

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANNA SILVESTRI	:	DETERMINATION
for Revision of Determinations or for Refund of	:	DTA NO. 829386
Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Sales Tax Quarterly Periods	:	
Ended August 31, 2015, February 29, 2016 through	:	
November 30, 2016, and February 28, 2017.	:	

Petitioner, Anna Silvestri, 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 sales tax quarterly periods ended August 31, 2015, February 29, 2016 through November 30, 2016, and February 28, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought a motion, dated January 21, 2021, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (i) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Abraham Schwartz, CPA, 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, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of six notices of determination assessing sales and use taxes.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a petition filed by petitioner, Anna Silvestri, protesting the following six notices of determination (Notices), each of which is addressed to petitioner at an address in Staten Island, New York:

<u>Assessment ID No.</u>	<u>Notice Date</u>	<u>Tax Period</u>	<u>Tax Amount</u> ¹
L-044181926	12/31/2015	06/01/15 – 08/31/15	\$39,242.27
L-046304089	04/25/2017	09/01/16 – 11/30/16	\$32,885.12
L-046304090	04/25/2017	06/01/16 – 08/31/16	\$56,476.38
L-046304091	04/25/2017	02/29/16 – 05/31/16	\$19,567.08
L-046304093	04/25/2017	12/01/15 – 02/29/16	\$ 0.00
L-046802753	07/11/2017	12/01/16 – 02/28/17	\$55,031.04

Each assessment was issued to petitioner as a person responsible to collect, account for and remit sales and use taxes on behalf of Caffè Silvestri, Inc., pursuant to Tax Law §§ 1131 (1), 1133, and 1138 (a).

2. Petitioner challenged the foregoing notices by filing a petition with the Division of Tax Appeals. The petition is dated as signed on May 15, 2019, bears a United States Postal Service (USPS) postmark dated May 17, 2019, and is stamped as received by the Division of Tax Appeals on May 21, 2019. The petition reflects that petitioner did not request a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS). The

¹ In addition to tax, each of the notices assessed penalty and interest amounts, save for assessment number L-046304093, which assessed penalty (only), for late payment of tax, plus interest thereon.

petition further states that the assessments set forth on the notices have been paid in full, and that petitioner specifically requests only a refund of the penalties imposed by the notices.

3. The Division filed its answer to the petition, and in turn brought the subject motion seeking dismissal or summary determination in its favor. To show proof of proper mailing of the six notices, the Division provided the following with its motion papers: (i) an affidavit of Mary R. Humphrey, Esq., dated January 19, 2021; (ii) three affidavits of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Projects Services Bureau (MAPS), each dated January 8, 2021; (iii) three multipage documents entitled, in part, "Certified Record for Presort Mail – Assessments Receivable" (CMR), postmarked, respectively, December 31, 2015, April 25, 2017, and July 11, 2017; (iv) three affidavits of Susan Saccocio, a supervisor in the Division's mail room, each dated January 11, 2020; (v) a copy of each of the six notices at issue, including the associated mailing cover sheet for each; (vi) a copy of petitioner's New York State resident income tax return for the year 2014 (form IT-201) filed on October 13, 2015, a copy of petitioner's form IT-370 filed on April 21, 2016, requesting an extension of time to file her individual income tax return for the year 2015, and a copy of petitioner's form IT-201 for the year 2015 filed on October 17, 2016, each of which documents lists the same Staten Island, New York, address for petitioner as is listed on the notices at issue herein.

4. Each of the affidavits of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices, such as those at issue herein. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her

duties in those positions, Ms. Picard 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. The procedures set forth in each of Ms. Picard's affidavits are the same in each instance, save for specifying the particular dates and numbers that are applicable to the relevant notice or notices addressed in each particular affidavit. In each instance, CARTS generates the CMR. Each page of the particular CMR lists an initial date ("run date") in the upper left corner that is approximately 10 days in advance of the anticipated date of mailing of the notices set forth thereon. Following the Division's general practice, this date is, and here was, manually changed on the first and last pages of the CMR in the particular case to reflect the actual mailing date of the notice or notices, and that change is set forth in the upper right corner of such pages. 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.

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. 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." Ms. Picard notes that each separate CMR that is attached

to each of her affidavits has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

6. The CMR pertaining to the notice L-044181926 consists of 16 pages and lists 173 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 16, which includes eight entries. The date "12/31" is handwritten in the upper right corner of pages one and 16 of the CMR. A USPS representative affixed the USPS Colonie Center, New York, postmark, dated December 31, 2015, to each page of the CMR, handwrote the number "173" on page 16 thereof, to the right of the heading "Total Pieces Received at Post Office," and initialed or signed each page of the CMR, including page 16.

7. Page 2 of the December 31, 2015 CMR reflects that a notice with certified control number 7104 1002 9730 0711 2701, and reference number L-044181926, was mailed to petitioner at the Staten Island, New York, address listed on the notice. The corresponding mailing cover sheet attached to the Picard affidavit bears this same certified control number and petitioner's name and address, as noted.

8. The CMR pertaining to notices L-046304089, L-046304090, L-046304091, and L-046304093 consists of 18 pages and lists 193 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 18, which includes 8 entries. The date "4/25/17" is handwritten in the upper right corner of pages 1 and 18 of the CMR. A USPS representative affixed the USPS Colonie Center, New York, postmark, dated April 25, 2017, to each page of the CMR, handwrote and circled the number "193" on page 18 thereof, to the right of the heading "Total Pieces Received at Post Office," and initialed or signed each page of the CMR, including page 18.

9. Page 4 of the April 25, 2017 CMR reflects that four notices, bearing the respective certified control numbers 7104 1002 9730 0125 1421, 7104 1002 9730 0125 1438, 7104 1002 9730 0125 1445, and 7104 1002 9730 0125 1469, and the respective reference numbers L-046304089, L-046304090, L-046304091, and L-046304093, were mailed to petitioner at the Staten Island, New York, address listed on the notices. The corresponding mailing cover sheets attached to the Picard affidavit bear these same certified control numbers and petitioner's name and address, as noted.

10. The CMR pertaining to the notice L-046802753 consists of 5 pages and lists 50 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 5 which includes 6 entries. The date "7/11/19" is handwritten in the upper right corner of pages 1 and 5 of the CMR. A USPS representative affixed the USPS Colonie Center, New York, postmark, dated July 11, 2017, to each page of the CMR, handwrote the number "50" on page 5 thereof, to the right of the heading "Total Pieces Received at Post Office," and initialed or signed each page of the CMR, including page five.

11. Page one of the July 11, 2017 CMR indicates that a notice with certified control number 7104 1002 9730 0139 4975, and reference number L-046802753, was mailed to petitioner at the Staten Island, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit bears this same certified control number and petitioner's name and address, as noted.

12. The affidavits of Susan Saccocio describe the general operations and procedures within the Division's mail room. Ms. Saccocio has been in her position as a manager in the

Division's mail room since 2017, has been employed in the mail room since 2012, and, as a result, is familiar with the practices and procedures of the mail room with regard to statutory notices. The procedures set forth in each of Ms. Saccocio's affidavits are the same in each instance, save for specifying the particular dates and numbers that are applicable to the relevant notice or notices addressed in each particular affidavit. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. 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 clerk checks the first and last pieces of mail against the information on the CMR. The clerk performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and 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. According to Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's handwritten number on the last page of the CMR, together with the employee's initialing or circling of the number of articles of mail on that page indicate that all of the articles of mail listed on a given CMR, including, in this case, the articles addressed to petitioner on the each of the CMRs in this case, were received by the USPS for mailing on above-noted dates (i.e., December 31, 2015, April 25, 2017, and July 11, 2017, respectively).

13. According to both the Picard and Saccocio affidavits, the notices in question here were mailed to petitioner on the specified dates, as claimed.

14. As noted, the petition states that the assessments set forth on the notices have been paid in full, and that petitioner requests a refund of such payment. In fact, the petition further specifically limits itself in that it seeks only a refund of the penalties imposed by the notices, premised upon the circumstances set forth in the petition, i.e., essentially a claim of reasonable cause for the non-payment of taxes by petitioner on behalf of the corporate entity Caffè Silvestri (*see* finding of fact 2).

15. In its answer, the Division affirmatively states that the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's claim because the petition was not timely filed, and further that the Division of Tax Appeals lacks jurisdiction because the petitioner has not applied for and been denied the refund request as set forth in the petition.

16. The documents in this matter include two power of attorney forms in favor of petitioner's representative, Abraham Schwartz, CPA. The first is an IRS form 2848 (Power of Attorney and Declaration of Representative). This form is dated as executed on October 27, 2017, and by its terms limits the scope of Mr. Schwartz's representation to (federal) income tax matters for the years 2000 through 2017. The second is form TA-105 (Power of Attorney), promulgated by the Division of Tax Appeals. This form is dated as executed on January 20, 2020.

17. The documents also include a form DTF-967 (Consolidated Statement of Tax Liabilities), dated November 28, 2017, and a form DTF-970 (Assessments Receivable Overpayment Notice), dated July 7, 2018. The form DTF-967 includes the six assessments at

issue herein (as well as an income tax assessment not included in this matter), and the amounts (tax, penalty and interest, less any payments or credits) outstanding with respect thereto as of the date of the form. The form DTF-970 reflects payments or credits in the aggregate amount of \$232,364.91, the Division's application of that amount against the assessments at issue herein, totaling \$231,796.94, resulting in a net overpayment of \$567.97. Interest (\$2.87) added to the net overpayment resulted in a net refund amount of \$570.84 available for offset or refund. The form DTF-970 indicates that a net refund of \$570.84 has been authorized as payable to Ms. Silvestri.

18. Petitioner did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. In this matter, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Essentially, the Division maintains that the petition should be dismissed in its entirety because it was not filed within 90 days after issuance of the notices, or that there are no material and triable issues of fact such that the Division is entitled to a determination in its favor as a matter of law. The Division further alleges that to the extent the petition seeks a refund of penalties, the Division of Tax Appeals lacks jurisdiction since petitioner did not file a claim for refund and did not, in turn, receive from the Division a denial thereof.

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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). 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*). In this matter, petitioner did not respond to the Division’s motion. Accordingly, she is deemed to have conceded that no question of fact requiring a hearing exists (*see Keuhne & Nagel, Incl v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 Ad2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]).

D. 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 (*see Tax Law*

§ 1138 [a] [1]. 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 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).

E. In this instance, petitioner did not file a request for a conciliation conference, but instead filed a petition. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to petitioner’s last known address (*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).²

² Since petitioner had not, as of the dates of issuance of the notices at issue herein, executed a power of attorney appointing an authorized representative, including her current representative, Mr. Schwartz, to appear on her behalf with respect to such notices, the Division was not obligated to issue a copy of the subject notices to a

F. Here, the Division has offered proof sufficient to establish the mailing of the notices at issue to petitioner, by certified mail, at her last known address. The CMRs have been properly completed and therefore constitute 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 CMRs, 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 CMRs conforms with the address listed on petitioner's filings with the Division for the tax periods immediately preceding the issuance of the notices at issue, which satisfies the "last known address" requirement. The Division's proper issuance of the notices gives rise to a rebuttable presumption that the notices were received by the taxpayer in due course (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011). In fact, petitioner made no assertion that the notices were not received. Furthermore, petitioner did not respond to the instant motion. Accordingly, with no claim and no evidence that the properly issued notices were not received, there is no basis upon which to conclude otherwise so as to rebut the presumption of receipt (*see Matter of T. J. Gulf v State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]). It is therefore concluded that the Division properly mailed the notices on December 31, 2015, April 25, 2017, and July 11, 2017, respectively, 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 those dates, respectively (*see* finding

representative, including petitioner's current representative, Mr. Schwartz (*see* finding of fact 16; *Matter of Shamim*, Tax Appeals Tribunal, January 11, 2018; *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003).

of fact 1; Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). The petition in this matter was filed when it was mailed on May 17, 2019 (*see* finding of fact 2), was thus untimely with respect to all of the notices in question, and is properly subject to dismissal.

G. To the extent the petition seeks a refund of penalties (only), it is likewise properly subject to dismissal for lack of jurisdiction. In this regard, subject matter jurisdiction may be raised at any point in a proceeding (*see Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry J.]). Proceedings in the Division of Tax Appeals are commenced by the filing of a petition protesting any written notice of the Division of Taxation that has advised the petitioner of a tax deficiency, a determination of tax due or a denial of a refund or credit application (Tax Law § 2008 [1]). To claim a refund or credit for any tax, a person must file an application for such refund or credit with the Division (Tax Law § 1139 [a]; 20 NYCRR 534.2[a]). The Division will review, and either grant, adjust or deny the application for credit or refund and issue a determination to the taxpayer (20 NYCRR 534.2 [d] [1]). That determination is final and irrevocable unless the applicant, within 90 days after the date of mailing of the notice of determination, applies to BCMS for a conciliation conference or to the Division of Tax Appeals for a hearing to review the determination (Tax Law § 1139 [b]; 20 NYCRR 534 [d] [3]). Such a claim for credit or refund of an overpayment of sales tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later (Tax Law § 139 [c]).

H. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*). Its power to adjudicate disputes is exclusively statutory (*id.*). Tax Law §

1139 (a) and its implementing regulations require a person to file an application with the Division (of Taxation) to receive a tax refund or credit (*see* 20 NYCRR 534.2 [a]). It is the written denial of a refund or credit application issued by the Division that is the critical document, which, if challenged within 90 days from issuance, provides the jurisdiction for review by the Division of Tax Appeals (*see Matter of Shnozz's, Inc.*, Tax Appeals Tribunal, February 22, 1991; Tax Law §§ 2008; 1139 [b]). Here, petitioner seeks to expand the scope of the petition to constitute a refund claim, the effect of which would be to render the filing requirements and the statute of limitations for refund claims superfluous. Allowing the same would have the effect of conferring jurisdiction on the Division of Tax Appeals over a matter that would otherwise not come within its jurisdiction. Accordingly, to the extent the petition seeks a refund it is properly subject to dismissal for lack of jurisdiction (*see Matter of Kroll Bond Rating Agency, Inc.*, Tax Appeals Tribunal, October 1, 2018).

I. The Division's motion for summary determination is granted, and the petition of Anna Silvestri is dismissed.

DATED: Albany, New York
May 20, 2021

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE