

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NATURO-MEDICAL HEALTH CARE P.C.** : ORDER  
 : DTA NO. 825907  
 :  
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 March 1, 2009 through February 29, 2012. :  
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Petitioner, Naturo-Medical Health Care P.C., 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 March 1, 2009 through February 29, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), brought a motion dated September 24, 2014 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(ii) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Bernard Pau, CPA, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following order.

***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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination, bearing assessment ID number L-039480885-4, dated May 28, 2013. The notice is addressed to petitioner, Naturo-Medical Health Care, P.C., at an East 20<sup>th</sup> Street address in New York, New York.

2. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of Assessment notices L-039483491-1 and L-039483492-9, notices other than the one in issue in this matter, noting the tax periods covered as "05/31/09-02/29/12 & 05/31/10-02/29/12." No explanation was provided as to why the Request submitted as part of this record does not appear to coincide with the Notice in issue herein.

3. BCMS issued a Conciliation Order Dismissing Request to petitioner dated September 27, 2013, concerning Notice Number L039480885, mailed to an East 20<sup>th</sup> Street address. The order determined that petitioner's protest of the subject notice of determination was untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on May 28, 2013, but the request was not mailed until September 3, 2013, or in excess of 90 days, the request is late filed."

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on October 7, 2013, bearing an East 20<sup>th</sup> Street, New York, New York, address.

5. To show proof of proper mailing of the May 28, 2013 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated September 12, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division, who is familiar with the Case and Resource Tracking System (CARTS) and procedures for generating statutory notices; (ii) an affidavit, dated September 17, 2014, of James Steven VanDerZee, a mail room supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 28, 2013; and (iv) a copy of petitioner's Notice of Determination, petitioner's Request for Conciliation Conference challenging notices not in issue in this matter, a Conciliation Order Dismissing Request with a cover letter that addresses the Notice in this matter and the petition. The Request, Conciliation Order with cover letter and petition all bear the same address as that appearing on the Notice of Determination.

6. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to 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 reflect the actual mailing date of "5/28/13."

7. According to the Nagengast affidavit, the CMR in the present matter consists of 65 pages and lists 712 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE 1," and are noted in the upper right corner of each page. Ms. Nagengast notes that the portion 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. She also stated that the USPS representative affixed his or her initials or signature and a U.S. postmark to each page of the CMR, circled the printed "712" on page 65 and initialed the same page.

8. Page 3 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1566 8611 and assessment ID number L 039480885 was mailed to petitioner at the E 20<sup>th</sup> Street, New York, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B" of attachment 4, bears the same certified control number and petitioner's name and E 20<sup>th</sup> Street address as noted. In addition, page 4 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1566 8727 and assessment ID number L 039480885

was mailed to petitioner's representative, "Bernard Pau, Kenneth K Chew at 350 Broadway, STE 201, New York New York 10013."

9. The affidavit of James Steven VanDerZee, a mail room supervisor in the Division's mail processing unit, describes the unit's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. VanDerZee confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. A mail processing clerk then performs a random review of thirty or less pieces of certified mail listed on the CMR by checking those envelopes against the information on the CMR. Once the review is completed, 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 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. In this case, all pages of the CMR bear a postmark of May 28, 2013, with the postmark bearing a Colonie Center NY USPS location in each case. On page 65, corresponding to "Total Pieces and Amounts," is the preprinted number 712, which is circled, along with the dated postmark. There are also initials next to the dated postmark on page 65, which are presumed to be the initials of the postal employee handling this CMR.

10. According to the Nagengast affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that all 712 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on May 28, 2013.

11. According to both the Nagengast and VanDerZee affidavits, a copy of the subject notice was mailed to petitioner on May 28, 2013.

### ***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 (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), 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. This order shall address the instant motion as such.

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]).

B. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same 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 v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146

AD2d 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “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. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services “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 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 substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. In this case, through the Nagengast and VanDerZee affidavits, the Division has established a standard mailing procedure, and through the same affidavits and the CMR has shown that the subject Notice was in fact mailed as claimed on May 28, 2013. However, there remains the question of whether the Notice issued to petitioner was *properly* mailed to petitioner at his last known address, as is required in order to effect proper mailing. Here, the record does not establish that the Notice was mailed to petitioner's last known address. In addition, even if it is determined that the Notice was properly mailed, there is a question of fact as to the Request filed, since the document submitted into evidence does not sufficiently correspond to the Notice in this matter.

F. The phrase "last known address," for purposes of the Division's issuance of statutory notices carrying with them the right to a hearing, has been defined and consistently interpreted to mean "the address given in the last return filed by [the taxpayer] . . . or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." (*see* Tax Law § 1147[a][1]; *Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012, *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). Thus, a taxpayer's last known address is that provided to the Division by the taxpayer through its own filings or applications, or if there were no filings or applications, then such address as the Division may obtain through other means, methods, or efforts undertaken with reasonable diligence (*id.*).

G. As explained, the Division is held to the initial standard of using the address supplied to it by the taxpayer. In this case, the record does not include any tax returns filed by petitioner, which would typically be the starting point for discerning petitioner's address. However, the record does include the Notice of Determination issued to petitioner by the Division. The address utilized by the Division on the Notice is an E 20<sup>th</sup> Street, New York, New York, address, though there is no evidence of where the Division obtained this address. Another document submitted was petitioner's Request for Conciliation Conference for notices other than the one in issue in this matter, dated August 20, 2013, bearing an E 20<sup>th</sup> Street, New York, New York, address. Mailing documents show this was sent to the Division on September 3, 2013. Following the Request was the Division's issuance of the Conciliation Order dated September 27, 2013, which was mailed to the E 20<sup>th</sup> Street address. The petition filed challenging the Order also bore the East 20<sup>th</sup> Street address.

The documents submitted by petitioner to the Division all post-date the Notice issued, although the address used to mail the Notice to petitioner is the same as the address used on all of these documents. While the record includes evidence establishing the mailing of the Notice, the same was not effected as a proper mailing, as previously explained. In turn, with no evidence of delivery of the Notice to petitioner (e.g., a USPS delivery record for certified mail showing delivery, or any information concerning attempts at delivery), nor any evidence of any particular date on which petitioner received the Notice, it cannot be concluded that the Request was not timely filed. Under these facts, the Division cannot be said to have mailed the Notice to petitioner's last known address, and thus the Notice was not properly mailed as required (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). In turn, without proper mailing the 90-day period for filing a petition is tolled until such time as petitioner actually received the Notice

(*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]). Since there is no conclusive evidence of when the Notice may have been received, the petition is deemed to have been timely filed and the Division's motion for summary determination must be denied.

Furthermore, there is a question of fact that exists concerning the Request filed, since it does not correspond with the Notice herein. Given that discrepancy, it is again impossible to determine whether the Request was timely made, and this also forms the basis for denial of the Division's motion.

H. The Division's motion for summary determination is denied without prejudice, and a hearing will be scheduled in due course.

DATED: Albany, New York  
January 22, 2015

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE