

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>NICOLE BREWER</b>	:	DETERMINATION
	:	DTA NO. 830126
for Revision of a Determination or for Refund of	:	
Fuel Use Tax Under Article 21-A of the Tax Law for	:	
the Periods April 1, 2016 through September 30, 2019.	:	

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Petitioner, Nicole Brewer, filed a petition for revision of a determination or for refund of New York State fuel use tax under article 21-A of the Tax Law for the periods April 1, 2016 through September 30, 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), filed a motion on September 8, 2021, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Penn York Accounting Services Inc. (Vicki L. Willis, EA), submitted a response by the October 8, 2021 deadline, which date commenced the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. On, September 8, 2021, the Division of Taxation (Division) brought a motion dated September 7, 2021 for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's, Nicole Brewer's, protest of a notice of determination, dated August 12, 2020, and bearing assessment identification number L-051774673 (notice). The notice is addressed to petitioner, as well as to "Nicole Brewer DBA High Up Truc," at an address in Jasper, New York.

2. On September 30, 2020, petitioner faxed a request for conciliation conference to the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On October 16, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

"The Tax Law requires that a request be filed within 30 days from the date of the statutory notice. Since the notice(s) was issued on August 12, 2020 but the request was not received until September 30, 2020, or in excess of 30 days, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on October 28, 2020.

5. In support of the motion and to show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to on August 26, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail – Assessment Receivable" (CMR) postmarked August 12, 2020; (iii) an affidavit, sworn to on August 26, 2021, of Susan Saccocio, a manager in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; (v)

an affidavit, sworn to on August 26, 2021, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel; (vi) an affirmation of Lori Antolick, Esq., the Division's representative in this matter; and (vii) a copy of petitioner's New York State IFTA Quarterly Fuel Use Tax Return, form IFTA-100, for the period of April 1, 2020 through June 30, 2020, filed on July 17, 2020, which, according to the Antolick affirmation, was the last return filed with the Division before the notice was issued. The address on the return lists the same Jasper, New York, address as listed on the notice.

6. The affidavit of Deena Picard, who has been in her current position since February 2006, and Acting Director since May 2017, 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 "8/12." 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.

7. 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."

8. The CMR in the present matter consists of 3 pages and lists 23 certified control numbers along with corresponding assessment numbers, names and addresses. 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 12, 2020, to each page of the CMR, wrote the number "23" on page 3 next to the box titled "POST OFFICE Hand write total # of pieces and initial," and initialed or signed page 3.

9. Page 2 of the CMR indicates that a notice with certified control number 7104 1002 9730 0166 5228 and reference number L-051774673 was mailed to petitioner at the Jasper, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position since 2017 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. Ms. Saccocio 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 places his or her initials or signature on the CMR, indicating receipt by the post office. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of August 12, 2020. On page 3, the postal service clerk wrote 23 to indicate 23 pieces of mail were received by the USPS. There is a set of initials or a signature on page 3.

11. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioner on August 12, 2020, as claimed.

12. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the notice addressed to petitioner. Specifically, using PS Form 3811-A, the Division requested delivery information for the article of mail bearing the certified control number addressed to petitioner as detailed in finding of fact 9. The USPS response to this request indicates the notice was in fact delivered on August 18, 2020, to petitioner's address as reflected on the notice. The scanned image of the recipient's signature as shown on the USPS response appears to be the signature of petitioner and includes petitioner's handwritten name below the signature.

13. On October 6, 2021, petitioner filed a response to the Division's motion.<sup>1</sup> In her response, petitioner asserts that she and her representative called the Division several times in an effort to discuss and challenge the notice. Petitioner asserts that the Division was not responsive to their inquiries and failed to affirmatively contact the petitioner's representative to discuss the power of attorney filed or the case. In her response, petitioner admitted that she did not file a challenge to the notice until September 30, 2020; furthermore, petitioner did not challenge the Division's assertion that the notice was properly mailed on August 12, 2020 or that she received the notice on August 18, 2020.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Because the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference.

B. 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

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<sup>1</sup> Petitioner filed a Notice of Exception to Administrative Law Judge's Determination (form TA-200) in response to the Division's motion. A Notice of Exception to Administrative Law Judge's Determination is utilized by parties in a challenge to a final determination issued by an administrative law judge, e.g., this written determination issued by the undersigned (*see* 20 NYCRR 3000.17). Since a final determination had not yet been issued on the motion at the time petitioner filed its Notice of Exception to Administrative Law Judge's Determination, petitioner's filing of such was premature. Based on the timing and contents of petitioner's filing such is construed as a response to the Division's motion.

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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “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*).

C. Tax Law § 510 authorizes the Division of Taxation to issue a notice of determination to a taxpayer where the Division determines that there is a deficiency of fuel use tax.<sup>2</sup> This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of same by the person to whom addressed.” Additionally, the Tax Law provides that such a determination will conclusively fix such tax unless the taxpayer files a petition with the Division of Tax Appeals seeking revision of the determination within 30 days of the mailing of the notice of determination (Tax Law § 528). Alternatively, Tax Law § 170 (3-a) (a) allows the taxpayer to file a request for a conciliation conference with BCMS following the issuance of a notice of determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 30 days from the issuance of the

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<sup>2</sup> Tax Law § 510 is incorporated by reference in Article 21-A, governing fuel use tax, via Tax Law § 528.

subject notice to file a request for a conciliation conference. 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 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 §§ 510 [1]; 528 [a] [1]; Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail of the subject statutory notice to petitioner's last known address (*see Tax Law § 510 [3]; see also Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

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

E. The Division has offered sufficient proof to establish the mailing of the statutory notice to petitioner's last known address on August 12, 2020. 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 on the CMR conform with the address listed on petitioner's New York State IFTA Quarterly Fuel Use Tax Return, form IFTA-100 for the period of April 1, 2020 through June 30, 2020, which satisfies the "last known address" requirement. In addition, the affidavit of Heidi Corina indicates that the notice was in fact delivered on August 18, 2020.

F. In her reply, petitioner appears to seek to have her, or her representative's, phone calls to the Division considered a timely filing of a protest. In this regard, the Tax Appeals Tribunal has used the informal claim doctrine to determine whether an informal protest has been filed (*see Matter of Vasilios Tsoumas*, Tax Appeals Tribunal, June 15, 2017, citing *Matter of Lehal Realty Assoc.*, Tax Appeals Tribunal, May 18, 1995). The informal claim doctrine provides that, in order to be recognized as such, an informal claim (i.e., one not conforming with regulatory requirements or that contains formal defects), must put the appropriate authority on notice, within the relevant period of limitations, that the taxpayer is making a refund claim, requesting a conciliation conference or filing a petition (*see Matter of Tsoumas*, citing *United States v Kales*, 314 US 186, 194 [1941] ["a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because it is too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period"]; *New England Elec. Sys. v United States*, 32 Fed. Cl. 636, 641 [1995] ["an informal claim must provide the Commissioner of the IRS with notice that the taxpayer is asserting a right to a refund"]; *Matter of Lehal Realty Assoc.*, ["It is necessary that the taxpayer provide some manner of notice to the Division of Tax

Appeals within the prescribed period so as to preserve a claim”]). However, to be considered, it is critical that “[a]n informal claim or protest must have a written component that includes the specific years or periods involved and the basis for the claim” (*Matter of Tsoumas*, citing *Hollie v Commr.*, 73 TC 1198, 1213 [1980]; *Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990).

In the case at hand, any informal protest that may have been made did not include the required written component. Accordingly, petitioner’s argument in this regard fails.

G. It is concluded that the notice was properly mailed to petitioner on August 12, 2020, and the statutory 30-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 (*see* Tax Law § 170 [3-a] [a]). Petitioner’s request was filed on September 30, 2020. This date falls after the 30-day period of limitations for the filing of such a request and was properly dismissed by the October 16, 2020 order issued by BCMS. Petitioner has offered insufficient evidence to meet her burden to prove that a timely protest was filed before the 30-day period of limitations for challenging the notice expired.

H. The Division of Taxation’s motion is granted, the petition of Nicole Brewer is denied, and the October 16, 2020 conciliation order dismissing petitioner’s request is sustained.

DATED: Albany, New York  
January 06, 2022

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE