

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KHAYER KAYUMI	:	SUPPLEMENTAL DETERMINATION ON REMAND
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods Ended June 30, 2010 and December 20, 2010.	:	DTA NO. 825953

Petitioner, Khayer Kayumi, 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 periods ended June 30, 2010 and December 20, 2010.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in New York, New York, on July 6, 2015 at 10:30 a.m., with all briefs to be submitted by January 4, 2016, which date began the six-month period for the issuance of Judge Bray’s determination. Petitioner appeared by Mumtaz Alvi, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel). Following the July 6, 2015 hearing and the subsequent submission of briefs, Judge Bray issued a determination dated April 21, 2016, which denied the petition and sustained two notices of determination, each dated March 29, 2011.

Petitioner timely filed an exception to the determination. In a decision dated July 14, 2017, the Tax Appeals Tribunal (Tribunal) identified a threshold jurisdictional issue not raised or addressed in the determination dated April 21, 2016, as follows:

“Whether the Division of Tax Appeals has jurisdiction to address the substantive arguments set forth by the parties when it is unclear whether petitioner filed a

timely request for conciliation conference with the Bureau of Conciliation and Mediation Services.”¹

The Tribunal remanded the matter for a hearing (or submission in lieu thereof), and the issuance of a supplemental determination thereafter. The Tribunal specified that the supplemental determination was to address the jurisdictional issue of the timeliness of petitioner’s request for a conciliation conference. The Tribunal also stated the following:

“As this matter is being remanded, we would also request that the issue of the notice of determination premised upon the amount paid for the actual purchase of the furniture, fixtures and equipment be addressed in the conclusions of law of any supplemental determination, as this issue was also not addressed in the conclusions of law of the original determination. The parties will not be allowed to address either the notice of determination premised upon the assertion by the Division [of Taxation] of petitioner’s derivative liability (*see* Tax Law § 1141 [c]), or the penalty issue, as both parties have already had an adequate opportunity to address the substantive issues presented in this matter.”

A hearing on remand was held before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on January 25, 2018 at 10:30 a.m., with all briefs to be submitted by June 1, 2018, which date began the six-month period for the issuance of this determination.² Petitioner appeared by Mumtaz Alvi, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

¹ In its July 14, 2017 Decision, the Tribunal identified the substantive issues as follows:

“Whether petitioner is personally liable under Tax Law § 1141 (c) as a purchaser in a bulk sale transaction for sales tax determined to be due from the seller.

Whether petitioner is liable on the transfer of tangible personal property for amounts he paid for the actual purchase or transfer of furniture, fixtures and equipment.

Whether penalties are appropriate.”

² Judge Bray retired from state service during the interim period when this matter was on exception. The matter was reassigned, on remand, to Administrative Law Judge Dennis M. Galliher.

ISSUES ON REMAND

I. Whether petitioner filed a timely request for conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services (BCMS), such that the Division of Tax Appeals has jurisdiction to address the substantive issues set forth by the parties.

II. Whether, if so, petitioner is liable for sales tax due on the transfer of tangible personal property, consisting of furniture, fixtures and equipment, based on the amounts he paid for the purchase or transfer of such tangible personal property.

FINDINGS OF FACT³

1. BK Inner City Chicken, Inc., operated Popeye's Chicken & Biscuit (Popeye's Chicken) located at 290 Livingston Street, Brooklyn, New York (the seller).

2. On December 31, 2010, the Division of Taxation (Division) received a notification of sale, transfer or assignment in bulk (notification) regarding the proposed sale of Popeye's Chicken on January 10, 2010 for \$160,000.00. The notification included a copy of the Agreement of Sale (Agreement) and a Rider to the Agreement (Rider) wherein petitioner agreed to purchase the business assets, inventory, accounts receivable and goodwill of Popeye's Chicken for \$160,000.00. The Agreement states that the consideration was due at the time of the closing, but that the details of the disbursement of funds were set forth in the Rider. With regard to the disbursement of funds, the Rider provides that the \$160,000.00 consideration was to be disbursed as follows: (1) a down payment of \$80,000.00 in the form of a certified check made payable to the seller at the time of signing the Agreement and Rider, with the seller having the option of

³ In its July 14, 2017 decision, the Tribunal found the facts as determined by Administrative Law Judge Bray, with the exception that certain of such facts (numbered 2, 6, 8, 10, 14 and 15) were modified to more accurately and completely reflect the record. The Tribunal also made additional findings of fact. For purposes of ease of review on exception, the Findings of Fact, per the Tribunal's July 14, 2017 decision, are set forth herein, followed by additional findings of fact based on the existing record and the record on remand.

requesting that the check be made out to “New York State sales tax”; (2) a payment of \$20,000.00 in the form of a certified check made payable to a creditor of the seller at the closing; and (3) the balance of \$60,000.00 to the seller in monthly payments of \$2,000.00 each for a period of 30 months. The Agreement, by its terms effective as of September 20, 2010, was signed by the seller on October 30, 2010 and by petitioner on December 1, 2010. Neither the Agreement nor the Rider mentioned any franchise related to the business. Thus, the Agreement did not require the franchisor’s approval of the purchaser.

3. The Rider was also signed by the seller on October 30, 2010 and petitioner on December 1, 2010. The first paragraph of the Rider provided, in part:

“At the time of the signing of the contract, the Purchaser shall pay to the Seller by Certified Check an amount of \$80,000. . . . However, at seller’s request, such check may be made payable to the New York State Sales Tax Department which shall be applied towards payment of sales tax due by the seller. Seller shall immediately remit such funds to the New York State Sales Tax Department and apply such amount as down payment toward the total purchase price of \$160,000.”

4. The second paragraph of the Rider acknowledged that there was a sales tax liability of at least \$200,000.00 and that the agreement was expressly conditioned upon the seller’s payment of this obligation. In addition, the seller acknowledged that the sales tax liability was the seller’s responsibility.

5. The third paragraph stated:

“Business shall be delivered free of any liabilities including but not limited to any tax liability due by seller to any governmental authority and seller shall be absolutely and unconditionally responsible for payment of any such amounts to any governmental authority. **This clause shall survive closing.**”

6. On January 3, 2011, the Division issued a notice of claim to purchaser advising petitioner that the Division had received information indicating that he was a purchaser in a bulk

sale and that there was a possible claim for sales and use taxes. Among other things, the notice stated that although not required by law, in order to be protected from incurring the seller's sales tax liability, he should place the entire amount for the purchase in an escrow fund for the purpose of satisfying the sales tax liabilities.

7. On January 7, 2011, the Division sent a follow-up letter to petitioner pointing out that sales tax is imposed on the transfer of tangible personal property and that, according to its records, the Division had not received the tax due on the same of \$10,338.67. The Division also noted that the sales tax liability of the seller could be passed on to the purchaser in a bulk sale and that it was advisable to maintain an escrow account until he received releases from the Division.

8. As of July 26, 2010, the seller had an outstanding assessed sales tax liability of \$116,397.65. As of March 29, 2011, the seller had an outstanding assessed sales tax liability of \$262,535.90.

9. By a notice of determination dated March 29, 2011 (assessment ID No. L-035572504), the Division assessed tax due against petitioner, for the period ended June 30, 2010, in the amount of \$160,000.00. The notice explained that the Division determined taxes are due from BK Inner City Chicken and that, as a purchaser, petitioner is liable for the same taxes under Tax Law § 1141 (c). The amount of the assessment was premised upon the amount tendered for the restaurant. The Division issued a second notice of determination to petitioner, also dated March 29, 2011 (assessment ID No. L-035572505), assessing tax due, for the period ended December 20, 2010, in the amount of \$10,338.67, plus penalty and interest for a total due of \$11,908.83. The second notice explained that petitioner was liable on the transfer of tangible

personal property in accordance with the provisions of Tax Law §§ 1133, 1138 and 1141 (c). This assessment was premised upon the amount paid for the furniture, fixtures and equipment.

10. Petitioner was a 25% shareholder of a firm known as Ariana Management Corp. (Ariana). Ariana authorized petitioner to obtain a check drawn in the amount of \$80,000.00. Accordingly, petitioner secured a check from TD Bank, dated October 28, 2010, for the amount authorized by Ariana payable to “New York State sales tax” and delivered the check to Kevin Davis, a shareholder of the seller. Another payment of \$20,000.00 was made to a creditor of the seller as required in the Rider. It is not possible to discern from the record the exact dates these two payments were made. According to the Agreement, petitioner was to pay the remaining \$60,000.00 of the purchase price through 30 monthly payments of \$2,000.00 each. Petitioner never made any of these monthly payments. Petitioner did not place any of the consideration in escrow in order to satisfy the seller’s outstanding sales tax liability.

11. At the end of 2010 or beginning of 2011, petitioner began operating the business and filed sales and use tax returns beginning with the period December 1, 2010 through February 28, 2011. The returns were filed in the name of 290 Livingston Chicken, LLC. At least two of the returns were signed by petitioner.

12. In August of 2012, petitioner was notified by the Division that it had not received the check for the payment of sales tax. Thereafter, petitioner contacted Mr. Davis regarding the disposition of the check, and he replied that it had been sent to the New York sales tax unit. In November 2013, petitioner contacted TD Bank regarding what became of the check and learned that the check had been deposited into a business account under the name of Platinum Properties at the Hackensack Courthouse TD branch. Upon learning that the check had been converted,

petitioner filed a complaint with the Hackensack Police Department. The criminal complaint led to an indictment against Mr. Davis for unlawful deception and theft.⁴

13. In or about 2013, Bank of America took possession of the restaurant because of an unpaid debt that the seller had with the bank.

14. The franchisor of the restaurant refused to give permission to petitioner to close on the restaurant because it had an issue and did not want to become involved in the situation, although it refused to inform petitioner of the exact nature of the issue.

15. Neither the lease of the restaurant, nor title to any of the equipment was ever transferred to petitioner's name.

16. A petition was received by the Division of Tax Appeals on November 6, 2013. Among other documents attached to the petition was a copy of a conciliation order dismissing request dated August 23, 2013 (conciliation order). The conciliation order indicated that, as the notices of determination involved were issued on March 29, 2011, but the request for conciliation conference was not received by BCMS until August 8, 2013, or in excess of the required 90-day filing window, the request was dismissed as late filed. A cover letter issued with the conciliation order states that “[I]f you wish to contest the timeliness of your filing, you may file a petition within ninety (90) days from the date of this order with the Division of Tax Appeals.” The petition filed with the Division of Tax Appeals contains a request that the timeliness requirement be waived in the interests of justice. It is further asserted in the petition that petitioner was the victim of poor professional advice and therefore should be allowed to either present his

⁴ The record does not reveal the disposition of the indictment.

substantive case to the Division of Tax Appeals, or have his case referred back to BCMS for a conference.

17. Paragraph 15 of the Division's answer affirmatively states that as petitioner did not file a request for conciliation conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days of the issuance of the notices of determination at issue, "the Division of Tax Appeals has no jurisdiction to review the petition herein."

18. Petitioner filed a document (denominated an "opposition to answer") in response to the Division's answer, essentially a reply, wherein he agrees with paragraph 15 of the answer, but again asserts that because of poor professional services he missed the deadline to file his request or petition and a gross injustice will result if he is unable to present his case.

19. There is no further mention in the record, as defined in Tax Law § 2016, of the apparently late-filed request for conciliation conference or the effect of the same on the scope of the review allowed the Division of Tax Appeals in this matter. Furthermore, a review of the complete file of the Division of Tax Appeals, including documents such as correspondence, computer records and briefs, reveals no further mention of the apparently late-filed request for conciliation conference or the effect of the same on the scope of the review allowed the Division of Tax Appeals in this matter.

ADDITIONAL FINDINGS OF FACT

The following additional findings of fact are based on the existing record, and on the record on remand.

20. At the hearing on remand, the Division submitted affidavits made by Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), and Fred Ramundo, a supervisor in the

Division's mail room since December 2013, and currently a Stores and Mail Operations Supervisor. These affidavits detail the regular process by which the Division creates and thereafter effects the issuance of notices of determination by delivery of the same, properly addressed and with appropriate postage affixed, into the custody of the United States Postal Service (USPS) for mailing via certified mail. Each affiant made a separate affidavit pertaining to each of the two notices of determination at issue in this matter, so as to detail the process and particular information relative to the Division's regular process as it relates to each such separate notice. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those at issue herein, as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

21. Included with the Picard and Ramundo affidavits were copies of two certified mail records (CMRs) for the blocks of notices to be issued by the Division on March 29, 2011, including the subject notices of determination to be issued to petitioner on such date. Each such separate CMR includes one of the two notices at issue. The facts set forth hereinafter concerning the preparation and issuance of the subject notices are taken from the affidavits, as verified by the documents included therewith.

22. The Picard and Ramundo affidavits explain the Division's general process for the electronic generation and subsequent issuance of notices, such as the notices of determination at issue herein, summarized as follows:

a) The generation of notices of determination involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number

for each notice appears on a separate one-page “Mailing Cover Sheet” generated for each such notice, and that sheet bears a bar code, the taxpayer’s mailing address and a departmental return address on the front, and 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 with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

b) The CARTS-generated 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 numbers for the notices appear on the CMR under the first columnar heading entitled “Certified No.” The assessment numbers for the notices appear under the second columnar heading, entitled “Reference No.,” and the names and addresses of the taxpayers are listed under the third columnar heading entitled “Name of Addressee, Street and PO Address.” Remaining columnar headings list appropriate postage and fee amounts. Each CMR and its associated batch of statutory notices are forwarded to the Division’s mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

c) Each statutory notice is 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. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, Julian 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 conforms 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).

d) Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the Division’s mail room in an area designated for “Outgoing Certified Mail.” 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, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then 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 of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The USPS employee is further instructed to either circle the number of pieces received or indicate the total number of pieces by writing the number of pieces 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 delivered back to the Division for storage and retention in the regular course of its business.

Notice Number L-035572505

23. The affidavits and the 28-page CMR for notice number L-035572505 provide information specific to the issuance of that notice, summarized as follows:

The CMR for the block of notices to be issued on March 29, 2011, including notice number L-035572505, consists of 28 cut-sheet pages, and reflects 11 entries on each of its pages except for page 28 (the final page) on which there are 6 entries, for a total of 303 entries. This total is preprinted on the last page of the CMR under the heading "pieces," which is located immediately to the right of the preprinted line "total pieces and amounts." Directly beneath the heading "total pieces and amounts" is the preprinted line "total pieces received at post office." The area immediately to the right of this preprinted line and directly below the preprinted heading "pieces" is blank. The date on which the CMR was printed (its "run" date) appears as "20110811700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notices set forth therein. In the upper right corner of the first page of the CMR, the date March 29, 2011 has been handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. This handwritten addition does not appear on the last page of the CMR, notwithstanding the assertion of that fact in the Picard affidavit.

Page 27 of the CMR reflects that notice, numbered L-035572505 was to be sent by certified mail under certified mail control number 7104 1002 9730 0543 5285 to petitioner, Khayer M. Kayumi, at his address in Bensalem, Pennsylvania. This address and certified control number appear on the mailing cover sheet accompanying Notice L-035572505, and the same address appears on such notice

of determination, as well as on the balance of documents in the record concerning petitioner, including the power of attorney, request for conference, cover letter accompanying the conciliation order, and the petition.

Each page of the CMR bears the stamped postmark of the Colonie Center, New York branch of the USPS (zip code 12205), dated March 29, 2011, including the last page, which also includes the following stamped instruction:

POST OFFICE

Hand write total # of pieces and initial.

Do Not stamp over written areas.

24. The aforementioned March 29, 2011 postmark, together with the initials of the USPS employee receiving the items for mailing, appear on the last page (page 28) of the CMR.

However, the number of pieces of mail is not hand written, per the specific direction set forth in the Division's stamped instruction. The stamped instruction, and the apparent failure to comply therewith, is not mentioned or addressed in any manner in the Picard or Ramundo affidavits.

Similarly, the preprinted total number of items of mail, 303, is not circled or handwritten in accord with the terms of the standard mailing procedures as described in the foregoing affidavits (*see* Finding of Fact 22 - d). This failure is likewise not mentioned in the Picard or Ramundo affidavits.

Notice Number L-035572504

25. The affidavits and the one-page CMR for notice number L-035572504 provide information specific to the issuance of that notice, summarized as follows:

The one page CMR for notice number L-035572504, to be issued on March 29, 2011 reflects one entry thereon, and the number "1" is preprinted on this one-page CMR under the heading "Total Pieces And Amounts." The date on which the CMR was printed (its "run" date) appears as "20110811700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notice set forth on the CMR. In the upper right corner of the CMR the date "3/29/11" has been handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. The one-page CMR bears the stamped postmark of the Stuyvesant Plaza branch office

of the USPS (zip code 12203), dated March 29, 2011, together with the initials of the USPS employee receiving the one item being mailed. The CMR reflects that only one notice, numbered L-035572504, was being sent by certified mail, under certified mail control number 7104 1002 9730 0543 5407, to petitioner, Khayer M. Kayumi, at his address in Bensalem, Pennsylvania. This address and certified control number appear on the mailing cover sheet accompanying Notice L-035572504, and the same address appears on such notice of determination, as well as on the balance of documents in the record concerning petitioner, including the power of attorney, request for conciliation conference, cover letter accompanying the conciliation order, and the petition.

All notices targeted for manual review are printed in one run. The page number of the CMR pertaining to such notices is noted in the upper right corner of each CMR page. Each unit which has notices selected for manual review receives a separate and complete CMR for their notices. The notice numbered L-035572504 was selected for manual review by the Audit Division-Sales Tax-Desk Audit-AG2, and was printed on page 5 of the run. This number ("5") appears in the upper right corner of the CMR, and directly above this number is the handwritten date "3/29/11," indicating the manually inserted date of actual mailing.

26. Unlike the multiple-page, multiple-notice, CMR described above and pertaining to notice number L-035572505, this one-page CMR lists and pertains to only one notice. As described above, the number "1" is preprinted on this single-page CMR, under the heading "pieces," which is located immediately to the right of the preprinted line "total pieces and amounts." Directly beneath the heading "total pieces and amounts" is the preprinted line "total pieces received at post office." The area immediately to the right of this preprinted line and directly below the preprinted heading "pieces" is blank. Also, unlike the multiple-page, multiple-notice CMR regarding notice number L-035572505, there is no stamped instruction on this one-page CMR directing the USPS employee to handwrite the number of pieces of mail thereon.

27. As to actual receipt of the notices at issue, petitioner stated in testimony that he received a "certified mailing," which he generically referred to as a "tax letter" and as "documents from New York State." Petitioner could not remember the date of receipt.

In particular, petitioner testified on direct examination as follows:

“Q. Mr. KAYUMI: Do you remember receiving a letter from the New York State tax department approximately in the end of March 2011 or the beginning of April 2011:

A. Yes I do. I remember I received by certified mail. It would be for - - I don't remember the date, it was sometime, I was at work - - I received certified mail from the New York State Department of - -

Q. That would be notice of determination; correct?

A. I don't really know. A couple of letters I received, yes, sir.

Q. What did you do with the letter?

A. By certified mail, I received the tax letter, I dropped off to my accountant or my attorney; the accountant” (Transcript of proceedings on remand, pp 28, 29).

28. Petitioner noted that he gives such tax documents that he receives to his accountant.

In this case, petitioner stated that he gave “whatever he received” to his accountant, Akshay Dudani, CPA. Thereafter, believing that Mr. Dudani was not acting on his accounting matters, including his tax matters, in a sufficiently expeditious manner, petitioner transferred his accounting business, including his tax matters, to another, un-named, accountant. In similar fashion, and upon the same perceived delay in acting, petitioner thereafter re-engaged Mr. Dudani as his accountant for all matters, including his tax matters.

29. Upon additional questioning, petitioner testified as follows:

“JUDGE GALLIHER: Mr. Khayumi, you initially said that you received the document, back around March of 2011, the notices of determination that are here. Those are dated on their face March 29, 2011.

Your answer was somewhat general. Do you recall what document you received and the date on which you received it?

THE WITNESS: It was from New York State.

JUDGE GALLIHER: Okay.

THE WITNESS: Again, some of the paperwork I can't understand what is that for. That's why I involved the accountant and then I worked with him.

JUDGE GALLIHER: Is it your general practice when you receive documents from a taxing authority, either the IRS, or the State of New York, you get any return documents over to your accountant:

A. Yes, sir” (Transcript of proceedings on remand, pp 38, 39).

30. In the request for a BCMS conference, signed by Mr. Dudani on August 7, 2013, petitioner specified four assessment numbers (notices) as at issue, including the two notices of determination identified herein. The August 23, 2013 conciliation order dismissing request, on the basis that the request was untimely, was captioned as pertaining specifically, by assessment number, to only the two notices of determination at issue in this matter.⁵ The petition, also signed by Mr. Dudani, likewise specifies that it pertains only to the two notices of determination identified as at issue herein. In addition to the substantive arguments asserted therein, the petition addresses itself to the issue of timeliness in essentially the same manner as the request for conference, as follows:

“This office requests to waive timeliness of filing requirement, in ‘INTEREST OF JUSTICE’. The taxpayer is victim of poor professional advice and has a just cause. We believe that the taxpayer should be granted an opportunity to present his case with Division of Tax Appeals.”

31. The Notification of Sale, Transfer, or Assignment in Bulk (form AU-196.10) in this matter specifies, at Section III - f thereof, a sales price of \$116,492.00 for the tangible personal property included in the subject transaction (*see* Exhibit G at p 43; Exhibit H). Petitioner stated that the tangible personal property consisted of “five tables and 20 chairs,” and alleged that the equipment was “beat up.” He also stated that he took physical possession of the premises (the building), and of the tangible personal property therein (the furniture, fixtures and equipment such as tables, chairs and ovens) at the end of 2010 or beginning of 2011, and used the same in

⁵ The record does not disclose the disposition of the other two assessments listed as being protested under the request for BCMS conference.

operating the business known as 290 Livingston Chicken, LLC (*see* finding of fact 11), for approximately two years thereafter.

CONCLUSIONS OF LAW

A. Two questions are presented in this matter on remand. The first is the potentially dispositive jurisdictional question of whether petitioner timely protested either, or both, of the Division's assessments of liability. The second involves petitioner's liability for sales tax with regard to tangible personal property, consisting of the furniture, fixtures and equipment, acquired as a consequence of the bulk sale transaction described herein, and used by petitioner in the operation of the business post acquisition.

B. As to the jurisdictional question, 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 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 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 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 Leibowitz*, Tax Appeals Tribunal, August 13, 2015; *Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *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).

C. In this case, petitioner chose to file a request for conference with BCMS, rather than a petition with the Division of Tax Appeals, in the first instance. In turn, BCMS dismissed petitioner's request as not timely filed. Petitioner thereafter challenged the BCMS dismissal order by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed well within the 90 day statutory time limit for filing a petition following the issuance of a conciliation order (*see* findings of fact 3 and 4; Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]). Hence, there is jurisdiction in this forum to address, initially, the issue of the timeliness of petitioner's request for a BCMS conference. As above, however, if that request was not filed in a timely manner, this forum is without jurisdiction to address the substantive arguments raised by petitioner.

D. Where, as here, the timeliness of a request is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138 [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). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory 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*).

It is well settled that the Division may meet this burden by providing affidavits made by individuals with the requisite knowledge of the Division's standard mailing process, together with a properly completed CMR (*see e.g. Matter of Western Aries Construction, LLC*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

E. Establishing proper issuance of a notice of determination serves to toll the generally applicable three-year period of limitations within which the Division may issue an assessment (Tax Law § 1147 [b]), and, in turn, triggers the 90-day period within which a taxpayer may challenge such a notice by filing, as here, a request for a conciliation conference with BCMS (Tax Law § 170 [3-a] [a]). The Division's proper issuance of a notice of determination by mailing also gives rise to a rebuttable presumption that the assessment made by the notice was received by the taxpayer in due course (Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Shanghai Pavilion, Inc.*, Tax Appeals Tribunal, June 10, 2010; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the taxpayer 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 (*id*; *see also Matter of Ruggerite, Inc. v State Tax Commission*, 97 AD2d 634 [2nd Dept 1983], *affd* 64 NY2d 688 [1984]).

F. With respect to each of the notices of determination at issue herein, the Division has introduced adequate proof detailing 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 and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax

Appeals Tribunal, September 13, 2012). The Division has also presented the documentary evidence, i.e., the CMR, ordinarily provided to establish that the notices of determination at issue were, in fact, mailed, by certified mail addressed to petitioner, as alleged, on March 29, 2011. It is noteworthy that there are two separate mailings in this case, with one involving a significant number of pieces of certified mail while the other involves only one piece of certified mail. These mailings were made via two different branch offices of the USPS, and there is a separate CMR for each mailing. The manner of each mailing, while similar, nonetheless reflects certain distinct differences between the two. These differences are not without consequence. Accordingly, each mailing will be addressed individually.

Notice Number L-035572505

G. Notice number L-035572505 assesses tax, penalty and interest against petitioner on the basis of the sale or transfer of tangible personal property (*see* findings of fact 7, 9, 10 and 31). The notice itself is dated March 29, 2011, and the Division's proof, including the Picard and Ramundo affidavits, clearly details the process by which such notices are generated and issued (*see* finding of fact 22). Petitioner's name and address, as well as the numerical information on the notice, appears on and corresponds to such information as set forth on the CMR, each page of which bears a USPS date stamp of March 29, 2011. However, unlike the CMR with respect to notice number L-035572504, as discussed hereinafter (*see* conclusions of law M and N), the CMR for notice number L-035572505 includes a stamped instruction directing the USPS representative to hand-write the number of pieces of mail actually received by the USPS for mailing (*see* finding of fact 23). This stamped instruction is consistent with the Division's standard mailing process, as described in the affidavits, whereunder the USPS employee is instructed to either circle or handwrite the number of pieces of mail actually delivered to, and

accepted into the custody of, the USPS for mailing (*see* finding of fact 22-d). The clear purpose of this instruction to the USPS is to provide evidence by which the Division can establish proper issuance of its notices, i.e., verify the number of pieces of mail actually delivered to, and accepted by, the USPS for mailing on a specific date. Accordingly, for example, in instances where one or more pieces of mail may be “pulled” from a multi-piece mailing, thus leaving some lesser number of pieces actually delivered to and accepted by the USPS for mailing, compliance with this instruction allows the Division to identify those pieces of mail not so delivered and accepted for mailing. In turn, by identification and elimination of such specific pulled pieces, the Division may establish the specific pieces of mail that were, in fact, delivered to and accepted by the USPS on a given date, and thereby establish whether the particular relevant notice (or notices) was among those delivered to and accepted by the USPS on such date (*see e.g. Matter of Victory Bagel Time*). This specific step, set forth as part of the Division’s standard mailing process in the affidavits, and included on the CMR via the stamped instruction thereon, is and was clearly a necessary part of establishing proper completion of the subject CMR.

H. In this case, all 303 pieces of mail listed on the CMR, including in particular notice number L-035572505, were allegedly delivered to, and accepted into the custody of, the USPS for mailing on March 29, 2011, in accordance with the Division’s articulated standard mailing process. However, the record shows that a critical step in the Division’s mailing protocol, circling or handwriting the number of pieces of mail, was not carried out. As a consequence, the CMR is flawed in that it fails to provide verification of the actual number of pieces of mail delivered to and accepted into the custody of the USPS for mailing on March 29, 2011. While affixation of the USPS postmark establishes that some of the items listed on the CMR were delivered to the USPS for mailing on that date, it does not establish that all of the pieces of mail

listed on the CMR were so delivered and accepted, or whether the piece of mail germane to this matter (notice number L-035572505) was in fact among those pieces of mail delivered and accepted into the custody of the USPS on March 29, 2011, as claimed.

I. Given the foregoing, the CMR has thus not been properly completed, and therefore does not rise to the level of providing acceptable probative documentary evidence of both the date and fact of mailing of notice number L-035572505. The flaw in this case is not that the affidavits do not refer to the stamped instruction on the face of the CMR (*see* finding of fact 23; *see Matter of Nello Balan*, Tax Appeals Tribunal, October 27, 2016, [fact of mailing established via properly completed CMR, including compliance with stamped instruction thereon, notwithstanding lack of reference to stamped instruction in affidavits describing Division's standard mailing procedure]). Rather, it is the failure to have completed the stated standard process of mailing, by handwriting or circling the number of items received, that leaves the CMR flawed, and therefore insufficient to establish actual mailing of notice number L-035572504 on March 29, 2011. The consequences of this failure to establish the date and fact of mailing are that the period within which a protest must be filed does not commence, and that the rebuttable presumption of receipt of a notice that ordinarily arises upon proof of proper mailing does not attach (*see Matter of Sugranes*).

J. A flawed CMR can be overcome by other evidence establishing actual receipt of a notice and the date of such actual receipt, and thereby commence the period within which a petition or a request for conference must be filed in order to be considered timely (*see e.g. Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). Where, as here, the Division's proof fails to establish the date of mailing of a particular notice (L-035572505), but where there is no question that the notice was in fact actually received, the 90-

day time period for filing a protest against that notice is not triggered until the date of petitioner's actual receipt of the notice is established (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), unless issuance of the assessment itself was precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commission of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).⁶

K. Petitioner has not denied receiving notice number L-035572505. Moreover, the fact that petitioner filed a request for conciliation conference, coupled with the information set forth thereon, bears out that he did, in fact, receive actual notice of that assessment (*see* finding of fact 30). However, there is nothing in the record from which any specific date of such actual receipt that is earlier than the August 7, 2013 date on which the request for a conciliation conference was signed may be objectively determined. Petitioner stated that he received a "certified mailing," generically referred to as a "tax letter," and as "documents from New York State," but could not remember and did not specify the date of receipt. Petitioner simply explained that he gives any tax documents he receives to his accountant, noting in testimony that "some of the paperwork I can't understand what is that for." (*see* findings of fact 27 - 29). Nothing in the testimony, or in petitioner's reply to the Division's answer, conclusively establishes the actual date of petitioner's receipt of notice number L-035572505, or that such notice was the "tax letter" to which petitioner alluded to in testimony. It cannot be said that the record provides any clear, objective and unequivocal basis, either via the Division's submitted proof of mailing or in petitioner's non-

⁶ There is no claim by petitioner, nor does the evidence support a conclusion, that notice number L-035572505 was not actually received by petitioner within the period of limitations on assessment (*see* finding of fact 27, n 5).

specific testimony, upon which to conclude that notice number L-035572505 was mailed on March 29, 2011, as claimed, or was actually received by petitioner at any point in time prior to August 7, 2013. Noting that dismissal for want of jurisdiction is a drastic and foreclosing result (*Matter of Sak Smoke Shop*), the appropriate course of action is to err, if at all, on the side of requiring strict adherence to a standard of objective certainty (*see Matter of Jeffrey Brager*, Tax Appeals Tribunal, May 23, 1996; *compare Matter of Balan*). It is somewhat tempting to accept the balance of the evidence, including the affixation of the postmark and the initials of the postal clerk, in combination with petitioner's and petitioner's representatives' implicit acknowledgment that the notice of determination at issue was in fact received prior to April 7, 2013, and conclude on that evidence that petitioner's BCMS request was not timely filed. However, this non-specific evidence is insufficient to overcome the Division's failure to have complied with its own protocol as to completion of the CMR, or to negate the resulting flaw in the proof of mailing of notice number L-035572505. Petitioner, at best, admits that he received something from the Division, by certified mail, in late March or early April of 2011. Such a non-specific admission of receipt of a "tax letter" and "documents from New York State," simply does not suffice as an admission the consequence of which serves to preclude the right to be heard (*see Matter of Brager*).

L. Consistent with the holdings of *Hyatt Equities* and *Riehm*, an unequivocal admission of actual receipt of a notice of determination on a specific date clearly constitutes an admission sufficient to trigger commencement of the period within which a petition, or a request for conference must be filed. In the parties' pleadings, the Division's answer affirmatively alleges that the notices in question were issued on March 29, 2011 (*see* Exhibit E [answer] at ¶¶ 10, 13). Petitioner agrees to the Division's subsequent affirmative allegation, in paragraph 15 of the

answer, that he did not file a request for conference or a petition within 90 days of the mailing of the notices of determination (*see* Exhibit E at ¶ 15; Exhibit F [opposition to answer] at ¶ 15). However, the mailing evidence submitted in support of the Division's affirmative allegation regarding notice number L-035572505 fails to prove the critical facts underlying that allegation, to wit, the date and fact of mailing of notice number L-035572505 by the Division. The Division's failure to establish any particular date of issuance of such notice effectively negates petitioner's agreement that he, in turn, failed to file a protest within 90 days after such alleged issuance. Moreover, petitioner's "admission by agreement" in his reply pleading, given the flaw in the Division's proof of mailing and the uncertainty in the testimony concerning the date of actual receipt of the notice (*see* findings of fact 27 - 29), does not constitute an unequivocal admission of receipt sufficient to preclude the right to a hearing (*see* 20 NYCRR 3000.0 [a], [c]).⁷

M. Taxpayers are held to a strict standard in establishing that a timely challenge to an assessment has been filed (*see Matter of American Woodcraft; Matter of William Roland*, Tax Appeals Tribunal, February 22, 1996). The Division should be under no less stringent standard in meeting its initial burden of establishing the date upon which notice of an assessment of tax is given. Establishing the mailing of a particular item on a given date, where (as here) more than one item is being mailed on that date, is a necessary part of establishing proper issuance of that item. The conclusion that circling or handwriting the number of items of mail delivered to, and accepted into the custody of, the USPS, is an essential part of the proper completion of a multiple-page, multiple-notice CMR, is borne out by a plethora of cases on this issue (*see e.g.*

⁷ In fact, petitioner does not dispute that the Division issued the notices dated March 29, 2011. At the time of his responsive pleading, however, petitioner would not have had the knowledge upon which to admit (or agree) that the Division actually issued such notices on March 29, 2011, or on any other particular date, thus undermining any weight to be accorded to petitioner's reply admission (or agreement) that he failed to file a protest within 90 days after the date of issuance of the notices.

Matter of Modica Tax Appeals Tribunal, October 1, 2015), as well as by the very existence of the stamped instruction that is affixed to the CMR itself. Thus, in a case where more than one notice is being delivered to the USPS for mailing, the Division cannot simply rely upon its standard mailing practice where the evidence in support of compliance therewith is, as here, flawed (*compare* conclusion of law O [failure to circle or handwrite number of items, where only one item is proffered for mailing, while a flaw in properly completing CMR, is properly deemed inconsequential as superfluous]). Upon the evidence in this record, the only objectively certain fact is that the earliest date of actual receipt of notice number L-035572505 is the August 7, 2013 signature date appearing on petitioner's request for a BCMS conference. As a result, the period within which to challenge that notice commenced to run on such August 7, 2013 date of actual receipt, and petitioner was required to file either a request for conciliation conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v Tax Commission of the State of New York; Matter of Rosen*). Petitioner's August 8, 2013 request fell within this 90 day window, and the conciliation order therefore improperly dismissed the request as untimely. In turn, given that the petition filed herein was timely (*see* conclusion of law C)), there is jurisdiction in this forum to address the merits of petitioner's claim with respect to notice number L-035572505.

N. In its instructions on remand, the Tribunal noted that the initial (April 21, 2016) determination in this matter had not resolved the substantive propriety of the assessment made by notice number L-035572505, and requested that the same be addressed in the conclusions on remand. In view of that request, and assuming that the foregoing conclusion as to timeliness is not reversed on exception, the Division properly assessed tax due on the furniture, fixtures and equipment via its issuance of notice number L-035572505. In particular, the notice advising the

Division of the bulk sale specified that the amount to be paid for furniture, fixtures and equipment being purchased or transferred was \$116,492.00 (*see* finding of fact 31). At hearing, petitioner admitted that for approximately two years post-transfer, the furniture, fixtures and equipment were utilized by petitioner in the operation of the business (*see* finding of fact 11). Under such circumstances, sales tax was properly due on the sale of the furniture, fixtures and equipment, but was not paid (Tax Law § 1141 [c]; 20 NYCRR 525.2 [a] [2] [sale is defined as transfer of title or possession, or both]). The Division therefor properly assessed tax with respect to such items, based upon the stated value thereof, and notice number L-035572505, assessing such liability, is sustained.

Notice Number L-035572504

O. Notice number L-035572504 assesses derivative liability against petitioner based upon the bulk sale transferor's own outstanding and unpaid tax liability, as limited in this case to the extent of the \$160,000.00 purchase price to be paid for the business per the parties' contract of sale (*see* finding of fact 2; Tax Law § 1141 [c]). Unlike the foregoing result concerning notice number L-035572505, the Division's documentary evidence is sufficient to establish that notice number L-035572504 was, in fact, properly issued to petitioner by mail, as claimed, on March 29, 2011, in accordance with the mailing procedures specified as applicable to that notice. As detailed in the Picard and Ramundo affidavits, and as borne out by the documentary evidence, the one-page CMR pertaining only to notice number L-035572504, bears the stamped USPS postmark dated March 29, 2011, and the initials of the USPS employee who received the single item of mail specified on the CMR as being delivered into the custody of the USPS for mailing (*see* findings of fact 22, 26). The CMR, as completed in light of the specific circumstances of the issuance of notice number L-035572504, provides highly probative proof of the mailing of such

single notice listed thereon on March 29, 2011 as claimed (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). It is recognized that the CMR was not completed per the terms of the affidavits describing the Division's standard mailing process, specifically in that the preprinted number of items is not circled or hand written on the CMR. As a practical matter, however, since the preprinted number on the CMR indicates that only one item was being mailed, this failure is rendered inconsequential as essentially superfluous. No less, and no more, than one item could have been proffered for mailing in connection with such CMR. Unlike mailings involving multiple-page, multiple-notice CMRs, the only notice that could have been delivered to, and received by, the USPS for mailing is the one notice (L-035572504) set forth on that particular one-page CMR. The fact that there is no stamped instruction directing the USPS employee to "Hand write total # of pieces and initial" on this CMR is fully consistent with this result (*compare* findings of fact 24 and 26). In sum, the proof adduced supports the conclusion that the one item listed on the CMR was in fact delivered to and accepted by the USPS for mailing on March 29, 2011. This conclusion gives rise to a rebuttable presumption of receipt of the notice, and the burden of proving that a timely protest was filed in response rests with the petitioner (*see Matter of Sugranes*).

P. As a consequence of having established that notice number L-035572504 was properly issued on March 29, 2011, the period within which petitioner was required to file a protest against that notice commenced on the date of its mailing, i.e., March 29, 2011, and any such protest had to have been filed within 90 days thereafter. Petitioner has not provided any basis to rebut the presumption of receipt that attached upon the Division's showing of proper mailing. In this regard, petitioner did not claim non-receipt of either of the notices at issue in this matter, and in fact has admitted receipt, as evidenced by the filing of the request for conference, as well as by

the claims made therein. The record is clear that petitioner did not file any protest (either a request for conference or a petition) within 90 days after the March 29, 2011 issuance date of notice number L-035572504. In fact, petitioner's request for conference, received by BCMS on August 8, 2013, was filed some 29 months after the date of issuance of that notice, and was clearly untimely. Accordingly, notice number L-035572504 became fixed and final, and the Division of Tax Appeals is without jurisdiction to address the substantive arguments concerning that notice (*see* conclusion of law B).

Q. As to the substantive merits of petitioner's derivative liability, as assessed by notice number L-035572504, the Tribunal's instructions on remand were that "the parties will not be allowed to address either the notice of determination premised upon the assertion by the Division [of Taxation] of petitioner's derivative liability (*see* Tax Law § 1141 [c]), or the penalty issue, as both parties have already had an adequate opportunity to address the substantive issues presented in this matter." Consistent with these instructions, and noting that the Tribunal has retained jurisdiction over this entire matter, including the foregoing issue of derivative liability, no further discourse on these issues is presented herein.

R. The petition of Khayer Kayumi:

- a) is granted on remand to the extent that there is jurisdiction in this forum to address the substantive merits of notice number L-035572505 (*see* conclusions of law G through M);
- b) is denied on remand on the basis that the Division properly assessed tax, per notice number L-035572505, on the tangible personal property transferred (*see* conclusion of law O); and
- c) is denied on remand on the basis that a timely protest against notice number L-035572504 was not filed leaving this forum without jurisdiction to address the substantive merits of that notice (*see* conclusions of law O and P).

This matter will be returned to the Tribunal for further proceedings.

DATED: Albany, New York
November 29, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE