

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CLINTONVILLE QUICK STOP, INC.** : DETERMINATION  
 : DTA NO. 827764  
 :  
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, 2012 through November 30, 2015. :  
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Petitioner, Clintonville Quick Stop, 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, 2012 through November 30, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion dated October 5, 2016 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to §§ 3000.5, 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, failed to timely respond to the Division of Taxation’s motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of Notice of Determination number L-044480838.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination, dated March 4, 2016, and bearing assessment identification number L-044480838. The notice is addressed to petitioner, Clintonville Quick Stop, Inc., at an address in Lindenhurst, New York.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the March 4, 2016 Notice of Determination. The request was filed with BCMS on June 8, 2016.

3. On June 24, 2016, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on March 4, 2016, but the request was not received until June 8, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on July 19, 2016.

5. To show proof of proper mailing of the March 4, 2016 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated September 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's

Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 4, 2016; (iii) an affidavit, dated September 22, 2016, of Bruce Peltier, a supervisor in the Division’s mail room; (iv) a copy of the March 4, 2016 Notice of Determination with the associated mailing cover sheet; (v) a copy of petitioner’s request for conciliation conference, stamped received June 8, 2016;<sup>1</sup> and (vi) petitioner’s New York State and Local Sales and Use Tax Web Filed Return for the period September 1, 2015 through November 30, 2015, which lists the same address for petitioner as that listed on the subject notice. The sales and use tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The 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 CMRs, 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 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 and last pages of the CMR, in the present case, to the actual mailing date of “3/4/16.” In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless

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<sup>1</sup> The request for conciliation conference was sent to BCMS via facsimile on June 8, 2016. There is no evidence in the record indicating that the request was sent by mail, and no mailing envelope with a postmark date was presented into the record.

otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

7. 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 Division’s return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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.”

8. The CMR in the present matter consists of 22 pages and lists 235 certified control numbers along with corresponding assessment numbers, names and addresses.<sup>2</sup> Each page of the CMR includes 11 such entries with the exception of page 10, which contains 10 entries (one of the original 11 entries is crossed out), and page 22, which contains 5 entries. Ms. Nagengast notes that the copy 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. A USPS representative affixed a postmark dated March 4, 2016 to each page of the CMR, wrote and circled the number “235” on page 22 next to the heading “Total Pieces Received at Post Office” and initialed or signed page 22.

9. Page 13 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0787 1593 and reference number L-044480838 was mailed to petitioner

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<sup>2</sup> The CMR originally listed 236 certified control numbers. As noted in the Findings of Fact below, the preprinted number of total pieces received at the post office is crossed out and “235” is handwritten on the last page of the CMR.

at the Lindenhurst, New York, address listed on the subject Notice of Determination. 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. Additionally, page 13 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0787 1586 and reference number L-044480838 was mailed to petitioner's former representative, William Starita, at a Lindenhurst, New York, address.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a Stores and Mail Operations Supervisor, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. 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. Here, as noted, the USPS employee initialed page 22 and affixed a postmark dated March 4, 2016 to each page of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Here, the USPS employee crossed out the preprinted number "236" appearing next to the heading "total pieces and amounts" and wrote and circled the number "235" on the last page next

to the heading “Total Pieces Received at Post Office,” along with the employee’s initials or signature. According to Mr. Peltier, the number of pieces received was changed from 236 to 235 to reflect that one piece of certified mail had been “pulled” from the mailing record. The affixation of the postmarks and the USPS employee’s initials and handwritten number indicate that a total of 235 articles of mail listed on the CMR were delivered to the USPS on March 4, 2016.

11. Mr. Peltier further explains that 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 pieces of mail “pulled” will be segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the CMR in this instance reflects that one piece of mail was “pulled.” The piece that was pulled is listed on page 10 of the CMR. This piece of mail had been assigned certified control number 7104 1002 9730 0787 1241. A line was placed through the entry for this taxpayer after the statutory notice was “pulled.” This deletion is reflected in the change of the total pieces received at the post office on page 22 of the CMR. No such mark is made on or near the listing for petitioner or petitioner’s former representative.

12. According to the Peltier affidavit, a copy of the subject notice was mailed to petitioner and petitioner’s representative on March 4, 2016, as claimed.

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

A. As noted, the Division brings a motion to dismiss the petition under § 3000.9(a) of the Tax Appeals Tribunal’s Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under § 3000.9(b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under

§ 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This order shall address the instant motion as such.

B. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9[b][1]).

C. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] citing *Zuckerman* at 562).

D. Petitioner did not respond to the Division's motion. Accordingly, it is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36

NY2d 539 [1975]; *John William Costello Assoc. v. Standard Metals*, 99 AD2d 227 [1st dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden* at 544; *Whelan v. GTE Sylvania* at 449).

E. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure



was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on March 4, 2016, as well as to petitioner's former representative on that date. 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 affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's sales and use tax return filed for the period September 1, 2015 through November 30, 2015, which satisfies the "last known address" requirement. The CMR also establishes that a copy of the subject notice was mailed to petitioner's former representative. It is thus concluded that the Division properly mailed the notice on March 4, 2016 and the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170[3-a][a]; 1138[a][1]).

H. Petitioner's Request for Conciliation Conference was filed on June 8, 2016. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the Request was untimely (*see* Tax Law §§ 1138[a][1]; 170[3-a][a]) and the same was properly dismissed by the June 24, 2016 Conciliation Order issued by BCMS. Petitioner has offered no claim or evidence to meet its burden to prove that a timely protest was filed before the 90-day period of limitations for challenging the notice expired.

I. The Division's motion for summary determination is hereby granted, the June 24, 2016 Conciliation Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York  
March 9, 2017

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE