” search information goes back only two years]; *Garrett v Commr.*, 112 TCM 343 [2016] [noting that a “Help” article at the USPS.com website states that records for certified mail service are stored in the tracking system for up to two years.]; *Ertelt v Commr.*, 113 TCM 1182 [2017]

the USPS certified control numbers pertaining to the subject notices may have been used more than once and, without such evidence, we decline to draw that inference in order to explain the tracking results (*see Hall v Queensbury Union Free Sch. Dist.*, 147 AD3d 1249, 1250 [3d Dept 2017] [at summary judgment stage, nonmoving party is afforded the benefit of every reasonable inference]).

Upon a motion such as this, the facts presented must be viewed “in the light most favorable to the non-moving party” (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019] [internal quotes omitted]; *Matter of Guffin*, Tax Appeals Tribunal, September 18, 2014 [citations omitted]). It is not for the Tribunal “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]; *Matter of United Water of New York, Inc.*, Tax Appeals Tribunal, April 1, 2004). The Division’s motion is not a substitute for a hearing. Based on the totality of the evidence in the record, petitioner has raised material factual issues as to her receipt of the notices. We conclude, therefore, that an evidentiary hearing on the issue of timeliness should be conducted in order to resolve this controversy. The USPS tracking information submitted by petitioner will not necessarily preclude a decision in favor of the Division at the hearing. The ultimate decision on that issue will depend on the credibility and persuasiveness of what petitioner and the Division offer into evidence.

Therefore, we remand this matter to the Administrative Law Judge for an evidentiary hearing to be held and a determination issued, as expeditiously as possible, on the issue of

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[after trial, undated screenshots of tracking information on USPS website not properly authenticated without showing that the tracking information was not expired].

timeliness. In this hearing, the parties are requested to address the USPS tracking information and the USPS regulations and policies with regard to the retention of tracking information and the use of certified control numbers during the period at issue.

This Tribunal will not retain jurisdiction over this matter on remand. If either party wishes to take exception to the determination issued by the Administrative Law Judge on remand, they may do so by filing a timely exception thereto.

DATED: Albany, New York  
January 25, 2021

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner