

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MANHATTAN RESTAURANT, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 827086  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period June 1, 2011 through February 28, 2014. :

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Petitioner, Manhattan Restaurant Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2011 through February 28, 2014.

On November 6, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until January 21, 2016, to respond to said notice. On December 4, 2015, petitioner, appearing by its president, Saajid Gilani, submitted documents in opposition to dismissal. On January 19, 2016, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel) submitted 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 began on January 21, 2016. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. This matter concerns sales tax audits of the Manhattan Restaurant, Inc. (petitioner), which was subject to audit for the period June 1, 2011 through February 28, 2014. Following the audit of the restaurant, petitioner was assessed sales and use taxes of \$85,913.32 plus penalty and interest.

2. Petitioner filed a Request for a Conciliation Conference regarding the Notice of Determination that had been issued to it.

3. On March 20, 2015, following a conciliation conference, a conciliation order sustaining the Notice of Determination was issued.

4. Petitioner filed a petition dated June 19, 2015 with the Division of Tax Appeals by United States Postal Service (USPS) First Class Mail. The USPS postage-paid stamp on the envelope containing the petition is dated July 2, 2015. The petition was received by the Division of Tax Appeals on July 6, 2015.

5. On November 6, 2015, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice of intent provides, in pertinent part, that:

“It appears that the conciliation order under protest in this matter, CMS No. 263142, was issued to petitioner on March 20, 2015. However the petition in this matter was not filed with the Division of Tax Appeals until July 2, 2015, or one hundred four (104) days later.”

6. To show proof of proper mailing of the conciliation order dated March 20, 2015, the Division of Taxation (Division) submitted, among other documents: (i) the affidavit of Jennifer L. Hink-Brennan, Esq., an attorney employed in the Office of Counsel of the Division, dated January 15, 2016; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated December 17, 2015; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked March 20, 2015; (iv) a copy of the conciliation order, cover letter and cover sheet, dated March 20, 2015, and copy of the three-windowed mailing envelope; (v) an affidavit, dated January 6, 2016, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (vi) petitioner’s request for conciliation conference, showing petitioner’s address in Princeton, New Jersey, and listing petitioner’s representative as Khondaker Haque, CPA, in Jackson Heights, New York. The addresses as listed for petitioner and petitioner’s representative on the request are the same addresses indicated on the conciliation order cover letter and cover sheet for petitioner and petitioner’s representative, respectively. The Division also submitted an affidavit, dated January 7, 2016, of Heidi Corina, Legal Assistant 2 in the Division’s Office of Counsel involved in making requests to the USPS for delivery information.

7. The affidavit of Robert Farrelly sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing,

and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

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

10. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case “3/20/15” is written in the upper right corner of pages 1 through 3 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of March 20, 2015.

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

15. Mr. Farrelly attested to the truth and accuracy of the copy of the three-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on March 20, 2015. This CMR lists 25 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the names and addresses of the addressees. There are no deletions from the list.

16. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0424 1191 is reference/CMS number 000263142, along with petitioner’s name and a Princeton, New Jersey, address that is identical to the address on petitioner’s request for conciliation conference. Additionally, on page two of the CMR, corresponding to certified control number 7104 1002 9730 0424 1351, is reference/CMS number 000263142, along with the name of petitioner’s representative, Khondaker Haque, CPA, and a Jackson Heights, New York, address that is identical to the representative’s address as indicated on the request for conciliation conference.

17. The cover sheet bearing petitioner's name and the Princeton, New Jersey, address appearing on petitioner's request for a conciliation conference and on the CMR shows the same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. The cover sheet bears petitioner's representative's name and address, which is identical to the representative's name and address as reflected on the request for conciliation conference and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's representative's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

19. In this particular instance, the postal employee affixed a postmark dated March 20, 2015 to, and also wrote his or her signature or initials on, each page of the three-page CMR. The Mail Processing Center further requests that the USPS employees either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the

CMR. A review of the March 20, 2015 CMR indicates that the USPS employee complied with this request by writing the number “25” to indicate the number received as well as circling the preprinted number “25” corresponding to the heading “Total Pieces and Amounts.”

20. Mr. Peltier’s affidavit states that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on March 20, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at its Princeton, New Jersey, address and an item of certified mail addressed to petitioner’s representative at his Jackson Heights, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 20, 2015 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and its representative.

22. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS 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. In this matter, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0424 1191 on March 20, 2015 from the Albany, New York, branch office of the USPS to petitioner at its Princeton, New Jersey, address. In response, the USPS confirmed delivery of this certified mail item at the noted address on March 23, 2015.

23. In its response to the Notice of Intent to Dismiss Petition, petitioner claims the petition was filed on June 19, 2015, the date the petition was signed. Based on this assertion, petitioner claims it timely filed its petition.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the applicable time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, it appeared to the Division of Tax Appeals that the petition was filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of*



*Accardo*, Tax Appeals Tribunal, August 12, 1993). Together, the mail cover sheet, cover letter, CMR and affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure and show that the procedure was followed in this instance. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The mail cover sheet bears petitioner's name and a Princeton, New Jersey, address that is identical to the address on the request for a conciliation conference and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of March 20, 2015. There are 25 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling and writing the number "25" on the line stating "Total Pieces Received at Post Office," that the post office received 25 items for mailing. Likewise, the documentary evidence in the record also establishes that a copy of the conciliation order was also properly sent to petitioner's representative. In short, the Division established that it mailed the order to petitioner by certified mail on March 20, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner does not dispute receipt of the conciliation order; in fact the affidavit of Heidi Corina firmly establishes that petitioner received the conciliation order. Rather, petitioner claims it filed the petition on June 19, 2015, the date the petition was signed. This assertion is rejected. In this case the petition was filed on July 2, 2015, the date of the USPS postmark

appearing on the envelope containing the petition (20 NYCRR 3000.22 [a][1]). However, even if petitioner's contention that the petition was filed on June 19, 2015 were accepted, the petition would still fall outside the 90-day period to file a petition with the Division of Tax Appeals following the issuance of a conciliation order as June 19, 2015 was the 91st day. Accordingly, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.

D. The petition of Manhattan Restaurant, Inc., is dismissed.

DATED: Albany, New York  
March 10, 2016

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE