

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition  
of  
**ROBERT S. WILCOX**

DETERMINATION  
DTA NO. 830465

for Revision of Determinations or for Refund of Sales and  
Use Taxes under Articles 28 and 29 of the Tax Law for the  
Periods December 1, 2014 through February 28, 2017.

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Petitioner, Robert S. Wilcox, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2014 through February 28, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), brought a motion on February 23, 2022, seeking summary determination in its favor pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, had until March 25, 2022, to file his response to the Division of Taxation’s motion, which date began 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, Donna M. Gardiner, 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 notices of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) brought a motion on February 23, 2022, seeking summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of the following notices of determination (notices): assessment number L-050329639, dated July 29, 2019, and assessment numbers L-050380690, L-050380691, L-050380692, L-050380693, L-050380694, L-050380695, L-050380696, and L-050380697, all dated August 13, 2019. The notices are addressed to petitioner, Robert S. Wilcox, at an address in Lacona, New York, and to his representative, authorized as his power of attorney, Sham Dean Bahgat, CPA, at Bahgat & Laurito-Bahgat, CPAs, at an address in Fredonia, New York.

2. On January 29, 2021, petitioner filed his request for a conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS). A conciliation order dismissing request (conciliation order), CMS No. 327133, dated February 26, 2021, was issued to petitioner dismissing his request since such request was not timely filed. On May 26, 2021, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

3. In support of the motion and to show proper mailing of the notices, the Division provided, along with an affirmation of Elizabeth Lyons, Esq., the following with its motion papers: (i) an affidavit, dated February 17, 2022, 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 – Assessments Receivable" (CMR) postmarked July 29, 2019; (iii) an affidavit, dated February 18, 2022, of Susan Ramundo, a manager in the Division's mail room; (iv) a copy of the notice dated July 29, 2019 mailed to petitioner and his representative with the associated mailing cover sheets; (v) a second affidavit

from Deena Picard, dated February 18, 2022; (vi) a second CMR, postmarked August 13, 2019, (vii) a second affidavit for Susan Ramundo, dated February 18, 2022; (viii) copies of the notices dated August 13, 2019 mailed to petitioner and his representative with the associated mailing cover sheets; (ix) a copy of petitioner's request filed with BCMS dated January 29, 2021; (x) a form POA-1, dated October 29, 2018, that authorized Sham Dean Bahgat, CPA, as petitioner's representative and (xi) a copy of petitioner's form IT-201, New York resident income tax return, for the year 2018, dated July 23, 2019. This was the last return filed by petitioner before the notices were issued and it lists the same Lacona, New York, address that is listed on the notices.

***Notice of Estimated Determination L-050329639***

4. The affidavit of Deena Picard 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, indicated by Julian day of the year and military time of day of "20192031700." 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 "7-29." 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.

5. 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."

6. The first CMR submitted with the motion consists of 24 pages and lists 259 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 24, which contains 6 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 July 29, 2019, to each page of the CMR, wrote the number "259" on page 24 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 24.

7. Page 21 of the CMR indicates that a notice with a certified control number of 7104 1002 9730 0404 2125 with reference number L 050329639 was mailed to petitioner at his Lacona, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears the certified control number for the notice and petitioner's name and address as noted.

8. Page 23 of the CMR indicates that a notice with a certified control number of 7104 1002 9730 0404 2330 with reference number L 050329639 was mailed to petitioner's

representative at his Fredonia, New York, address. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears the certified control number for the notice and petitioner’s representative’s name and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo 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. 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 of mail listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers 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. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of July 29, 2019. On page 24, corresponding to “Total Pieces and Amounts,” is the preprinted number 259 and next to “Total Pieces Received At Post Office” is the handwritten entry “259.” There is a set of initials or signature on page 24. According to the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner and his representative on July 29, 2019, as claimed.

***Notices of Estimated Determination L-050380690, L-050380691, L-050380692, L-050380693, L-050380694, L-050380695, L-050380696, and L-050380697***

10. The affidavit of Deena Picard, dated February 18, 2022, sets forth the Division's general 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, indicated by Julian day of the year and military time of day of "20192181700." 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 "8-13." 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 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.

11. 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."

12. The second CMR submitted with the motion consists of 25 pages and lists 270 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 25, which contains 6 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 13, 2019, to each page of the CMR, wrote the number “270” on page 25 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 25.

13. Page 15 of the CMR indicates that notices were mailed to petitioner at his Lacona, New York, address listed on the notices as follows: certified control number 7104 1002 9730 0000 3168 with reference number L 050380690; certified control number 7104 1002 9730 0000 3175 with reference number L 050380691, certified control number 7104 1002 9730 0000 3182 with reference number L 050380692, certified control number 7104 1002 9730 0000 3199 with reference number L 050380693, certified control number 7104 1002 9730 0000 3205 with reference number L 050380694, certified control number 7104 1002 9730 0000 3212 with reference number L 050380695, certified control number 7104 1002 9730 0000 3229 with reference number L 050380696 and certified control number 7104 1002 9730 0000 3236 with reference number L 050380697. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear the certified control number for each notice and petitioner’s name and address as noted.

14. Page 18 of the CMR indicates that copies of the notices were mailed to petitioner’s representative at his Fredonia, New York, address as follows: certified control number 7104 1002 9730 0000 3496 with reference number L 050380690, certified control number 7104 1002

9730 0000 3502 with reference number L 050380691, certified control number 7104 1002 9730 0000 3519 with reference number L 050380692, certified control number 7104 1002 9730 0000 3526 with reference number L 050380693, certified control number 7104 1002 9730 0000 3533 with reference number L 050380694, certified control number 7104 1002 9730 0000 3540 with reference number L 050380695, certified control number 7104 1002 9730 0000 3557 with reference number L 050380696 and certified control number 7104 1002 9730 0000 3564 with reference number L 050380697. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear the certified control number for each notice and petitioner’s representative’s name and address as noted.

15. The second affidavit of Susan Ramundo describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. 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 of mail listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers 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. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of August 13, 2019. On page 25,

corresponding to “Total Pieces and Amounts,” is the preprinted number 270 and next to “Total Pieces Received At Post Office” is the handwritten entry “270.” There is a set of initials or signature on page 25. According to the Picard and Ramundo affidavits, copies of the notices were mailed to petitioner and his representative on August 13, 2019, as claimed.

16. Petitioner did not respond to the motion.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law § 2006 [4]; 20 NYCRR 4000.5 [c] [4]). Pursuant to Tax Law § 1138 (a) (1), the notices in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with 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 90-day 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 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 Lukas*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice 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 evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance.

C. The Division has established the existence of a standard mailing procedure through the affidavits of Ms. Picard and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the relevant period. Moreover, the CMRs for both July 29, 2019 and August 13, 2019 have been properly completed and, thus, constitutes highly probative evidence of both date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Further, the address on the mailing cover sheets and on the CMR conformed with the address listed on petitioner’s 2018 e-filed resident income tax return, which satisfied the “last known address” requirement of Tax Law § 1138 (a) (1). Therefore, the Division has met its burden to show that copies of the notices at issue were mailed, as addressed, to petitioner and his representative on July 29, 2019 and August 13, 2019.

D. Since the Division has demonstrated proper mailing of the notices, such a showing gives rise to a presumption of receipt of the notices by the person to whom it was addressed (*see* Tax Law § 1147 [a] [1]). In this matter, petitioner did not respond to the Division’s motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel*

