

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
MARIO A. CUPO
for Revision of a Determination or for Refund of Sales and
Use Taxes under Articles 28 and 29 of the Tax Law for the
Tax Periods Ended May 31, 2011 through August 31, 2012,
and May 31, 2013.

ORDER
DTA NO. 829619

Petitioner, Mario A. Cupo, 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 tax periods ended May 31, 2011 through August 31, 2012, and May 31, 2013.

On November 25, 2019, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the basis that the petition did not appear to be timely filed and that the Division of Tax Appeals lacked jurisdiction to hear the merits of the petition. By letter dated December 19, 2019, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to February 8, 2020. On January 28, 2020, the Division of Taxation, by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel) submitted an affirmation and accompanying documents, including other affidavits, in support of the proposed dismissal of the petition. On December 19, 2019, petitioner, appearing by Danow, McMullan & Panoff, PC (William R. McMullan, Esq., of counsel) submitted a response to the notice of intent to dismiss petition. After due consideration of the documents presented, Winifred M. Maloney, Administrative Law Judge renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Mario A. Cupo, notice of determination number L-040752044-1, dated February 6, 2014, which assessed sales and use taxes due in the amount of \$213,249.06, plus interest and penalty, for the periods ended May 31, 2011 through August 31, 2012. This notice is addressed to “CUPO-MARIO A 15 LAKESHORE DR EASTCHESTER, NY 10709-5208.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0151 9279. The foregoing notice was issued to petitioner upon the Division’s assertion that he was an officer/responsible person of CD Restaurant Enterprises Inc., who as such officer or responsible person was liable for taxes determined to be due for the period March 1, 2011 through August 31, 2012.

2. The Division issued to petitioner a notice of estimated determination number L-041370735-7, dated June 4, 2014, which assessed sales tax in the amount of \$750.00, plus interest and penalty, for the period ended May 31, 2013. The notice is addressed to “CUPO-MARIO A 15 LAKESHORE DR EASTCHESTER, NY 10709-5208.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0241 7239. The foregoing notice was issued to petitioner upon the Division’s assertion that he was an officer or responsible person of Florios To Go Corp. and such corporation had failed to file a required return.

3. Petitioner filed a petition with the Division of Tax Appeals. The petition was hand-dated and signed by petitioner on October 4, 2019. The FedEx Express envelope in which the petition was shipped bears a FedEx Express Priority Overnight label dated October 16, 2019.

The petition and envelope are date stamped as received by the Division of Tax Appeals on October 17, 2019. Petitioner's address is listed on the petition as "c/o Danow McMullan & Panoff, 275 Madison Ave, Suite 1711 New York NY 10016." In addition, the petition contained the following information: in section IV, petitioner indicated that he petitions for a refund; in section V, petitioner stated that notice/assessment ID numbers L-040752044-1 and L-041370735-7 are being challenged; in section VI, petitioner selected sales and compensating use taxes as the tax in question; and in section VII, petitioner stated that the amount of tax determined was "\$370,260.31 AND \$1,019.01," and the "amount contested is \$370,260 and \$1,019.01." In section VIII of the petition, petitioner asserted that he had nothing to do with either CD Restaurant Enterprises Inc. or Florios to Go Corp., and he believed his "father, Benedetto Cupo was the actual person who owned and operated the restaurant."

4. Attachments to the petition include, among other documents, a copy of notice of determination L-040752044, a copy of notice of estimated determination L-041370735, and a copy of a tax compliance levy first and final demand, levy ID: E-040752044-L005-4, dated July 30, 2018.¹ The levy was issued by the Division as judgment creditor against petitioner and sent to RBC Dain Rauscher, Inc., as garnishee. Another attachment to the petition is a copy of a notice of refund denial, dated August 28, 2019, by which the Division denied petitioner's sales or use tax refund claim application, #AM1907089352, for the period March 1, 2011 through August 31, 2012.

5. On November 25, 2019, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioner and the Division of Taxation. The notice of intent stated that the petition did

¹ The tax compliance levy lists petitioner as the judgment debtor for warrant ID numbers E-040752044-W003-1 and E-040752044-W001-2.

not appear to have been timely filed because the notice of determination and the notice of estimated determination appeared to have been issued by the Division on February 6, 2014 and June 4, 2014, respectively. The notice of intent also stated that pursuant to Tax Law § 2000, a tax compliance levy does not provide jurisdiction to the Division of Tax Appeals.

Assessment ID L-040752044-1

6. In response to the issuance of the notice of intent, the Division provided the following: (i) an undated affirmation of Anita Luckina, Esq., in support of dismissal; (ii) an affidavit, dated January 8, 2020, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management and Project Services Bureau (MAPS); (iii) an affidavit, dated January 14, 2020, of Fred Ramundo, supervisor of the Division's mail room; (iv) a "Certified Record for Presort Mail – Assessment Receivable" (CMR) dated February 6, 2014; (v) a copy of notice of determination L-040752044-1, dated February 6, 2014, and the associated mailing cover sheet; (vi) a copy of the petition and the envelope in which it was sent; and (vii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2010, which was filed on or about April 18, 2011.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, 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 has an initial date that is approximately 10 days in advance of the anticipated date of mailing. 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 page numbers of the CMR run consecutively, starting on "PAGE:1," and are noted in the upper right corner of each page.

8. 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 the taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

9. The computer printout CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." 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." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

10. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be

manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

11. The affidavit of Fred Ramundo, a supervisor in the Division's mail room and whose current title is Stores and Operations Supervisor, describes the general operations and procedures within 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. Under the Division's standard mailing procedures, statutory notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained on the CMR. A staff member then delivers the sealed, stamped 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 his or her initials or signature to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and the CMR itself. 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. The CMR is the

Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

12. The CMR for the batch of notices to be issued on February 6, 2014, includes the notice of determination addressed to petitioner herein, assessment number L-040752044-1. The CMR consists of 15 cut sheet pages including page 2, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20140301700." Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date of "2/6/14," reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. All pages of the CMR include 11 entries, with the exception of page 15, on which 6 entries appear. The 15-page CMR listed 160 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. Each page of CMR bears a USPS postmark date of February 6, 2014, and the initials or signature of a USPS employee. The USPS postmark "Colonie Center NY USPS 12205" is illegible on several pages of the CMR, i.e., pages 3, 7 and 8.

13. Page 2 of the CMR indicates that notice of determination L-040752044 assigned certified control number 7104 1002 9730 0151 9279 was mailed to "CUPO-MARIO A" at the 15

Lakeshore Dr., Eastchester, NY 10709-5208 address listed thereon. The corresponding mailing cover sheet attached to the Picard affidavit as “exhibit B,” bears this certified control number and petitioner’s name and address as noted.

14. Review of the 15-page CMR indicates that the USPS employee initialed or signed each page of the CMR. On the last page of the CMR, the USPS employee circled the preprinted number “160” next to the preprinted heading “TOTAL PIECES AND AMOUNTS.” A USPS postmark date of February 6, 2014 appears to the right of the stamped “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The initials or signature of the USPS employee also appear on page 15 of the CMR.

15. Mr. Ramundo states, based upon his knowledge of the Picard affidavit and the exhibits attached thereto, and his personal knowledge of the procedures of the mail room, that on February 6, 2014, an employee delivered a piece of certified mail addressed to petitioner, in Eastchester, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Ramundo attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in the mailing of the piece of mail to petitioner on February 6, 2014.

16. Attachment 4 to Ms. Luckina’s affirmation is a copy of petitioner’s 2010 resident income tax return (*see* finding of fact 6) that reported petitioner’s address as 15 Lakeshore Drive, Eastchester, NY 10709. This tax return was the last return filed by petitioner prior to the issuance of the subject notice of determination.

Assessment ID L-041370735-7

17. In response to the issuance of the notice of intent, the Division provided the following: (i) an undated affirmation of Anita Luckina, Esq., in support of dismissal; (ii) an affidavit, dated January 8, 2020, of Deena Picard; (iii) an affidavit, dated January 14, 2020, of Fred Ramundo; (iv) a “Certified Record for Presort Mail – Assessment Receivable” (CMR) dated June 4, 2014; (v) a copy of notice of estimated determination L-041370735-7, dated June 4, 2014, and the associated mailing cover sheet; (vi) a copy of the petition and the envelope in which it was sent; and (vii) a copy of petitioner’s 2010 New York State resident income tax return.

18. The Division’s general practice and procedure for processing statutory notices, as set out in the affidavit of Ms. Picard in findings of fact 7 through 10 is incorporated by reference as if fully set forth here. The Division’s general operations and procedures in its mail room, as set forth in the affidavit of Mr. Ramundo in finding of fact 11, are also incorporated by reference as if fully set forth here.

19. The CMR for the batch of notices to be issued on June 4, 2014 includes the notice of estimated determination addressed to petitioner herein, assessment number L-041370735-7. The CMR consists of 245 cut sheet pages, including page 80, the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time “run” listing of “20141481700.” Appearing in the upper right corner of the first and last pages of the CMR, is the handwritten date “6/4/14,” reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. All pages of the CMR include 11 entries, with the exception of page

245, on which 4 entries appear. The 245-page CMR listed 2,688 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee affixed a USPS postmark to many pages of the CMR, many of which are illegible, and also wrote his or her initials on the last page thereof. Many of the pages of the CMR bear a USPS postmark date of June 4, 2014, and postmark "Albany NY G.M.F." A somewhat legible USPS postmark appears on the last page of the CMR.

20. Page 80 of the CMR indicates that notice of estimated determination L-041370735 assigned certified control number 7104 1002 9730 0241 7239 was mailed to "CUPO-MARIO A" at the 15 Lakeshore Dr., Eastchester, NY 10709-5208 address listed thereon. The corresponding mailing cover sheet attached to the Picard affidavit as "exhibit B," bears this certified control number and petitioner's name and address as noted.

21. Appearing below the four entries on page 245 of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," next to which is the preprinted number "2,688." Immediately below this heading is the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," next to which the handwritten number "2688" appears. Directly below and to the right of the handwritten number appears the initials of the USPS employee.

22. Mr. Ramundo states, based upon his knowledge of the Picard affidavit and the exhibits attached thereto, and his personal knowledge of the procedures of the mail room, that on June 4, 2014, an employee delivered a piece of certified mail addressed to petitioner, in Eastchester, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Ramundo attested that the procedures described in

his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in the mailing of the piece of mail to petitioner on June 4, 2014.

23. Attachment 4 to Ms. Luckina's affirmation is a copy of petitioner's 2010 resident income tax return (*see* finding of fact 17) that reported petitioner's address as 15 Lakeshore Drive, Eastchester, NY 10709. This tax return was the last return filed by petitioner prior to the issuance of the subject notice of estimated determination.

24. In response to the notice of intent, petitioner submitted a three-page document entitled "Petitioner's Response to Notice of Intent to Dismiss Petition," dated December 13, 2019, that was signed by petitioner's representative, William R. McMullan. Petitioner, in his response, claims that he "did not live at 15 Lakeshore Drive, Eastchester, New York 10709-5208 during any of the periods which are the subject of the petition," and he never received the notices of determination and estimated determination, allegedly issued on February 6, 2014 and June 4, 2014, respectively, and the tax compliance levy first and final demand, allegedly sent on July 30, 2018. Petitioner states that he finally received a copy of the tax compliance levy from his financial institution when the Division levied his account. He further claims that he "is disabled in that he suffers from substance reliance and abuse" and "[i]n and around the time the notices were allegedly sent" by the Division he "was in treatment centers and half way houses designed to help him deal with substance abuse." In addition, petitioner claims that he "had no interest in and performed no services for the business which is the subject of the petition." He also claims that his father, Benedetto Cupo, lived at 15 Lakeshore Drive, Eastchester, New York, during the periods in question, and may have used petitioner's name without his knowledge or permission. No supporting documentation was submitted with petitioner's response to the notice of intent.

CONCLUSIONS OF LAW

A. This matter proceeds on a notice of intent to dismiss petition under 20 NYCRR 3000.9 (a) (4), upon the bases that: a) the petition was untimely with respect to notice of determination L-046752044-1 and notice of estimated determination L-041370735-7; and b) a tax compliance levy does not provide jurisdiction to the Division of Tax Appeals. In *Matter of Victory Bagel Time, Inc.*, (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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.

B. A motion for summary determination shall be granted:

“if, upon all 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]).

C. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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]). Inasmuch 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 whether the material issue of fact is “arguable” (*Glick & Dolleck v Tri Pac Export Corp.*, 22 NY2d 439 [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]).

D. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Department of Taxation and Fin. v Tax Appeals Tribunal*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry, J.]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]). Tax Law § 2008 limits the jurisdiction of the Division of Tax Appeals to matters

“protesting any written notice of the division of taxation which has advised the petitioner of a deficiency, a determination of tax due, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

E. The tax compliance levy attached to the petition (*see* finding of fact 4) is not a document that provides hearing rights in the Division of Tax Appeals (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998). As such, the petition must be dismissed with respect to the tax compliance levy, levy ID: E-040752044-L005-4, dated July 30, 2018.

F. The petition in this matter was filed on October 16, 2019 (*see* finding of fact 3). Review of the petition indicates that petitioner is petitioning for a refund of sales and use taxes (*id.*). A copy of notice of refund denial, AM#1907089352, dated August 28, 2019, was attached to the petition (*see* finding of fact 4). Inasmuch as the petition in this matter was filed within 90 days of the issuance of notice of refund denial, AM#1907089352, petitioner has a right to proceed on such notice of refund denial.

G. A taxpayer may protest a notice of determination or estimated determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may protest a notice of determination by filing a request for a conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (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 statutory time limit for filing either a petition or a request is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006, *confirmed* 50 AD3d 1187 [3d Dept 2008]; *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).

H. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order 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 is produced and the burden of demonstrating proper mailing rests with the Division (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

I. The Division may meet its burden of proving proper mailing by providing 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). 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 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*).

J. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

K. With respect to notice of determination L-040752044, the Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the subject notice of determination was mailed as addressed to petitioner on February 6, 2014. Specifically, this document did not contain legible USPS postmarks on each page, indicating the mailing date of February 6, 2014, despite the fact that both the Picard and Ramundo affidavits assert that a postmark was affixed to each page.²

In sum, the February 6, 2014 CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). As a result, without other evidence that proves mailing (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008 [evidence demonstrating receipt of

² USPS Domestic Mail Manual § 503 [5.1.1] provides that each individual form sheet is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer's receipt, i.e., certificate of mailing. A "local" postmark shows the full name of the Post Office, a two-letter state abbreviation, "ZIP CODE,TM" and date of mailing (*see* USPS Handbook PO-408 [1-1.3]).

statutory notice remedied otherwise insufficient mail proof]), the Division has not established that it performed its standard mailing procedure with regard to the subject notice of determination.

L. With respect to notice of estimated determination L-041370735, the Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the subject notice of estimated determination was mailed as addressed to petitioner on June 4, 2014. Specifically, this document did not contain legible USPS postmarks on each page, indicating the mailing date of June 4, 2014, despite the fact that both the Picard and Ramundo affidavits assert that a postmark was affixed to each page (*see* USPS Domestic Mail Manual § 503 [5.1]).

In sum, the June 4, 2014 CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*). As a result, without other evidence that proves mailing (*see Matter of Rywin*), the Division has not established that it performed its standard mailing procedure with regard to the subject notice of estimated determination.

M. The petition of Mario A. Cupo is dismissed to the extent indicated in conclusion of law E, the notice of intent to dismiss is rescinded to the extent indicated in conclusions of law F, K and L, and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
May 7, 2020

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE