

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
AZIZ YAKOUB	:	DETERMINATION
for Revision of Determinations or for Refund of Sales	:	DTA NOS. 827406, 827407,
and Use Taxes under Articles 28 and 29 of the Tax Law	:	827408 AND 827424
for the Periods March 1, 2011 through May 31, 2014.	:	

Petitioner, Aziz Yakoub, filed petitions 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, 2011 through May 31, 2014.

On March 11, 2016, the Division of Tax Appeals issued to petitioner separate notices of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the petitions did not appear to be timely with respect to the statutory notices being petitioned. By request of the Division of Taxation, the 30-day period to respond to the notices of intent to dismiss petition was extended to May 26, 2016. On May 18, 2016, the Division of Taxation by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel), submitted affidavits and accompanying documents in support of dismissal of the petitions. Petitioner, appearing by Ahmed Abdelhalim, CPA, did not file a response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 26, 2016. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed timely petitions with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

1. On November 16, 2015, the Division of Tax Appeals received four separate petitions from petitioner, Aziz Yakoub, that protested the following notices of determination:

Notice #	Taxable Period	Notice Date
L-042739923-2	3/1/11 - 5/31/14	4/21/15
L-042739884-9	6/1/12 - 5/31/14	4/21/15
L-042739921-4	3/1/12 - 2/28/14	4/21/15
L-042739922-3	3/1/12 - 11/30/12	4/21/15

2. The United States Postal Service (USPS) postmark affixed to the envelope containing the petitions bears a date of November 10, 2015.

3. On March 11, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner four notices of intent to dismiss petition. Each Notice of Intent to Dismiss Petition indicated that the respective petition was filed in protest of a notice of determination issued to petitioner more than 90 days prior to the petition being filed in this matter.

4. In response to the issuance of the notices of intent to dismiss petition the Division submitted: (i) four affidavits, each dated April 22, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) four copies of a "Certified Record for Presort Mail - Assessments

Receivable” (CMR) dated April 21, 2015; (iii) four affidavits, each dated April 25, 2016, of Bruce Peltier, a mail and supply supervisor in the Division’s mail room; (iv) four affidavits, all dated April 26, 2016, of Heidi Corina, a Legal Assistant II in the Division’s Office of Counsel; and (v) four copies of a representation of petitioner’s 2014 electronically filed form IT-201 tax return, filed on or about February 11, 2015, bearing the same address as contained on the notices of determination being the last return filed by petitioner prior to the issuance of said notices.

5. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 is manually changed on the first and last pages of the CMR, in this case April 21, 2015. In addition, as described by Ms. Nagengast, 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 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.

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 numbers are 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. The April 21, 2015 CMR consists of 21 pages and lists 224 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee initialed each page of the CMR, and affixed USPS postmarks dated April 21, 2015 and April 22, 2015 to each page as well, with the exception of pages 2, 20 and 21, which only have one postmark affixed. Page 2 of the CMR has a postmark date of April 22, 2015, while pages 20 and 21 are both postmarked April 21, 2015. No explanation is given for the discrepancies in the postmark dates appearing on the CMR.

8. Page 16 of the CMR indicates that notices of determination, assigned certified control numbers 7104 1002 9730 0453 3272, 7104 1002 9730 0453 3289, 7104 1002 9730 0453 3296 and assessment numbers L-042739884, L-042739921 and L-042739922, respectively, were mailed to petitioner at the Syosset, New York, address listed thereon. Likewise, page 17 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0453 3302 and assessment number L-0427399923, was mailed to petitioner at the Syosset, New York, address listed thereon. The corresponding mailing cover sheets for each notice bear these certified control numbers and petitioner's name and address as noted.

9. Each of the four affidavits of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room's general operations and

procedures. The mail room 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 first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. Each of the CMRs has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed each page of the CMR and affixed a postmark to each page thereof.¹ The Mail Processing 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. A review of the CMR indicates that the USPS employee complied with this request by circling the number of pieces received. According to the Peltier affidavits, a copies of the respective notices were mailed on the date indicated as claimed.

10. The affidavits of Heidi Corina describe the Division’s request to the USPS for delivery information on the April 21, 2015 notices of determination. Specifically, using a separate PS Form 3811-A for each notice, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 0453 3272, 7104 1002 9730

¹As noted in Finding of Fact 7 there are discrepancies in the postmark dates appearing on the CMR.

0453 3289, 7104 1002 9730 0453 3296 and 7104 1002 9730 0453 3302 addressed to petitioner at the Syosset, New York address. The USPS responses to the requests indicates the notices were delivered to petitioner at his Syosset, New York, address on April 24, 2015.

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]). It is well established that the 90-day statutory time limit for filing a petition 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).

B. Where the timeliness of a petition 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 statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in

this particular instance (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

C. While the Division has established there exists a standard procedure used by the Division for the issuance of statutory notices, the proof tendered to establish that the procedure was followed in this instance is insufficient. There are discrepancies in the postmark dates appearing on the CMR, these discrepancies raise questions as to the actual date the notices listed thereon were delivered into the custody of the USPS. Regardless, however, the Division has affirmatively proven via the Corina affidavits that the notices of determination were actually delivered to petitioner's last known address, as reflected on his 2014 personal income tax return, on April 24, 2015.

D. Since the petitions were not filed until November 10, 2015, or well in excess of 90 days from delivery of the notices by the USPS on April 24, 2015, the petitions are untimely and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of these notices.

E. The petitions of Aziz Yakoub are hereby dismissed.

DATED: Albany, New York
August 18, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE