

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ROLAND BIAMONTE** : ORDER  
: DTA NO. 826021  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 2008 through August 31, 2009, and :  
for Redetermination of Deficiencies or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
for the Periods Ended December 31, 2007, March 31, :  
2008, September 30, 2008, December 31, 2008, :  
March 31, 2009 and June 30, 2009. :  
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Petitioner, Roland Biamonte, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2008 through August 31, 2009 and for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods ended December 31, 2007, March 31, 2008, September 30, 2008, December 31, 2008, March 31, 2009 and June 30, 2009.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion filed September 8, 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)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Samuel Ahne, Esq., was granted an extension of time to file a response to the motion until December 5, 2014, but ultimately did not respond to the motion. Based upon the motion papers, the affidavits and documents submitted therewith, and

all pleadings and documents submitted in connection with this matter, Joseph W. Pinto, Jr., 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.

***FINDINGS OF FACT***

1. Petitioner, Roland Biamonte, filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The Request was filed in protest of four notices of determination for sales tax due, bearing assessment numbers L-031962030, dated May 18, 2009, L-031962031, dated May 18, 2009, L-032570488, dated October 5, 2009, and L-037307088, dated February 8, 2012. In addition, the request was filed in protest of six notices of deficiency for income tax due, bearing assessment numbers L-031962016, dated May 26, 2009, L-031962017, dated May 18, 2009, L-031962018, dated May 18, 2009, L-031962019, dated May 18, 2009, L-033443479, dated March 25, 2010 and L-033655702, dated April 29, 2010. The Request was date stamped as received by BCMS on November 29, 2013.

2. On December 13, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice numbers L-031962030, L-031962031, L-032570488, and L-037307088, the Order determined that petitioner's protest 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 notices were issued on May 18, 2009, October 5, 2009 and February 8, 2012, but the request was not mailed until November 26, 2013, or in excess of 90 days, the request is late filed.”

3. On December 13, 2013, BCMS issued a second Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice numbers L-031962016, L-031962017, L-031962018, L-031962019, L-033443479 and L-033655702, the Order determined that petitioner's protest 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 notices were issued on May 18, 2009, May 26, 2009, March 25, 2010 and April 29, 2010, but the request was not mailed until November 26, 2013, or in excess of 90 days, the request is late filed.”

4. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals on March 13, 2014, documented by the U.S. Postal Service (USPS) postmark on the envelope dated March 13, 2014. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on March 17, 2014. There is no dispute that the petition was filed within 90 days after the December 13, 2013 issuance of the BCMS Orders and constitutes a timely challenge thereto.

5. In support of its motion and to prove mailing of the notices of determination under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated September 3, 2014, of Anita K. Luckina, Esq.; (ii) four affidavits, dated August 5, 2014 and September 5, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) four affidavits, dated September 5, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) four “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked May 18, 2009, May 26, 2009, October 5, 2009 and February 8, 2012; (v) a copy of a transcript of petitioner's IT-201 New York State Resident Income Tax Return for the

year 2007, the last return filed by petitioner before the notices were issued to him in 2009, reporting the same Brooklyn, New York, address for petitioner as that listed on said notices; and (vi) a computer screen printout with petitioner's address summary as compiled by the Division from its records, indicating petitioner's address as of April 5, 2010, to be the same New York, New York, address to which the notice dated February 8, 2012 was issued.

6. The affidavits of Mary Ellen Nagengast, who has been in her current position since October 2005, set forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 page of the CMR, in the present case to the actual mailing dates of "5/18/09," "5/26/09," "10/5/09," and "2/8/12." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into 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.

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 "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 P.O. Address."

8. There were four separate CMRs relevant to the notices under protest. The first, dated May 18, 2009, consists of 24 pages and lists 254 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated May 18, 2009 to each page of the CMR and also wrote his or her initials on the last page thereof.

9. Page 7 of the CMR indicates that two notices of deficiency, assigned certified control numbers 7104 1002 9730 1338 1222 and 7104 1002 9730 1338 1239 and assessment numbers L-031962017 and L-031962018, respectively, and were to be mailed to petitioner at his Brooklyn, New York, address listed thereon. The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

Page 8 of the CMR indicates that one Notice of Deficiency, assigned certified control number 7104 1002 9730 1338 1246 and assessment number L-031962019, and two notices of determination, assigned certified control numbers 7104 1002 9730 1338 1253 and 7104 1002 9730 1338 1260 and assessment numbers L-031962030 and L-031962031, respectively, were to be mailed to petitioner at his Brooklyn, New York, address listed thereon. The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

10. The second CMR, dated May 26, 2009, consists of 56 pages and lists 609 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated May 26, 2009 to each page of the CMR and also wrote his or her initials on the last page thereof.

Page 27 of the CMR indicates that one Notice of Deficiency, assigned certified control number 7104 1002 9730 1340 4914 and assessment number L-031962016, was to be mailed to petitioner at his Brooklyn, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

11. The third CMR, dated October 5, 2009, consists of 31 pages and lists 332 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated October 5, 2009 to each page of the CMR and also wrote his or her initials on the last page thereof.

Page 12 of the CMR indicates that one Notice of Determination, assigned certified control number 7104 1002 9730 1524 5652 and assessment number L-032570488, was to be mailed to petitioner at his Brooklyn, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

12. The fourth CMR, dated February 8, 2012, consists of 16 pages and lists 170 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of

information relating to other taxpayers. A USPS employee affixed a USPS postmark dated February 8, 2012, to each page of the CMR and also wrote his or her initials on the last page thereof.

Page 2 of the CMR indicates that one Notice of Determination, assigned certified control number 7104 1002 9730 0992 8608 and assessment number L-037307088, was to be mailed to petitioner at his New York, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

13. The affidavits of Bruce Peltier describe the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 24 and affixed a postmark dated May 18, 2009, to each page of the first CMR; a USPS employee initialed page 56 and affixed a postmark dated May 26, 2009, to each page of the second CMR; a USPS employee initialed page 31 and affixed a postmark dated October 5, 2009, to each page of the third CMR; and a USPS employee initialed page 16 and affixed a

postmark dated February 8, 2012, to each page of the fourth CMR. The Center 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 last page of the CMR. Here, the USPS employee complied with this request by writing and circling the number of pieces received on the last page of the second, third and fourth CMRs. On the first, the employee wrote the number of pieces received for mailing.

14. According to the Peltier affidavit, a copy of each of the subject notices of determination and notices of deficiency were mailed to petitioner on the dates specified.

15. The facts set forth above in Findings of Fact 5 through 13 were established through the affidavits of Mary Ellen Nagengast and Bruce Peltier, as well as the documentary evidence presented by the Division. Ms. Nagengast's affidavits aver that she is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of notices for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavits aver that he has been a supervisor in the Division's mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the operations and procedures of the mailing of notices.

16. On petitioner's 2007 New York State Resident Income Tax Return, filed April 15, 2008, the last return filed by petitioner before the issuance of the notices of determination and notices of deficiency dated May 18, 2009, May 26, 2009 and October 5, 2009, petitioner reported the same Brooklyn, New York, address as that listed on said notices.

17. A taxpayer profile inquiry revealed a change in address for petitioner as of April 5, 2010 indicating a New York, New York, address, which was the same address listed on the

Notice of Determination, assessment number L-037307088, dated February 8, 2012, and also the address supplied by petitioner on his request for BCMS conference, dated November 26, 2013, and on his petition filed herein.

18. The Division's motion for summary determination, although inclusive of two additional notices, assessment numbers L-033443479, dated March 25, 2010, and L-033655702, dated April 29, 2010, did not provide any evidence of mailing for same.

### ***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 timely filed, 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 determination shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

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]).

C. 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 572 [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*).

D. Petitioner did not respond to the Division’s motion, except to advise the Division of Tax Appeals, by letter from his representative, dated November 26, 2014, that he was not responding. Accordingly, he is deemed to have 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*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

E. A taxpayer may protest a notice of determination or notice of deficiency 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]; 681). 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 or notice of deficiency 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).

F. Where, as here, 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 or registered mail to petitioner’s last known address (Tax Law § 1147[a][1]; *see 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, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

G. Here, the Division has offered proof sufficient to establish the mailing of eight of the ten statutory notices to petitioner’s last known address. 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 Sheets and CMR conforms with the address listed on petitioner's 2007 New York State Resident Income Tax Return, filed April 15, 2008, which satisfies the "last known address" requirement for the notices issued in 2009. Likewise, the address on the Mailing Cover Sheet and CMR conforms with the address listed on the response to the Division's taxpayer profile inquiry indicating a New York, New York, address as of April 5, 2010, which satisfies the "last known address" requirement for the notice issued in 2012. It is thus concluded that the Division properly mailed the eight notices for which they submitted evidence on the dates specified and the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170[3-a][a]; 681;1138[a][1]).

H. Petitioner's Request for Conciliation Conference was filed on November 26, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the Request was untimely (*see* Tax Law §§ 1138[a][1]; 170[3-a][b]; 681) and the same was properly dismissed by the December 13, 2013 Orders issued by BCMS. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

I. The Division's motion for summary determination is hereby granted with respect to notices of determination numbers L-031962030, dated May 18, 2009, L-031962031, dated May 18, 2009, L-032570488, dated October 5, 2009, and L-037307088, dated February 8, 2012, and

notices of deficiency numbers L-031962016, dated May 26, 2009, L-031962017, dated May 18, 2009, L-031962018, dated May 18, 2009, and L-031962019, dated May 18, 2009. The December 13, 2013 Orders dismissing petitioner's Request are sustained and the petition is denied with respect only to the eight notices set forth above. With regard to notices L-033443479, dated March 25, 2010, and L-033655702, dated April 29, 2010, the motion is denied and the matters will be placed on the hearing calendar in due course.

DATED: Albany, New York  
February 26, 2015

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE