

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SPICY’S CHICKEN RESTAURANT CORP.** : DETERMINATION  
DTA NO. 826130  
for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for :  
the periods September 1, 2005 through February 28, 2011, :  
June 1, 2011 through February 28, 2011, March 1, 2012 :  
through August 31, 2012 and March 1, 2013 through :  
May 31, 2013; for Redetermination of Deficiencies or for :  
Refund of Corporation Franchise Tax under Article 9-A :  
of the Tax Law for the Years 2010 and 2011, and for :  
Redetermination of Deficiencies or for Refund of New :  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Years 2012 and 2013. :

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Petitioner, Spicy’s Chicken Restaurant Corp., 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 periods September 1, 2005 through February 28, 2011, June 1, 2011 through August 31, 2011, March 1, 2012 through August 31, 2012 and March 1, 2013 through May 31, 2013; for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2010 and 2011, and for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2012 and 2013.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated June 19, 2014, on the grounds that (i) the petition did not appear to have been filed in a timely manner and (ii) the Division of Tax Appeals lacks subject matter

jurisdiction because the petition was not filed in protest of a statutory notice. Extensions of time to respond to the Notice of Intent to Dismiss Petition by October 16, 2014 were granted to both parties. On June 24, 2014, petitioner, appearing by Cartier, Bernstein, Auerbach and Dazzo, PC (William J. Bernstein, Esq., of counsel) submitted a letter and documents in opposition to dismissal.<sup>1</sup> On October 14, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich) submitted an affidavit and documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on October 14, 2014. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether the Division of Tax Appeals has subject matter jurisdiction over the petition filed in this matter.

### ***FINDINGS OF FACT***

1. On February 24, 2014, petitioner, Spicy's Chicken Restaurant Corp., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review four notices of determination (assessment numbers L-037896116, L-037896117, L-038499405, and L-038499406)<sup>2</sup> and ten notices and demands (assessment numbers L-037026198, L-038304905, L-

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<sup>1</sup> By letter dated June 27, 2014, petitioner's representative was notified that assessment numbers L-038499405 and L-038499406 were no longer included in the Notice of Intent to Dismiss Petition case under DTA No. 826130, because they were already being protested under DTA No. 825912, of the same name. By letter dated October 6, 2014, petitioner's representative was informed that assessment number L-037896116 was included in the Spicy's Chicken Restaurant Corp. case that was in the Notice of Intent to Dismiss Petition phase and was currently awaiting a response from the Division of Taxation, Office of Counsel.

<sup>2</sup> By letter dated April 16, 2014, petitioner's representative advised that "Sales Tax Assessment No.: L-037896776-8 was typed incorrectly" on the petition and that the correct number, L-037896116, was also listed. See footnote number 1.

038852280, L-039250764, L-040075118, L-039579649, L-040174883, L-039035175, L-039839668 and L-040221498), which were attached to the petition.

2. Notices of determination L-037896116 and L-037896117, each dated May 22, 2012, were issued to petitioner for sales and use taxes due as a bulk sale purchaser of a restaurant from William Stoner. These notices assessed tax liabilities of the seller estimated in accordance with Tax Law § 1138. The two notices were collectively issued in one document entitled “Notice of Determination” under “Audit Case ID” X-263538921-4 that listed petitioner’s address as 225 West Main Street, Riverhead, NY 11901-2840.<sup>3</sup>

3. The Division of Taxation (Division) issued to petitioner a Notice of Estimated Determination (Assessment ID no. L-040075118-9), dated September 9, 2013, that assessed sales and use taxes due in the amount of \$9,319.40, plus penalty and interest, for the period March 1, 2013 through May 31, 2013. This Notice of Estimated Determination was issued to petitioner because it failed to file a sales and use tax return for the period ended May 31, 2013. The notice was addressed to petitioner at the Riverhead, New York, address.

4. Subsequently, the Division issued to petitioner, at the Riverhead, New York, address, a Notice and Demand for Payment of Tax Due (Notice and Demand) (Assessment ID no. L-040075118-9), dated September 24, 2013, that asserted interest of \$281.39 and penalty of \$995.31 for a balance due of \$1,276.70 for the period March 1, 2013 through May 31, 2013. This Notice and Demand was issued to petitioner because it filed its sales and use tax return late for the tax period ended May 31, 2013. On its sales and use return, petitioner reported tax due in the amount of \$8,094.32 and remitted \$8,294.32. On the Notice and Demand, the Division

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<sup>3</sup> As the two notices of determination were combined in one Notice of Determination (X-263538921-4), for ease of reference, this determination will hereinafter refer to the Notice of Determination in the singular.

disallowed the claimed vendor credit of \$200.00 and computed sales tax due in the amount of \$8,294.32.

5. The Division also issued to petitioner, at the Riverhead, New York, address, nine notices and demands for payment of tax due as follows:

<b>Assessment ID Number</b>	<b>Tax Type</b>	<b>Date Issued</b>
L-037026198-7	Sales and Use Tax	December 8, 2011
L-038304905-7	Sales and Use Tax	July 18, 2012
L-038852280-9	Sales and Use Tax	December 7, 2012
L-039250764-5	Sales and Use Tax	April 17, 2013
L-039579646-2	Corporation Franchise Tax	June 28, 2013
L-040174883-5	Corporation Franchise Tax	October 4, 2013
L-039035175-3	Withholding	January 30, 2013
L-039839668-9	Withholding	July 31, 2013
L-040221498-6	Withholding	October 15, 2013

6. On June 19, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

“Pursuant to § 2006(4) of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice is issued. Pursuant to Tax Law § 170-a(3)(c) the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due.

In this case, petitioner filed a petition in protest of four Notices of Determination (L-037896116, L-037896117, L-038499405, and L-038499406), and ten Notices and Demands (L-040174883, L-040221498, L-039035175, L-039579646, L-039839668, L-039250764, L-040075118, L-037026198, L-038304905, and L-038852280).

The Notices of Determination, Assessment Nos. L-037896116, and L-037896117, were issued to petitioner on May 22, 2012, and Assessment Nos. L-038499405 and L-038499406, were issued to petitioner on August 24, 2012. However, the petition was not filed with the Division of Tax Appeals until

February 24, 2014, or six hundred and forty three (643) days later and five hundred and forty nine (549) days later, respectively.

The Notices and Demands include Assessment Nos. L-040174883, L-040221498, L-039035175, L-039579646, L-039839668, L-039250764, L-040075118, L-037026198, L-038304905, and L-038852280. Since no hearing rights exist to protest a Notice and Demand, the Division of Tax Appeals lacks jurisdiction. Therefore, the Division of Tax Appeals is without jurisdiction to consider the merits of this petition with respect to these ten Notices and Demands.”

7. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination, dated May 22, 2012, the Division submitted the following: (i) an affidavit, dated September 9, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked May 22, 2012; (iii) an affidavit, dated September 11, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (iv) a copy of petitioner’s New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the tax period December 1, 2011 through February 29, 2012, dated March 20, 2012.

8. To prove the mailing of the Notice of Estimated Determination, dated September 9, 2013, the Division submitted the following: (i) an affidavit, dated October 7, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the MAPS Bureau; (ii) pages numbered 1, 1,365 and 1,879 from a “Certified Record for - DTF-965-E - Not of Est Determination,” each legibly postmarked September 9, 2013; (iii) an affidavit, dated October 7, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; (iv) an affidavit, dated October 7, 2014, of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery

information; (v) Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated October 2, 2014; and (vi) a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the tax period December 1, 2012 through February 28, 2013, dated March 20, 2013.

**The Notice of Determination dated May 22, 2012**

9. The first affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of certified mail records, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The computer-generated certified mail record (CMR) is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, this date was manually changed on the first page to "5/22/12," to reflect the actual mailing date. In addition, the initial date on the last page was also manually changed to "5/22/12." It is also the Division's general practice that 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 its office. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

10. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the

mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and P.O. Address."

11. The CMR for the block of statutory notices issued on May 22, 2012, including the statutory notice issued to petitioner, consists of 25 pages and lists 268 certified control numbers along with corresponding numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 1, which contains 9 such entries (two of the original such certified control numbers and the assessment numbers, names and addresses corresponding thereto, have been crossed out), and page 25, which contains 4 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated May 22, 2012 to each page of the CMR and also wrote his or her initials on page 25.

12. Page 14 of the May 22, 2012 CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1113 3052 and reference number X 263538921, was to be mailed to petitioner at the Riverhead, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

13. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the batch of notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet.

A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 25 and affixed a postmark dated May 22, 2012 to each page of the CMR. The Mail Processing Center further requested that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by crossing out the preprinted number 268, as appearing next to the heading "TOTAL PIECES AND AMOUNTS," and thereafter both hand writing and circling the number "266" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE." This change was made to reflect that two pieces of certified mail (two such pieces of mail identified but crossed out on page one of the CMR [*see* Finding of Fact 11]) had been "pulled" from that particular run. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled is segregated from the remaining group of statutory notices for correction and issuance at another time.

14. The pieces of mail pulled from this run had been assigned certified control numbers 7104 1002 9730 1113 1621 and 7104 1002 9730 1113 1638 and lines had been drawn through



the entries for these items to indicate that they were pulled from the run.

15. Based upon his review of the affidavit of Mary Ellen Nagengast and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on May 22, 2012, an employee of the mail room delivered a piece of certified mail addressed to petitioner in Riverhead, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope 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 May 22, 2012 for the Division's records. He asserted that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on May 22, 2012.

16. Petitioner's New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the period December 1, 2011 through February 29, 2012, dated March 20, 2012, reported petitioner's address as Riverhead, New York 11901. This was the last return filed by petitioner prior to the issuance of the May 22, 2012 Notice of Determination.

#### **The Notice of Estimated Determination Dated September 9, 2013**

17. The second affidavit of Ms. Nagengast, submitted in support of the Division's mailing of the Notice of Estimated Determination dated September 9, 2013, sets forth the Division's general practice and procedure for processing statutory 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 and the last page to "9/9/13," to reflect the actual mailing date. In addition, according to Ms. Nagengast, 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. According to Ms. Nagengast, the page numbers of the CMR run consecutively starting with "PAGE: 1," and are noted in the upper right corner of each page.

18. 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 PO Address."

19. According to the Nagengast affidavit, the CMR postmarked September 9, 2013 consists of 1,879 pages. Ms. Nagengast notes that the portion of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 1,879. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 25,320.

20. Attached to the Nagengast affidavit, as exhibit "A," is a copy of pages 1, 1,365 and 1,879 of the CMR issued by the Division on September 9, 2013. Pages 1 and 1,879 have handwritten entries referring to September 9, 2013 on the top; however, page 1,365 does not have a similar entry.

21. Page 1,365 of the CMR indicates that a Notice of Estimated Determination with certified control number 7104 1002 9735 1421 4524 and reference number L-040075118 was to

be mailed to petitioner at the Riverhead, New York, address listed thereon. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

22. The affidavit of Bruce Peltier describes the mail room's general operations and procedures. The mail room receives a batch of notices and the accompanying CMR in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. 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. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The Mail Processing Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR.

23. Each of the three pages of the CMR in exhibit "A" of the Nagengast affidavit contain a USPS postmark of September 9, 2013. On page 1,879, corresponding to "TOTAL PIECES AND AMOUNTS," is the preprinted number 25,320, on a printed line next to this preprinted number is the handwritten entry "25,320." Below the handwritten entry, and next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" initials or a signature appear on a printed line.

According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee's initials or signature indicate that a total of 25,320 articles of mail listed on the CMR, including

the article addressed to petitioner, were delivered to the USPS on September 9, 2013.

24. According to both the Nagengast and Peltier affidavits, a copy of the Notice of Estimated Determination was mailed to petitioner on September 9, 2013.

25. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of PS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with regard to the Notice of Estimated Determination. Filing PS Form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. Ms. Corina filed Form 3811-A seeking information for one item mailed by the Division under certified number 7104 1002 9735 1421 4524 on September 9, 2013 from the USPS General Mail Facility to petitioner at its Riverhead, New York, address listed above. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9735 1421 4524 and addressed to petitioner was delivered to an address in Riverhead, New York, on September 11, 2013. Attached to the Corina affidavit as exhibit "A" is the Division's "Request for Delivery Information" for article number 7104 1002 9735 1421 4524. Exhibit "B" attached to the Corina affidavit is the USPS response to the Division's request. The response for article number 7104 1002 9735 1421 4524 indicates delivery of the same article to 225 W. Main Street in Riverhead, New York, and bears an illegible signature of the recipient.

26. Petitioner's New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the period December 1, 2012 through February 28, 2013, dated March 20, 2013, reported petitioner's address as Riverhead, New York 11901. This was the last return filed by petitioner prior to the issuance of the September 9, 2013 Notice of Estimated Determination.

### **The Notices and Demands**

27. In response to the issuance of the Notice of Intent to Dismiss Petition with regard to the notices and demands issued to petitioner, the Division submitted copies of four sales and use tax notices and demands numbers L-037026198, L-038304905, L-038852280, and L-039250764 dated December 8, 2011, July 18, 2012, December 7, 2012, and April 17, 2013, respectively; two corporate franchise tax notices and demands numbers L-039579646, and L-040174883 dated June 28, 2013, and October 4, 2013, respectively; and three withholding tax notices and demands L-039035175, L-039839668 and L-040221498 dated January 30, 2013, July 31, 2013 and October 15, 2013, respectively.

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

28. In opposition to the dismissal of the petition, petitioner's representative submitted a letter dated June 23, 2014, and attached exhibits. Petitioner's representative claimed that all assessments were timely protested. Attachments to this letter included, among other things, the Conciliation Order, dated September 20, 2013, issued with respect to statutory notices numbers L-038499405 and L-038499406; a copy of the cover letter addressed to the Supervising Administrative Law Judge, NYS Division of Tax Appeals, that indicated the original and two copies of the petition for Spicy's Chicken Restaurant Corp. was sent via "Certified Mail RRR" under article number 7010 2780 0000 4142 6691 and was received by the Division of Tax Appeals on February 27, 2014; a copy of the subject petition received by the Division of Tax Appeals on February 27, 2014; and a copy of the revised petition subsequently filed in this matter on May 8, 2014.

### ***CONCLUSIONS OF LAW***

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers

are limited to those conferred by its authorizing statute (*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 Tribunal*, 151 Misc 2d 326 [1991]). Accordingly, absent legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . , unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]).

C. The Division of Taxation is authorized to issue a notice and demand for payment of sales and use taxes reported due where a taxpayer fails to remit payment with its return and for penalties arising from failure to timely file or failure to timely remit payment for the amount reported due (*see* Tax Law § 173-a[3], [b][1]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[3][c]).

D. The Division of Taxation is authorized to issue a notice and demand for payment of corporation franchise tax, where a taxpayer fails to remit payment for the amount reported due on its return and for penalties arising from a failure to timely file a return and timely remit tax reported due (*see* Tax Law §§ 183-a[2]; 1082[a]; 1085[h]; 1092[b]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[2]).

E. The Division of Taxation is authorized to issue a notice and demand for payment of income tax, including withholding tax, where a taxpayer fails to remit payment for the amount reported due on a return and for penalties arising from a failure to timely file a return and timely

remit tax reported due (*see* Tax Law §§ 173-a[2]; 682[a]; 685[1]; 692[b]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[2]).

F. Accordingly, petitioner's right to a hearing in the Division of Tax Appeals with respect to the notices and demands for payment of sales and use tax, corporation franchise tax and withholding tax is specifically denied pursuant to Tax Law § 2006[4]; *Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).

G. Addressing next the Notice of Determination and Notice of Estimated Determination, there is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

H. Where, as here, timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing is produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

I. 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 statutory notices 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.*

J. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

K. The 25-page CMR provides sufficient documentary proof to establish that the Notice of Determination dated May 22, 2012 was mailed by certified mail to petitioner at its last known address on May 22, 2012. Specifically, each page of this 25-page document lists certified control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated May 22, 2012. A postal service employee handwrote and circled the number “266” near the “Total Pieces Received at Post Office” heading and initialed the last page near the circled number, thereby indicating that all 266 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 266 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

L. Tax Law § 1138(a)(1) provides that a notice of determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of



the receipt of the same by the person to whom addressed.”

M. Here, the record shows that petitioner’s address listed on its sales and use tax return for the period December 1, 2011 through February 29, 2012, dated March 20, 2012, was in Riverhead, New York. Thus petitioner’s last known address prior to the issuance of the Notice of Determination on May 22, 2012 was that stated on the sales and use tax return for the period December 1, 2011 through February 29, 2012.

Accordingly, the Division has shown that it properly mailed the Notice of Determination dated May 22, 2012 to petitioner at its last known address consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on May 22, 2012 (Tax Law §§ 170[3-a][b]; 1138[a][1]).

N. In order to timely protest the Notice of Determination issued on May 22, 2012, petitioner was required to file a petition or a Request for Conciliation Conference within 90 days of May 22, 2012, i.e., on or before August 20, 2012. The petition filed in protest of the Notice of Determination dated May 22, 2012 was filed on February 24, 2014, well beyond the expiration of the 90-day period of limitations for protesting the statutory notice issued on May 22, 2012. The petition protesting the Notice of Determination was therefore untimely filed (*see* Tax Law § 1138[a][1]). As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner’s protest for the Notice of Determination dated May 22, 2012 (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

O. With respect to the Notice of Estimated Determination dated September 9, 2013, the Division has not fulfilled the requirement to introduce adequate proof that its standard procedure

was followed in issuance of that notice. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*). Exhibit “A” of the second Nagengast affidavit contains three pages of what purports to be a longer multi-page computer generated CMR. Unlike the procedure described in the second Nagengast affidavit, the three pages in exhibit “A” are not physically connected, and the pages are not consecutively numbered. Moreover, the date at the top of pages 1 and 1,879 has been changed to September 9, 2013, but remains unchanged on page 1,365. Pages 1 and 1,879, therefore, bear a different date than page 1,365. As a result, the partial CMR submitted as exhibit “A” of the second Nagengast affidavit also does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

P. These flaws may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in the matter with respect to Notice of Estimated Determination number L-040075118 bearing certified control number 7104 1002 9735 1421 4524. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly shows that a copy of this notice, addressed to petitioner, which was also listed on the CMR, was delivered to petitioner at its Riverhead, New York, address on September 11, 2013. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that Notice of Estimated Determination number L-040075118 was delivered to petitioner’s last known address, as claimed, on September 11, 2013 (*see Matter of Victory Bagel Time, Inc.; Matter of Winners Garage, Inc.* Tax Appeals Tribunal, June 10, 2010).

Q. Based upon the above conclusion, the 90-day period for filing a petition or Request for

Conciliation Conference with regard to the Notice of Estimated Determination dated September 9, 2013 is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the Notice of Estimated Determination commenced to run on the date of such actual receipt of the notice by petitioner, i.e., September 11, 2013, and petitioner was required to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services, 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*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). The petition filed in protest of the Notice of Estimated Determination was not filed until February 24, 2014. This date falls after the 90-day period of limitations for filing such a protest. The petition was therefore untimely filed (Tax Law § 1138[a][1]).

R. In opposition to dismissal of the petition, petitioner's representative claimed that the statutory notices were timely protested. However, petitioner has not offered any evidence to meet its burden to prove that any timely protest was filed before the 90-day period of limitations expired for challenging the Notice of Determination dated May 22, 2012 or the Notice of Estimated Determination dated September 9, 2013 expired. Rather, the only evidence submitted was a copy of the subject petition filed on February 24, 2014. Unfortunately, since that petition was untimely filed, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the statutory notices (*Matter of Lukacs*).

S. The petition of Spicy's Chicken Restaurant Corp. is dismissed.

DATED: Albany, New York  
January 8, 2015

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE