

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SHAHRAM HAGHIGHAT** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 825905  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period September 1, 2009 through February 29, 2012. :

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Petitioner, Shahram Haghighat, 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, 2009 through February 29, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion dated April 8, 2014 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and (vii) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on May 9, 2014, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference 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 February 15, 2013, bearing assessment identification number L-039082916-1. The notice is addressed to petitioner, Shahram H. Haghghat, at "12 WILLOW LN #A, GREAT NECK, NY 11023-1139." It assesses sales and use taxes for the period September 1, 2009 through February 29, 2012 in the amount of \$41,835.44 plus penalty and interest for a balance due of \$72,179.88. The notice explained that petitioner must file a request for a conciliation conference or a petition for a hearing by May 16, 2013.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination. The request was mailed via Federal Express and received by the Division on June 24, 2013. On July 12, 2013, BCMS issued a conciliation order dismissing request. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing of the statutory notice. Since the notice(s) was issued on February 15, 2013 but the request was not received until June 24, 2013, or in excess of 90 days, the request is late filed.

3. On October 11, 2013, the Division of Tax Appeals received a petition dated October 7, 2013 that stated, in pertinent part, that petitioner's Request for a Conciliation Conference was mailed in a timely manner.

4. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) the petition of Shahram Haghghat, dated October 7, 2013, that was stamped received by the Division of Tax Appeals on October 11, 2013, (ii) the Notice of Determination issued to Shahram Haghghat, dated February 15, 2013, (iii) an affidavit, dated March 18, 2014, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iv) an affidavit, dated March 18, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 15, 2013; and (vi) a copy of petitioner's New York State Resident Income Tax Return for the year 2011.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 page of the CMR to the actual mailing date of "2/15/13." In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. 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 P.O. Address."

7. According to the Maney affidavit, the CMR in the present matter consists of 25 pages. Mr. Maney notes that the entire CMR is attached to his affidavit, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR, and initialed or signed page 25. He adds that the total number of statutory notices mailed pursuant to the CMR was 267.

8. Page 13 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1496 3595 and assessment ID number L-039082916 was mailed to petitioner at his Great Neck, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then

weigh, seal and place postage on each envelope. The certified control numbers are verified against 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 signature or initials on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Each page of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of February 15, 2013. On page 25, corresponding to "Total Pieces and Amounts," is the preprinted number 270. The number 270 was struck and replaced by the handwritten number "267" which is circled.<sup>1</sup> There are two sets of initials or a signature near the circled number of pieces. The CMR reflects the fact that three pieces of mail were "pulled." The change in the total number of pieces received at the post office reflects the deletions from the CMR.

10. The Maney affidavit explains that the affixation of the postmarks and the Postal Service employee's initials show that 267 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on February 15, 2013.

11. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner and petitioner's representative on February 15, 2013 as claimed.

12. Petitioner's New York State Resident Income Tax Return for the year 2011 was the last return filed before the Notice was issued. The address appearing on the return is "12-A Willow Lane, Great Neck, N.Y. 10023." This was the last return filed before the notice was

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<sup>1</sup> It is recognized that the number "268" was also written and then struck. The obvious arithmetic error is of no consequence.

issued and the address shown on this return corresponds with the address appearing on the notice and the CMR.

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

A. The Division brings this motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, summary determination under section 3000.9(b). As the petition in this matter was timely filed, 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 will address the instant motion as such.

B. 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services "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 e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the merits of the protest (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., February 15, 2013, to petitioner's last known address. 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 New York State income tax return for the year 2011, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). The notice was thus properly mailed to petitioner on February 15, 2013. It is also noted that petitioner has not denied receipt of the notice.

E. In sum, since the Notice of Determination was mailed on February 15, 2013 but the Request for a Conciliation Conference was not filed until June 24, 2013, the Request was not filed within the requisite period of limitation and must be dismissed (Tax Law § 170[3-a][a]).

F. Although the Division of Tax Appeals lacks subject matter jurisdiction, petitioner has the option of paying the tax and, within two years of the payment, filing a claim for refund (Tax Law § 1139[c]). If the claim for refund is disallowed, petitioner may request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance to contest such disallowance (Tax Law §§ 170[3-a][a]; 1139[b]).

G. The Division's motion for summary determination is granted, the July 24, 2013 Order dismissing petitioner's Request is sustained and the petition of Shahram Haghighat is denied.

DATED: Albany, New York  
July 31, 2014

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE