

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREGG M. REUBEN	:	DETERMINATION
	:	DTA NO. 827052
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods December 1, 2012	:	
through February 28, 2013, June 1, 2013 through	:	
August 31, 2013 and March 1, 2014 through	:	
May 31, 2014.	:	

Petitioner, Gregg M. Reuben, 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 periods December 1, 2012 through February 28, 2013, June 1, 2013 through August 31, 2013 and March 1, 2014 through May 31, 2014.

On January 27, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Jessica DiFiore, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of Jessica DiFiore, dated January 26, 2016, and annexed exhibits supporting the motion. On February 12, 2016, petitioner, appearing by Ballon, Stoll, Bader & Nadler, P.C. (Norman R. Berkowitz, Esq., of counsel), filed a letter brief in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this determination commenced on February 27, 2016 (Tax Law § 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, petitioner's

response in opposition, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest following the issuance of four notices of determination assessing tax, penalties and interest against him.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued four notices of determination, all dated December 5, 2014, to petitioner, Gregg M. Reuben, assessing sales tax due, as follows:

Assessment ID Number	Period	Tax Assessed ¹
L-042254140-9	12/01/2012 - 02/28/2013	\$31,534.22
L-042254141-8	06/01/2013 - 08/31/2013	\$1,494.81
L-042254142-7	03/01/2014 - 05/31/2014	\$36,173.41
L-042254143-6	12/01/2012 - 02/28/2013	\$3,071.12

The foregoing notices were issued to petitioner upon the Division's assertion that he was a person under a duty to collect, account for and remit sales and use taxes on behalf of Canal Parking Mgmt., LLC, for the periods specified in the notices.

2. Petitioner challenged the foregoing notices by filing a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The Request is dated as signed on April 22, 2015, and was accompanied by a letter from petitioner's representative, dated April 29, 2015, together with a power of attorney and copies of the four notices. The mailing envelope in which the Request, accompanying letter and

¹ In addition to tax (as shown), the notices assess penalties and interest.

copies of the notices were enclosed bears a machine-metered postage stamp dated April 29, 2015, and all of such documents, including the envelope, bear a BCMS receipt stamp dated May 1, 2015.

3. By a Conciliation Order Dismissing Request (CMS No. 266337) dated May 15, 2015 (Dismissal Order), BCMS dismissed petitioner's Request as not timely filed, stating:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on December 5, 2014, but the request was not received until May 1, 2015, or in excess of 90 days, the request is late filed."

4. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax Appeals. The petition, mailed by certified mail, is dated as signed on June 24, 2015 and is stamped as received by the Division of Tax Appeals on June 29, 2015. The petition alleges that the four notices were not properly served on petitioner in accordance with Tax Law § 1147, challenges the Division's assertion that petitioner was personally responsible for the taxes assessed, and further challenges the imposition of penalties. On August 19, 2015, the Division timely filed its answer to the petition, and petitioner, in turn, filed a reply thereto on September 2, 2015. Thereafter, the Division brought the subject motion.

5. To show proof of proper mailing of the four notices of determination on December 5, 2014, the Division provided the following: (i) an affidavit, dated January 26, 2016 of Jessica DiFiore, Esq.; (ii) an affidavit, dated January 14, 2016, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (iii) an affidavit, dated November 13, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iv) an affidavit, dated November 17, 2015, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (v) the 39-

page “Certified Record for Presort Mail - Assessments Receivable” (CMR); (vi) copies of the four notices of determination all dated December 5, 2014 together with their associated mailing cover sheets; (vii) four United States Postal Service (USPS) PS forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the responses thereto; (viii) a copy of petitioner’s e-Filed Form IT-201 (Resident Income Tax Return) for the year 2013, dated October 2, 2014; and (ix) an internal email of the Division relating to a Change of Address Application concerning petitioner.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the notices of determination at issue herein, and other such notices during the period here in question, involves the use of the Division’s electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page “Mailing Cover Sheet” generated for each such notice, and that sheet bears a bar code, the taxpayer’s mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the

notices appear on the CMR under the first columnar heading entitled “Certified No.” The assessment numbers for the notices appear under the second columnar heading, entitled “Reference No.,” and the names and addresses of the taxpayers are listed under the third columnar heading entitled “Name of Addressee, Street and PO Address.” Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded to the Division’s mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division’s mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division’s general practice, this preprinted date, identified as the “run,” is to be manually changed by personnel in the Division’s mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the Division’s mail room in an area designated for “Outgoing Certified Mail.” Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any

required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on December 5, 2014, including those addressed to petitioner, consists of 39 cut sheet pages. Each of these pages includes in its upper left corner the preprinted year/day/time "run" listing of "20143321700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages 1 and 39 is the handwritten date "12/5/14," indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the foregoing 39 pages includes a USPS postmark of the Colonie Center postal service branch

office, dated December 5, 2014 and listing zip code “12205.” Each page of the CMR includes 11 entries for pieces of mail, except for page 39 (the final page), which includes 4 entries for pieces of mail, thus resulting in 422 entries for pieces of mail in total.

11. In this instance, certified control numbers 7104 1002 9730 0331 5275, 7104 1002 9730 0331 5282, 7104 1002 9730 0331 5299, and 7104 1002 9730 0331 5305, were assigned, respectively, to the reference (i.e., assessment) numbers L-042254140, L-042254141, L-042254142, and L-042254143, with each to be mailed to petitioner, Gregg M. Reuben, at 555 W 59th St., Apt. 31D, New York, NY 10019-1247. This information appears on the four notices of determination in conjunction with the respective cover sheets associated therewith, and also appears at page 2 of the CMR²

12. Appearing below the 4 entries on page 39 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 422, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “422” is handwritten and circled. Appearing at the lower right area of page 39 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above this stamped instruction reflects the aforementioned USPS postmark as well as initials presumably affixed by the postal clerk.

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division's MAPS Bureau, and Bruce Peltier, an employee and Supervisor in the Division's mail room (*see* Finding of Fact 5). Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. The record includes copies of the four notices of determination allegedly mailed by certified mail to petitioner, Gregg Reuben, on December 5, 2014, as described. The record also includes petitioner's New York State Resident Income Tax Return (Form IT-201) as e-Filed for the year 2013 (*see* Finding of Fact 5). This return was the last return filed by petitioner prior to the date of issuance of the notices at issue, and it lists petitioner's address as "555 West 59th St., **Apt No. 32D**, New York, NY, 10019" (emphasis added).

15. The record also includes a one-page email document, dated Monday, October 27, 2014 at 10:49 a.m., listing petitioner's name, taxpayer identification number, and a "New physical [and] mailing address: 555 W 59th St., **Apt 31D**, New York, NY 10019-1247," (emphasis added), as well as new contact information (i.e., telephone numbers). The "subject" line of the email states "Change of Address application - Individual - PROD." This document is described as "an internal email of the Division which was automatically generated after Petitioner changed his physical and mailing address on October 27, 2014 to 555 W 59th St., Apt 31D, New York, NY 10019-1247, via his Online Services Account" (*see* DiFiore affidavit at 7). The record includes no other information or explanation concerning the document.

16. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her preparation and filing of a USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with respect to each of the notices of determination at issue in this matter. Filing USPS form 3811-A commences a process by which post-mailing return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the forms 3811-A sought such information for the items mailed by the Division, under the certified mail numbers listed above, on December 5, 2014 from the Colonie Center, New York, branch office of the USPS to petitioner at his "555 W 59th St., **Apt 31D**, New York, NY," address (emphasis added). In response, the USPS confirmed delivery of each of the four items of certified mail in question to petitioner at the specified address, i.e., **Apt 31D**, on December 22, 2014 at 3:57 PM, and included the scanned signature and printed name of the recipient as "Gregg Reuben."

17. In opposition to the motion, petitioner asserts that the Division has not established proper issuance of the subject notices. Specifically, petitioner posits that the proper address to which the notices should have been mailed would include **Apt No. 32D**, as set forth on the last tax return filed by him prior to issuance of the notices, and would not include **Apt 31D**, as set forth on the notices as mailed. Petitioner states that the only indication of a change of address in the record is the Division's inter-office email memorandum described above, that there is no evidence petitioner notified the Division of a change of address before the date of issuance of the notices, and there is no evidence that petitioner had anything to do with this inter-office email indicating a change of address.

CONCLUSIONS OF LAW

A. 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 (Tax Law § 1138[a][1]). Alternatively, a taxpayer may protest a notice of determination by filing a Request with the 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 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 Voelker*, Tax Appeals Tribunal, August 31, 2006; *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).

B. In this case, petitioner chose to file a request with BCMS, rather than a petition with the Division of Tax Appeals, in the first instance. In turn, BCMS dismissed petitioner’s Request as not timely filed. Petitioner thereafter challenged the BCMS Dismissal Order by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed well within the 90 day statutory time limit for filing a petition following the issuance of a conciliation order (*see* Findings of Fact 3 and 4; Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]).

C. The Division brings a motion here to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination

under section 3000.9(b). Since, as noted, the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition. 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 a conciliation conference. This determination shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

D. 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]). 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 [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* at 562). As detailed hereafter, there exist no material and triable issues of fact, and the Division is entitled to summary determination in its favor.

E. Where, as here, the timeliness of a Request is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, 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). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory 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*).

F. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination at issue were mailed by certified mail addressed to petitioner on December 5, 2014. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address, as well as the numerical information on the notices, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of December 5, 2014 and the initials of the USPS employee. There are 422 certified mail control numbers listed on the CMR for December 5, 2014, and the USPS employee who initialed the CMR indicated, by writing and circling the number "422" near such initials, that 422 items were received for mailing. The CMR has thus 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

H. The only remaining issue in this case is the question of whether the notices were addressed to petitioner at his "last known address" at the time they were mailed, so as to be considered "properly mailed." Petitioner asserts, very specifically, that the Division's use of "Apt 31D," on the basis of a change of address application evidenced herein only by an internal email document (*see* Finding of Fact 15), without any further evidence pertaining thereto, was

improper and does not support using the allegedly changed address for purposes of properly mailing the subject notices. Rather, petitioner maintains the evidence on this motion only supports the conclusion that petitioner's "last known address" was "Apt No. 32D," as appearing on the last return filed prior to issuance of the notices (*see* Finding of Fact 14).

I. Tax Law § 1138(a)(1) and § 1147(a)(1) govern the issuance of a notice for the assessment of sales and use tax liability against an individual. Tax Law § 1138(a)(1) provides:

"A notice of determination shall be *mailed* by certified or registered mail to the person or persons liable for the collection or payment of the tax *at his last known address in or out of this state . . .* After ninety days from the *mailing* of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same" (italics added).

Tax Law § 1147(a)(1) provides:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope *addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.* A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (italics added).

Since there is no evidence or argument of fault or flaw with the physical method and fact of mailing (*see* Conclusion of Law G), this case distills to the simple question of whether the Division's use Apt 31D rather than Apt No. 32D was proper.

J. As above, Tax Law § 1138(a)(1) calls for mailing to a person's "last known address in or out of this state," and Tax Law § 1147(a)(1) further calls for mailing to "the address given in

the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” Under these rules, the Division must, in the first instance, mail the notice to the last known address provided by the person through his own filings or applications. In this case, the only evidence that petitioner advised the Division, through his own filings, applications or otherwise, that his personal address had changed from that set forth on his tax return filed most recently prior to issuance of the notices, is the one-page internal Division email (*see* Finding of Fact 15). The record on this motion includes no evidence in explanation of the process by which such change of address was initiated, so as to result in the automatic generation of the noted email, and no evidence to establish that petitioner in fact gave notice of or requested that a change of address be entered for him via his Online Services Account (e.g., the “Change of Address application” referenced in the “subject” line of the email, and generically described in the DiFiore affidavit [*see* Finding of Fact 15]). Without additional evidence in explanation of the process by which the foregoing occurred, the record is not sufficient to support a conclusion that petitioner’s address changed from “Apt No. 32D,” per his return, to “Apt 31D,” as alleged by the Division. Under the foregoing circumstances, it cannot be concluded that the Division mailed the notices to petitioner’s last known address, such that the notices may be said to have been *properly* mailed as required (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Consequently, the subject motion may not be granted and a hearing on the merits of the petition

may not be denied, on the basis of the Division's allegation that it established proper mailing of the notices.³

K. Consideration of this motion does not end with the foregoing. That is, absent proof of proper mailing, the 90-day period for filing either a request or a petition was tolled until such time as petitioner actually received notice of the assessments (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest would have then commenced, unless issuance of the assessments themselves was precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Notwithstanding the foregoing failure of proof regarding petitioner's last known address, however, the Division has nonetheless established, via the Corina affidavit and accompanying USPS forms 3811-A and USPS responses thereto, that the notices were mailed by certified mail and were, in fact, thereafter delivered to and accepted by petitioner on December 22, 2014 (*see* Finding of Fact 16). As a result, the period within which to challenge the notices commenced to run on the date of such actual receipt of the notices by petitioner, i.e., December 22, 2014, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*;

³ It is noted that Domestic Mail Manual 600 (Mailing Standards of the USPS), 602 (1.3) (Address Elements) and (1.4.2[e]) (Complete Address Elements) regards the inclusion of a secondary address unit designator (such as a street, apartment, unit or suite number, as applicable) as a required element of an address. From this, it follows that the use of an incorrect secondary address unit designator (e.g., an incorrect apartment number) is properly considered a consequential error for purposes of commencing the period within which a taxpayer must act to preserve the right to be heard on the merits (*see Matter of Combemale*).

Matter of Rosen). In turn, 90 days after the December 22, 2014 date of actual receipt of the notices was March 22, 2015, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. However, petitioner's Request was not filed until April 29, 2015 at the earliest (*see* Finding of Fact 2), a date that falls beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

L. The Division's motion for summary determination is hereby granted, the petition of Gregg M. Reuben is denied, and the notices of determination dated December 5, 2014 are sustained.

DATED: Albany, New York
May 12, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE