

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROBERT FULLER</b>	:	DETERMINATION
	:	DTA NO. 828513
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 June 1, 2009 through May 31, 2015.	:	

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Petitioner, Robert Fuller, 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 June 1, 2009 through May 31, 2015.

On March 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that the petition did not appear to be timely filed and did not confer jurisdiction upon the Division of Tax Appeals. By request from the Division of Taxation, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to June 13, 2018. On June 13, 2018, the Division of Taxation by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel), submitted an affidavit and accompanying documents in support of dismissal of the petition. Petitioner, appearing by Cosentino, Snyder & Quinn (Patrick M. Quinn, Esq., of counsel), did not respond to the notice of intent to dismiss petition. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on June 13, 2018. 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 the petition should be dismissed for lack of jurisdiction.

***FINDINGS OF FACT***

1. On December 12, 2017, petitioner, Robert Fuller, filed a petition with the Division of Tax Appeals protesting the issuance of a notice and demand for payment of tax due (notice and demand), dated November 16, 2017, and bearing assessment identification L-046883419. The notice and demand is addressed to petitioner at an address in Madison, New York.

2. The notice and demand referenced a notice of determination (notice), dated August 1, 2017, also bearing the assessment identification number L-046883419. The notice was not attached to the petition.

3. On March 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in pertinent part:

“Pursuant to Tax Law § 1138 (a) (1) of the Tax Law, the protest of a statutory notice that has been issued to a taxpayer under Articles 28 and 29 of the Tax Law is commenced by the timely filing of a petition with the Division of Tax Appeals (20 NYCRR 3000.3 [c]). Such petition must include a copy of the statutory notice under protest (*see* 20 NYCRR 3000.3 [b] [8]). With respect to Articles 28 and 29 of the Tax Law, this requirement will be satisfied by the petitioner’s provision of a copy of either a notice of determination or a refund denial (*see* Tax Law § 1138 [a] [1]; 20 NYCRR 3000.1 [k]). In addition, Tax Law § 173-a (3) specifically provides, that a taxpayer is not entitled to a hearing before the Division of Tax Appeals with respect to the issuance of a notice and demand under the circumstances presented here.

The petition in this matter appears to have been filed in protest of a Notice and Demand for Payment of Tax Due, notice L-046883419, issued on November 16, 2017 (sic) This notice is insufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition.”

4. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted: (i) an affidavit, dated April 30, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked August 1, 2017; (iii) an affidavit, dated April 30, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the August 1, 2017 notice with the associated mailing cover sheets addressed to petitioner and his representative; (v) a copy of petitioner's MT-903 WEB highway use tax return for the tax period January 1, 2017 through March 31, 2017, filed on June 29, 2017, which is the last return filed by petitioner before the notice was issued but does not list any address for petitioner; (vi) a copy of petitioner's MT-903-MN highway use tax return for the tax period October 1, 2016 through December 30, 2016, postmarked on March 31, 2017 and stamped as received by the Division on April 3, 2017, which lists the same address for petitioner as that listed on the notice, the notice and demand and the petition.

5. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, 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 "8/1/17." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into 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.

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 PO Address."

7. The CMR in the present matter consists of 22 pages and lists 238 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 22, which lists 7 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 August 1, 2017 to each page of the CMR, wrote the number "238" on page 22 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 22.

8. Page 19 of the CMR indicates that a notice with certified control number 7104 1002 9730 0156 1520 and reference number L-046883419 was mailed to petitioner at the Madison, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted. The Madison, New York, address for petitioner is the same address used by petitioner on his MT-903-MN, filed with the Division on March 31, 2017, and on his petition. Page 20 of the CMR indicated that a notice with certified control number 7104 1002 9730 0156 1544 and reference number L-046884319 was mailed to petitioner's representative, Patrick M. Quinn, at the West Winfield, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and Mr. Quinn's name and address as noted.

9. The affidavit of Fred Ramundo describes the Division's mail room's general operations and procedures. Mr. Ramundo has been in his 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 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 Division 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. As noted, each of the 22 pages of the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark dated August 1, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s writing and circling “238” on the last page of the CMR (page 22), and the employee’s initialing of that page indicate that all of the 238 articles of mail listed on the CMR, including the articles addressed to petitioner and his representative, were received by the USPS for mailing on August 1, 2017.

10. According to the Picard and Ramundo affidavits, copies of the notice were mailed on the date indicated, as claimed.

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

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may 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]).

C. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of determination (Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the

merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on August 1, 2017 and to petitioner's representative on the same day. 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 conform with the address listed on petitioner's MT-903-MN, filed with the Division on March 31, 2017, as well as the address listed on the petition, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice when it was delivered into the custody of the USPS on August 1, 2017. Since it was properly addressed with the requisite amount of postage affixed, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

G. The Division has established that notice of determination L-046883419 was properly mailed as addressed to petitioner at his last known address on August 1, 2017 and to petitioner's representative on the same day. Having established that the notice of determination was properly mailed to petitioner, it was incumbent upon petitioner to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioners did not file a request for conciliation conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until December 12, 2017, a date that falls beyond 90 days after the date of issuance of the notice. Thus, insofar as the petition seeks a hearing on the merits of the notice, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits

(*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. In addition, the petition purports to challenge the notice and demand subsequently issued to petitioner on November 16, 2017 (*see* Findings of Fact 1 and 2). The Division of Tax Appeals is without jurisdiction to provide a hearing on this notice (*see* Tax Law §173-a [3] [c]).

I. The petition of Robert Fuller is hereby dismissed.

DATED: Albany, New York  
September 6, 2018

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE