

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ROOMS WITH A VIEW ENTERPRISES, INC.** : DETERMINATION  
 : DTA NO. 825749  
for Revision of a Determination or for Refund of Sales :  
and Use Taxes under Articles 28 and 29 of the Tax :  
Law and for Redetermination of a Deficiency or for :  
Refund of New York State Personal Income Tax under :  
Article 22 of the Tax Law for the Period June 1, 2007 :  
through December 31, 2013. :  
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Petitioner, Rooms With A View Enterprises, Inc., 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 and for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the period June 1, 2007 through December 31, 2013.

On April 4, 2014, 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 have been filed in a timely manner and no protest rights exist to protest a Notice and Demand. On June 12, 2014, the Division of Taxation, by Amanda Hiller, Esq. (David Gannon, Esq., of counsel) submitted an affidavit and documents in support of dismissal. Petitioner, appearing by Stephen Jaffe Sabbeth, officer, filed letters and documents in opposition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced October 15, 2014. After due consideration of the documents and arguments submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether petitioner timely filed its petition with the Division of Tax Appeals following the issuance of the conciliation order.

II. Whether the Division of Tax Appeals has subject matter jurisdiction with respect to a notice and demand.

***FINDINGS OF FACT***

1. Petitioner, Room With A View Enterprises, Inc. (RWV), filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was in response to a Notice of Determination, dated May 3, 2011, (assessment L-035822553), issued by the Division of Taxation (Division), assessing additional sales and use taxes due against RWV for the period June 1, 2007 through February 28, 2009.

2. BCMS issued to RWV a Conciliation Order, pertaining to assessment number L-035822553 (CMS No. 246670), dated April 13, 2012, which denied RWV's request and sustained the Notice of Determination.

3. On June 29, 2013, RWV mailed a petition to the Division of Tax Appeals challenging three assessments: L-035822553, L-038355459 and L-039711130. The petition was mailed via the United States Postal Service and was received by the Division of Tax Appeals on July 1, 2013. The first assessment is described in finding of fact one. Assessment L-038355459 is an estimated Notice of Determination, dated July 26, 2012, which assessed a penalty of \$50.00 for the failure to file a sales and use tax return for the period ending February 29, 2012. Assessment L-039711130 is a Notice of Failure to File Return and Demand for Payment for Penalty Due. This document, dated July 19, 2013, assessed a penalty of \$1,000.00 pursuant to Tax Law

§ 685(v)(1) for the failure to file a complete Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return for the period ended March 31, 2013.

4. As stated above, on April 4, 2014, the Petition Intake Unit of the Division of Tax Appeals issued to RWV a Notice of Intent to Dismiss Petition on the basis that the petition had not been timely filed and that no protest rights exist with respect to a notice and demand.

5. In support of its motion and to prove mailing of the notices under protest, the Division submitted, among other documents, the following: (i) the petition of RWV that includes a copy of the notices that are being challenged, (ii) an affidavit, dated June 5, 2014, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) an affidavit, dated June 5, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 13, 2012; and (v) an attachment, that included the last sales tax return filed prior to the issuance of Assessment L-038355459, for the period December 1, 2010 through February 28, 2011, reflecting an address of 617 11<sup>th</sup> Avenue, New York, NY 10036. The Division also included: a power or attorney, filed February 8, 2011, pertaining to a prior audit matter wherein RWV's address was listed as 603 West 45<sup>th</sup> Street, New York, NY, a screen shot from the address summary screen of the Division's electronic business profile regarding RWV wherein 603 West 45<sup>th</sup> Street, New York and 617 11<sup>th</sup> Avenue, New York, NY are identified as addresses for RWV, and two printouts from Google Maps showing that each address pertains to the building on the corner of West 45<sup>th</sup> Street and 11<sup>th</sup> Avenue, New York, NY.

6. As noted, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, employees of the Division, sworn to on June 5, 2014. The affidavit of Robert Farrelly, Assistant

Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

7. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover

letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

11. It was the general office practice that the BCMS clerk stamps on the bottom left corner “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the last page of the CMR. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “4-13-12” was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

13. Mr. Farrelly attests to the truth and accuracy of the copy of the 5-page CMR, which contained a list of the 53 conciliation orders issued by the Division on April 13, 2012. The CMR also listed 53 certified control numbers. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

14. Information regarding the conciliation order issued to RWV and RWV’s representative was contained on pages two and three of the CMR. On page two, corresponding to certified control number 7104 1002 9730 1079 8122 was reference number 000246670, along with the name and address of RWV at 603 West 45<sup>th</sup> Street, New York, NY 10036. This is the address used by RWV in its request for a conciliation conference dated June 29, 2011 and the address used by RWV’s representative on a power of attorney form dated January 28, 2011.

RWV does not argue that this is an incorrect address. On page three, corresponding to certified

control number 7104 1002 9730 1079 8337 was a reference to number 000246670, along with the name and address of RWV's representative at the time, Gerard Terry, Esq., of East Hills, New York.<sup>1</sup>

15. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. Here, the postal employee affixed a postmark date of April 13, 2012 to each page of the five-page CMR. The postal employee also wrote his or her initials on each page of the CMR and circled the number "53" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page five of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 53 pieces of mail were actually received.

17. Mr. Peltier stated that the CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and

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<sup>1</sup> It is recognized that RWV used the address of 617 11<sup>th</sup> Avenue, New York, NY 10036 on its sales tax return for the period ended February 28, 2011. In its papers, the Division indicates that the two addresses pertain to the same building. Since RWV does not argue that it did not receive the conciliation order, further attention to RWV's address appears to be unwarranted.

procedures of the Division's Mail Processing Center, the CMR was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

18. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on April 13, 2012 an employee of the Mail Processing Center delivered pieces of certified mail addressed to RWV, in New York, New York, and Gerald Terry, in East Hills, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 13, 2012 for the records of BCMS. He asserted that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to RWV on April 13, 2012.

19. With respect to assessment L-038355459, the Division offered an affidavit of Daniel A. Maney that sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer generated CMR and the corresponding notices. The notices 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 page of the CMR to the actual mailing date of "7/26/12."

20. In addition, according to Mr. Maney, all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his

office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

21. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and P.O. Address."

22. According to the Maney affidavit, the CMR in the present matter consists of 2,759 pages. Each page consists of 11 entries except for page 2,759 which contains 3 entries. Mr. Maney notes that pages 1, 402 and 2,759 are attached to his affidavit, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that a USPS representative affixed his or her initials or signature and/or a U.S. postmark to each page of the CMR, wrote 30,391 on page 2,759 and initialed or signed page 2,759 of the certified mail record. There is a Postal Service postmark of July 26, 2012 on pages 1, 402 and 2,759.

23. Page 402 of the CMR indicates that one notice of determination with certified control number 7104 1002 9730 1191 4385 and assessment ID number L-038355459 was mailed to RWV at the 603 West 45<sup>th</sup> Street, New York, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Maney affidavit, bears the certified control number and RWV's name and address as previously noted. The three pages of the CMR



in evidence are not physically connected. Page 402 was not changed to reflect the actual mailing date. However, the July 26, 2012 mailing date is written in the top right corner of page 2,759.

24. The representative of the Division submitted a letter wherein he affirmed under penalty of perjury that the Division sent a request for delivery information to the United States Postal Service (USPS) with respect to an item of mail sent on July 26, 2012 that was addressed to RWV at 603 West 45<sup>th</sup> St., New York, NY 10036-1904. The Postal Service's response refers to certified mail number 7104 1002 9730 1191 4385 and states, in part, that "The delivery record shows that this item was delivered on July 30, 2012 at 1:45 pm in New York, NY 10036." The letter also contains a scanned image of the signature of the recipient and lists the address of the recipient as 617 11<sup>th</sup> Avenue.

25. In support of its position that the petition was timely filed, RWV presented the affirmation of Gerard Terry, Esq. To the extent that it deals with the timeliness issue, Mr. Terry states that he was retained by RWV after the issuance of the conciliation order and that a petition was timely filed with the Division of Tax Appeals. According to Mr. Terry, he placed a petition, that was applicable to Rooms With A View and Howard Rosenbluth, in a United States Postal Service mailbox on or about July 6, 2012. In the second half of 2012, Mr. Terry experienced health-related issues and in December 2012 and again in January 2013, he was hospitalized for extended periods due to a serious medical condition that required him to incur a lengthy suspension of his practice of law.

26. In or about May 2013, Mr. Terry learned that the Division of Tax Appeals was unable to locate a copy of the petition. Thereafter, he conducted a search of his records for proof that the initial petition had been filed. However, since his office had been flooded on two separate occasions, documents were damaged or destroyed including the file in this matter. According to

Mr. Terry, on or about August 31, 2013, he filed a supplemental petition with the Division of Tax Appeals.

***SUMMARY OF PETITIONER'S POSITION***

27. RWV states that it was in discussions with officials of the Division of Taxation and that the talks were discontinued when the Division of Tax Appeals was unable to locate the petition. RWV asks why anyone would go to such great lengths and not file a petition. It also argues that the affidavit of Bruce Peltier does not address an important aspect of this matter which is the receipt of the petition.

28. RWV also contends that after several audits, the Division assessed overlapping periods and was only recently able to provide an accurate accounting. It also posits that the Division did not acknowledge the previous audits or the supervising auditor's instructions regarding what steps RWV should take. It further alleges that the Division ignored a determination of the Division of Tax Appeals.

29. RWV submits that a confusing situation was presented to the Division and to it. According to RWV, it was only after the Division's current representative became involved that the Division was able to provide updated amounts for the period that is open. RWV posits that with all of the problems experienced, all it is asking for is a day in court. In the alternative, RWV requests that the ruling on this matter be stayed until a related audit is adjudicated.

30. RWV's remaining documents pertain the merits of its petition which is based, in part, upon the doctrine of estoppel and, in part, on the premise that the fees paid by patrons for the use of private rooms are not subject to sales tax. RWV also contends that the estimates of the amount of sales tax due are erroneous and that penalties should not have been assessed.

**CONCLUSIONS OF LAW**

A. Before addressing the merits of the timeliness issue, a preliminary matter regarding the scope of this order should be resolved. Contrary to certain assertions in RWV's papers, the petition in this matter (DTA#825849) does not pertain to an assessment against Howard Rosenbluth as a responsible person for RWV. Mr. Rosenbluth is not mentioned in the caption of the petition and an assessment against Mr. Rosenbluth was not included in the petition in the list of assessments being challenged.

B. There is a 90-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]; 4000.5[c]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1), the conciliation order and underlying assessments in this case would be binding upon RWV unless it filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed 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 has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely

protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

D. 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 orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation order to RWV at its last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to RWV by certified mail on April 13, 2012, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the conciliation order issued to RWV. RWV's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of April 13, 2012. There are 53 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "53" on the line stating "total pieces received at post office," that the post office received 53 items for mailing. In short, the

Division established that it mailed the order to RWV by certified mail on April 13, 2012 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Additionally, the Division has established that it mailed a copy of the order to RWV's representative by certified mail on April 13, 2012.

E. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 13, 2012 and it is this date which commenced the 90-day period within which a protest had to have been filed. RWV's protest was not filed until July 1, 2013 which is well beyond the statutory 90-day limit. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of RWV's protest (*Matter of Sak Smoke Shop*).

F. RWV submitted the affirmation of Gerard Terry, Esq., to support its position that it filed a timely petition. Standing alone, this evidence is insufficient. Sworn testimony without a contemporaneous affidavit of mailing or a certified mailing receipt is insufficient to prove the timely mailing of a petition (*Matter of Siegel v. New York State Tax Comm.*, 137 AD2d 954 [1988]). Moreover, RWV has not challenged the Division's proof of mailing of the conciliation order. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and RWV has not presented any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. Without a timely filed petition, the Division of Tax Appeals does not have the jurisdiction to entertain the substantive issues presented in the petition pertaining to assessment L 0355822553.

H. As noted, assessment L-039711130 is a Notice of Failure to File Return and Demand for Payment for Penalty Due. A protest of this notice does not confer the right to a hearing (Tax Law § 173-a[2]). Accordingly, the notice of intent regarding this assessment is sustained.

I. Lastly, the notice of intent pertaining to assessment L-038355459 is also sustained. In reaching this conclusion, several items have been considered. First, the certified mailing record presented with respect to the mailing of this assessment is insufficient to support the Division's position. The pages are not physically connected and do not run in consecutive order. The dates on page 1 and 2,759 were added to reflect the mailing date. However, no mailing date is shown on page 402. As a result, it cannot be positively determined that pages 1, 402 and 2,759 are from the same mailing record. No explanation by the Division's attorney or its affiants has been presented as to why the Division presented a portion of the certified mail record or offered a method for associating the pages that have been submitted. Accordingly, the portion of the certified mail record offered with the Division's papers is insufficient to establish that the item of mail listed on page 402 was delivered to the USPS (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Rakusin*, July 26, 2001).

J. Although the portions of the certified mailing record are insufficient to establish a mailing of the notice of determination, the documentation provided to the Division by the USPS shows that the article of mail bearing the certified control number that was assigned to the notice on the CMR was delivered to RWV's address on July 30, 2012. It thus received actual notice of

the subject notice of determination on that date. Since the petition was filed on June 29, 2013, the petition was not filed within the 90-day period.<sup>2</sup>

K. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of a determination in favor of the Division on a motion for summary determination for failure to timely file a petition with respect to assessments L-035822553 and L-039711130. As such, it precludes RWV from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion “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.”

L. Although the Division of Tax Appeals lacks jurisdiction to entertain the merits of RWV’s arguments with respect to assessments that are the subject of this determination, RWV has the option of paying the tax and, within the period of limitations, filing a claim for refund (Tax Law § 1139). If the claim for refund is disallowed, RMV may request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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<sup>2</sup> Case law has established that the 90-day period for filing a petition or a request for a conciliation conference is tolled if the taxpayer’s representative is not served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). Here, although there are a number of power of attorney forms in the file, none of the power of attorney forms pertaining to personal income tax were executed prior to the issuance of assessment L-038355459. Accordingly, there is no showing that RWV had a representative that should have been served with a copy of assessment L-038355459.

M. The Notice of Intent to Dismiss Petition is sustained and the petition of Rooms With  
A View Enterprises, Inc. is dismissed.

DATED: Albany, New York  
January 8, 2015

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE