

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
ISRAEL WEINSTOCK : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NOS. 828962
and Use Tax under Articles 28 and 29 of the Tax Law : AND 829012
for the periods 2017 and 2018 and for Review of :
a Notice of Proposed Driver’s License Suspension :
Referral under Tax Law § 171-v. :

Petitioner, Israel Weinstock, filed a petition (DTA No. 828962) for revision of a determination or for refund of New York State sales and use tax under articles 28 and 29 of the Tax Law for the years 2017 and 2018.

Petitioner filed a petition (DTA No. 829012) for revision of a notice of proposed driver license suspension referral issued on November 20, 2018, pursuant to Tax Law § 171-v.

On April 8, 2019, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition in DTA No. 828962, pursuant to 20 NYCRR 3000.9 (a) (4). On May 21, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), filed an affidavit with attachments in support of dismissal. Petitioner, appearing by Alan Goodman CPA PC (Alan Goodman, CPA, of counsel), responded to the notice of intent to dismiss petition by letter dated June 15, 2019, opposing dismissal of the petition.

On June 13, 2019, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Hannelore F. Smith, Esq., of counsel), brought a motion seeking an order of dismissal or, in the

alternative, summary determination in DTA No. 829012, pursuant to sections 3000.5, 3000.9 (a) (1) (i), (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Petitioner did not respond to the Division's motion.

By letter dated July 17, 2019, these matters were consolidated for purposes of resolving the pending motions and for hearing, if one is necessary.

Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination began on June 22, 2019. After due consideration of the documents submitted, and upon all pleadings and proceedings had herein, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the petition in DTA No. 828962 should be dismissed for lack of jurisdiction because it is untimely.

II. Whether the notice of proposed driver's license suspension referral at issue in DTA No. 829012 should be sustained.

FINDINGS OF FACT

1. Petitioner, Israel Weinstock, filed a petition, dated November 6, 2018, with the Division of Tax Appeals that was signed by petitioner's representative, Alan Goodman, CPA. The envelope enclosing the petition bore no postmark. The petition was dated as received by the Division of Tax Appeals on November 13, 2018. In section V of the petition, which asks for the notice numbers of the statutory documents being protested, petitioner listed the following numbers: L-047938424, L-047938423, L-047938421, L-047938420, L-047938419, L-047938418, and L-047938417. In section VII of the petition, which asks for the amount of the

tax determined and the amount contested, petitioner responded with “\$63,258.” No copies of any statutory documents were attached to the petition as filed. Attached to the petition, however, was a consolidated statement of tax liabilities issued by the Division of Taxation (Division) and dated October 29, 2018, which listed the last five of the preceding sales tax assessments (five notices), and provided the following information about them:

<u>Assessment ID</u>	<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Balance (including penalties and interest and credits)</u>
L-047938421	2/28/17	\$5,980.24	\$ 6,766.48
L-047938420	5/31/17	\$5,980.24	\$ 8,837.25
L-047938419	8/31/17	\$9,607.01	\$13,488.74
L-047938418	11/30/17	\$8,816.69	\$11,747.06
L-047938417	2/28/18	\$8,255.61	\$10,423.59
	Total		\$51,263.12

2. Upon being contacted about the petition being insufficient because it lacked copies of the statutory documents being protested, Mr. Goodman responded by sending two faxes to the Division of Tax Appeals. The cover page of the first fax, dated November 27, 2018, stated in pertinent part:

“Attached please find POA and petition revised[.]

...

Please see Driveras [sic] License Suspension Letter Statement if that helps.”

The remaining eight pages of the fax consisted of the following:

(i) a three-page Division of Tax Appeals petition form (TA-100) identical to the petition form already filed by petitioner except that it deleted notice numbers L-047938424 and L-047938423 in section V of the petition, decreased the amount listed in section VII to \$53,560.99, and changed the date in the signature section of the form to November 27, 2018.

(ii) a two-page power of attorney form (TA-105), dated November 27, 2018, appointing Mr. Goodman to represent petitioner for all tax types for the years 2016 through 2018; and

(iii) a three-page notice of proposed driver's license suspension referral (form DTF-454), dated November 20, 2018, collection case ID: E-047938418-CL01-1 (60-day notice), issued to petitioner, advising him that, unless he pays his tax debts his license would be suspended. The last page of that notice listed the five notices under the heading "Bills subject to collection action" and showed a total balance due for those notices of \$53,580.99.

3. Mr. Goodman sent a second fax, dated January 16, 2019, which, as pertinent here, attached complete copies of the five notices. Each of the five notices is entitled a notice of estimated determination and recites that the notice is being issued to petitioner because the Division's records show that petitioner was an officer or responsible person of HN & Sons II LLC (the LLC) and that the tax assessed by the notice was estimated in accordance with Tax Law § 1138 as a result of that business not filing a required tax return.

4. Upon being advised by the Division of Tax Appeals' Petition Intake Unit that the notice of proposed driver's license suspension referral could not be protested as part of DTA No. 828962, petitioner filed a new Division of Tax Appeals petition to protest that notice, which is the subject of DTA No. 829012, consolidated herewith and discussed below.

5. With regard to DTA No. 828962, 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), dated April 8, 2019. The notice of intent stated that the petition did not appear to have been timely filed because the five notices appeared to be issued by the Division on April 18, 2018, while the petition protesting them appeared to be filed with the Division of Tax Appeals on November 8, 2018, or more than 90 days after the apparent date of mailing of the five notices. The notice of intent also stated that the consolidated statement of tax

liabilities was insufficient to confer jurisdiction on the Division of Tax Appeals. The notice of intent advised petitioner of the Division of Tax Appeals' intent to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that it was not timely filed and the petition was insufficient to confer jurisdiction upon the Division of Tax Appeals, and gave the parties 30 days to submit written comments on the proposed dismissal.

6. Petitioner responded to the notice of intent with a letter dated June 15, 2019. The letter opposed the proposed dismissal, contending that petitioner was not a responsible person and thus should not be held liable, and attaching proof that petitioner was not a responsible person.

7. The Division responded by letter dated May 29, 2019, in which the Division agreed with the proposed dismissal of the petition on the grounds of timeliness, and submitted mailing records to establish the date of mailing of the five notices. More specifically, to show proof of proper mailing of the five notices, the Division provided the following with its motion papers: (i) an affidavit, dated April 24, 2019, 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 April 18, 2018; (iii) an affidavit, dated April 29, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the five notices with the associated mailing cover sheets; and (v) a copy of petitioner's 2016 form IT-201, New York State resident income tax return, filed on May 25, 2017, which lists the same Brooklyn, New York, address for petitioner as that listed

on the five notices and the petition.¹ The 2016 income tax return was the last return filed with the Division by petitioner before the notice was issued.

8. The affidavit of Deena Picard, who has been in her current position as Acting Director of MAPS since May 2017, and is a Data Processing Fiscal Systems Auditor 3, sets forth the Division's general practice and procedure for processing statutory notices. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard 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 (the "run" date) in the upper left hand margin. Each page of the CMR lists a run 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 "4/18." 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.

9. 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

¹ The only difference between the address as reported on petitioner's 2016 form IT-203 and the address used on the CMR and the five notices is that the address on the form IT-203 included a dash between the "3" and the "L" in petitioner's apartment number, which dash was omitted on the notices and the CMR. Petitioner also omitted the dash in providing his address on the petition in this matter. This difference is determined to be inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

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.”

10. The CMR in the present matter consists of 21 pages and lists 228 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 21, which includes 8 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.

11. A USPS representative affixed a postmark dated April 18, 2018 to each page of the CMR, handwrote the number “228” on page 21 beneath the heading “Total Pieces Received at Post Office,” and initialed or signed that page.

12. Page 6 of the CMR indicates that five notices with the following certified control numbers and reference numbers were mailed to petitioner at the Brooklyn, New York, address listed on the five notices.

<u>Certified Control Number</u>	<u>Reference Number</u>
7104 1002 9730 0246 0808	L-047938417
7104 1002 9730 0246 0815	L-047938418
7104 1002 9730 0246 0822	L-047938419
7104 1002 9730 0246 0839	L-047938420
7104 1002 9730 0246 0846	L-047938421

The corresponding mailing cover sheets for each of the notices, attached to the Picard affidavit as exhibit "B," bear these same certified control numbers and petitioner's name and address as noted.

13. The affidavit of Fred Ramundo describes the general operations and procedures of the Division's mail room. 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 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. According to Mr. Ramundo, the affixation of the USPS postmark on each page of the CMR, the USPS employee's writing "228" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 228 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on April 18, 2018.

14. According to both the Picard and Ramundo affidavits, copies of the five notices were mailed to petitioner on April 18, 2018, as claimed.

15. The 60-day notice issued to petitioner (*see* finding of fact 2), advised that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v. Included with the 60-day notice was a consolidated statement of tax liabilities (form DTF-967-E), also dated November 20, 2018, which listed the five notices as "Bills subject to collection action" and showed the balance due for each as follows:

<u>Notice Number</u>	<u>Current Balance Due</u>
L-047938421	\$ 8,839.87
L-047938420	\$ 8,880.77
L-047938419	\$ 13,556.14
L-047938418	\$ 11,806.72
L-047938417	\$ 10,477.49
Total:	\$ 53,560.99

16. The 60-day notice indicated that a response was required within 60 days from its mailing, or the Division would notify the New York State Department of Motor Vehicles (DMV) and petitioner's driver's license would be suspended. The front page of the 60-day notice informed petitioner that unless one of the exemptions on the back page of the 60-day notice applied, he was required to either pay the amount due, or set up a payment plan, in order to avoid suspension of his license.

17. The back page of the 60-day notice is titled, "How to respond to this notice." The opening sentence directly beneath the title lists a phone number and instructs the recipient that

“[i]f any of the following apply,” he or she is to call the Division at that number. Furthermore, the recipient is advised that he or she may be asked to supply proof in support of his or her claim.

18. The first two headings under the title, “How to respond to this notice,” are “child support exemption” and “commercial driver’s license exemption.” The third heading, “Other grounds,” states that the recipient’s driver’s license will not be suspended if any of the following apply:

- “- You are not the taxpayer named in the notice.
- The tax debts have been paid.
- The Tax Department [Division] is already garnishing your wages to pay these debts.
- Your license was previously selected for suspension for unpaid tax debts **and**:
 - you set up a payment plan with the Tax Department [Division],
 - and** the Tax Department [Division] erroneously found you failed to comply with that payment plan on at least two occasions in a twelve-month period.”

Also under the “Other grounds” heading is the statement that the recipient may contact the Division to establish that he or she is eligible for innocent spouse relief under Tax Law § 654, or that enforcement of the underlying tax debts has been stayed by the filing of a bankruptcy petition.

19. Under the heading, “Protests and legal actions,” the notice explained that if the recipient protests with the Tax Department, or brings a legal action, he or she may only do so based upon the grounds listed above. Furthermore, under a heading titled, “If you do not respond within 60 days,” the recipient is informed the Division will provide DMV with the information necessary to suspend the recipient’s driver’s license, unless the recipient does one of the following within 60 days: resolves his or her tax debts or sets up a payment plan; notifies the Division of his or her eligibility for an exemption; or protests the proposed suspension of his or

her license by either filing a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS), or a petition with the Division of Tax Appeals.

20. As discussed above, petitioner filed a petition challenging the 60-day notice, commencing DTA No. 829012. Section VIII of the petition pointed out that petitioner was not an integral part of the business, did not sign payroll checks, and had resigned from the business.

21. The Division submitted with its motion in DTA No. 829012 an affidavit, dated May 16, 2019, of Todd Lewis, who is employed as a Tax Compliance Manager 4 with the Division's Civil Enforcement Division (CED). Mr. Lewis's responsibilities and duties include overseeing the operations of the CED's Operations Analysis and Support Bureau and working with the Office of Information Technology Services. His affidavit is based upon his personal knowledge of the facts in this matter and a review of the Division's official records, which are kept in the ordinary course of business.

22. Mr. Lewis's affidavit details the sequential actions, i.e., the initial process, the DMV data match, the suspension process and the post-suspension process, undertaken by the Division in carrying out the license suspension program authorized by § 171-v of the Tax Law. These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60-day notice of proposed driver license suspension referral under Tax Law § 171-v. First, the Division internally sets the following selection criteria: the taxpayer has an outstanding cumulative balance of tax, penalty and interest in excess of \$10,000.00; the age of the assessment used to determine the cumulative total must be less than 20 years from the

notice and demand issue date; all cases in formal or informal protest, and all cases in bankruptcy status are eliminated; all cases where taxpayers have active approved payment plans are excluded; and, any taxpayer with a “taxpayer deceased” record on his or her collection case is excluded.

Next, the criteria are utilized to search the Division’s databases on a weekly basis, and a file is created of possible taxpayers to whom a 60-day notice of proposed driver license suspension referral could be sent. This process involves first using the criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) in excess of \$10,000.00 in the relevant time frame, and then for each such identified candidate, determining whether that candidate would be excluded under any of the following criteria:

- a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment(s) would leave the balance of such liability below the \$10,000.00 threshold for license suspension;
- the taxpayer is in bankruptcy;
- the taxpayer is deceased;
- the Division has an active approved payment plan for the taxpayer;
- the age of the assessment included determining the cumulative amount of liability is more than 20 years from the notice and demand issuance date; or
- the taxpayer’s wages are being garnished for the payment of past-due tax liabilities, past-due child support, or combined child and spousal support arrears.

b) The “DMV Data Match” involves the Division providing identifying information to DMV for each taxpayer not already excluded under the foregoing criteria to determine whether the taxpayer has a qualifying driver’s license potentially subject to suspension per Tax Law

§ 171-v. DMV then conducts a data match of the information provided by the Division with its information and returns the following information to the Division: (1) social security number; (2) last name; (3) first name; (4) middle initial; (5) name suffix; (6) DMV client ID; (7) gender; (8) date of birth; (9) mailing address information for the taxpayer; (10) driver's license class; and (11) driver's license expiration date.

Once the Division determines that a taxpayer included in the DMV Data Match has a qualifying driver's license, that taxpayer is put into the suspension process.

c) The "Suspension Process" commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension detailed above in (a). If the taxpayer remains within the criteria for suspension, then a 60-day notice of proposed driver's license suspension referral will be issued to the taxpayer via regular United States mail.

After 75 days with no response from the taxpayer, and no update to the case such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed), the case will be electronically sent by the Division to DMV for license suspension.² Such case data is sent daily, Monday through Friday, by the Division to DMV. DMV then sends a return data file to the Division each day confirming data records that were processed successfully, and indicating any data records with an issue. The Division investigates those data records with an issue. With regard to the data records that were processed successfully, DMV

² Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer "fails" the compliance criteria check, the case status will be updated to "on-hold" or "closed" (depending on the circumstances) and the suspension will be stayed. If the status is "on-hold," the 60-day notice of proposed driver license suspension referral remains on the Division's system but the suspension will not proceed until the "on-hold" status is resolved. If the suspension is "closed," the 60-day notice will be canceled. If the taxpayer "passes" this final compliance check, the suspension by DMV will proceed.

sends a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension Process" involves monitoring events subsequent to license suspension so as to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed." A change to "on-hold" status can result from events such as those set forth above in (a) (e.g., the filing of a protest, a bankruptcy filing, or the creation and approval of an installment payment agreement). Where a subsequent event causes a case status change to "on-hold," the license suspension would be revoked by DMV and the matter would not be referred back to DMV by the Division for resuspension until resolution of the "on-hold" status; however, the 60-day notice of proposed driver's license suspension referral would remain in the Division's system. If the status is changed to "closed," the 60-day notice of proposed driver license suspension referral is canceled.

23. Mr. Lewis's affidavit also fully details how that process was followed by the Division in the instant matter concerning the 60-day notice issued to petitioner. A copy of the 60-day notice and the consolidated statement of tax liabilities described in findings of fact 15 through 19, and a payment document (form DTF-968.4), by which petitioner could remit payment against the liability in question, were included with Mr. Lewis's affidavit. Mr. Lewis avers that, based upon his review of the Division's records and his personal knowledge of the Division's policies and procedures regarding proposed driver's license suspension referrals, the issuance of the 60-day notice to petitioner on November 20, 2018 comports with statutory requirements, petitioner

has not raised any of the specifically listed grounds for challenging such a notice set forth at Tax Law § 171-v (5) and, therefore, the 60-day notice has not been, and should not be, canceled.

24. To show proof of proper mailing of the five notices underpinning the 60-day notice, the Division also submitted with its motion papers in DTA No. 829012 a copy of the mailing proof for the five notices discussed in findings of fact 7 through 14.

25. With its motion papers for DTA No. 829012, the Division also submitted an affirmation, dated June 13, 2019, of Hannelore F. Smith. Ms. Smith's affirmation explains that, after the issuance of the five notices, the Division adjusted the amount of tax assessed via the five notices based on returns late-filed by the LLC for the periods covered by the five notices. Based on those returns, the Division issued notices and demands to petitioner to reflect the tax amounts reported as due on the late-filed returns for each of the five notices. Ms. Smith notes that the balance reported for each of the five notices in the consolidated statement of tax liabilities included in the 60-day notice (*see* finding of fact 15) reflects the adjusted amount listed on the notices and demands issued to petitioner. Ms. Smith's affirmation does not provide copies of the notices and demands issued to petitioner as a result of the late-filed returns or provide the issuance date of those notices and demands.

26. Petitioner did not respond to the Division's motion for summary determination in DTA No. 829012.

CONCLUSIONS OF LAW

A. At issue in DTA No. 828962 is the propriety of the notice of intent, which proposes to dismiss the petition in that proceeding based on petitioner's failure to timely protest the five

notices.³ At issue in DTA No. 829012 is the Division's motion for summary determination on the ground that no material questions of fact exist with regard to petitioner's challenge of the 60-day notice. These issues are analyzed in turn below.

DTA No. 828962

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the 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, and this determination shall analyze the propriety of the notice of intent under that standard.

C. 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]).

D. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138 [a] [1]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, since it appeared upon receipt of the subject petition by the Division of Tax Appeals that it was filed late, a notice of intent to dismiss petition was issued pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.9 (a) (4).

³ The three petition pages petitioner's representative faxed to the Division of Tax Appeals as part of his November 27, 2018 fax described in finding of fact 2 were sufficient to correct the petition to remove notice numbers L-047938424 and L-047938423 from the list of notices being protested by the petition (*see* 20 NYCRR 3000.3 [d]).

E. Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice 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 (*id.*). The Division may meet this burden by presenting 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).

F. 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; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. Here, the Division has offered proof sufficient to establish the mailing of the five notices to petitioner's last known address on April 18, 2018. 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). Specifically, this document lists the certified control numbers of the five notices with the corresponding name and address of petitioner and bears a USPS postmark dated April 18, 2018. Additionally, a postal employee hand wrote "228" beneath the heading "Total Pieces Received at Post Office" on page 21 of the CMR and initialed that page to indicate receipt by the post office of all pieces of mail

listed thereon. The Picard and Ramundo affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and therefore establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the five notices, corresponding mailing cover sheets, and CMR all conform with the address petitioner provided on his 2016 form IT-201, which was the last return petitioner filed prior to the issuance of the five notices. Therefore, the address used satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the five notices on April 18, 2018, and the statutory 90-day time limit to file either a request for conciliation conference or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). It is noted that petitioner has not raised an issue with respect to the address used by the Division or whether the Division followed its standard mailing procedure here.

H. The petition in DTA No. 828962 lacks any postmark date. Under the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules), when an envelope enclosing a document required to be filed with the Division of Tax Appeals and affixed with the proper United States postage lacks a postmark that should have been affixed by the United States Postal Service, then the document must be received

“not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)” (20 NYCRR 3000.22 [b] [ii]; *Matter of GRJH, Inc.*, Tax Appeals Tribunal, July 16, 2019).

Here, given that the five notices were mailed on April 18, 2018, petitioner's last day for filing a petition with the Division of Tax Appeals was July 17, 2018. The petition was received on November 13, 2019, or 120 days after that prescribed filing date. Under these circumstances, the petition was received later than it ordinarily would have been if mailed before the prescribed mailing date and is therefore not timely filed under section 3000.22 (a) (3) and (b) (1) (ii) of the Rules (*see Matter of GRJH, Inc.* [finding that a notice of exception contained in an envelope addressed to the Secretary of the Tax Appeals Tribunal but bearing no United States Postal Service postmark and received by the Tax Appeals Tribunal 13 days after the filing deadline "was [received] later than the time that a timely mailed and USPS-postmarked document would ordinarily be received"]).

DTA No. 829012

I. Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of drivers' licenses. The Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division intends to refer the taxpayer to DMV for action (Tax Law § 171-v [3]). At issue is a 60-day notice, dated November 20, 2018, addressed to petitioner, advising him of the possible suspension of his driver's license. This notice is in facial compliance with the terms of Tax Law § 171-v, in that it is specifically based on the Division's claim that: a) sales tax assessments pertaining to petitioner and reflecting tax, interest and penalty due in the amount of \$53,560.99, remains outstanding and unpaid; and b) petitioner does not meet any of the six specifically enumerated grounds set forth at Tax Law § 171-v (5) (i) through (vi) allowing for relief from license suspension.

J. As discussed above, the five notices were fixed and final as of July 17, 2018 (*see* conclusions of law H and I). Thus, they were fixed and final at the time the Division issued the 60-day notice to petitioner on November 20, 2018.⁴ The petition filed by petitioner challenging the 60-day notice (DTA No. 829012) does not assert that any of the foregoing six specifically enumerated substantive bases for relief from an otherwise facially valid notice of proposed license suspension (*see* Tax Law § 171-v [5] [i] - [vi]). Moreover, petitioner did not file a response to the Division's motion for summary determination in DTA No. 829012. Therefore, it is deemed that petitioner has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Thus, with no dispute as to the facts and no basis in law upon which to grant the petition, summary determination is appropriate (*see Matter of Faupel*, Tax Appeals Tribunal, December 23, 2015).

K. The petition in DTA No. 828962 is dismissed, and the Division of Taxation's motion for summary determination in DTA No. 829012 is hereby granted, the petition of Israel Weinstock in DTA No. 829012 is denied, and the notices of determination L-047938421,

⁴ The issuance of the notices and demands to petitioner for the revised amount of tax shown due on the returns late-filed by the LLC (*see* finding of fact 25) does not change the fact that the five notices were fixed and final as of July 17, 2018. Those notices and demands would not have been the proper vehicle for assessing petitioner as a person responsible for the sales and use tax owed by the LLC and reported by the LLC's filing of returns for the periods at issue (*see* Tax Law § 1138 [a] [3] [B]). Thus, unless those notices and demands were issued by the Division to petitioner to advise him of a fixed and final liability as required by Tax Law § 173-a (3) (b), they were legal nullities.

L-047938420, L-047938419, L-047938418, and L-047938417, as well as the Division's notice of proposed driver license suspension referral, dated November 20, 2018, are sustained.

DATED: Albany, New York
September 19, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE