

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CLINTON GOURMET CORP.** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 828590  
Sales and Use Taxes under Articles 28 and 29 of :  
the Tax Law for the Period August 1, 2009 through :  
August 31, 2013. :

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Petitioner, Clinton Gourmet Corp., 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 August 1, 2009 through August 31, 2013.

On July 31, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), submitted an affirmation and documentation in support of the dismissal. Petitioner, appearing by Israrul Hasan, CPA, submitted a letter and documentation opposing the dismissal. The 90-day period for issuance of this determination commenced on October 15, 2018. Based upon the affidavits and documents submitted in connection with this matter, Dennis M. Galliher, 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 notice of determination.

***FINDINGS OF FACT***

1. Petitioner, Clinton Gourmet Corp., filed a petition that was received by the Division of Tax Appeals on February 12, 2018. The envelope containing the petition bears a United States Postal Service (USPS) priority mail label, indicating the petition was mailed on February 8, 2018.

2. The petition included a copy of a notice of determination bearing audit case number X-685865875, dated as issued to petitioner on June 2, 2017.

3. The petition challenges only the foregoing notice of determination, and there were no other statutory notices attached to the petition.

4. On July 31, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notice of determination, the petition was not timely filed.

5. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) an affirmation, dated October 12, 2018, of Justine Clarke Caplan, an attorney employed by the Office of Counsel of the Division; (ii) a copy of the petition; (iii) a copy of the notice of intent, dated July 31, 2018; (iv) a copy of the June 2, 2017 notice of determination with the associated mailing cover sheet addressed to petitioner; (v) an affidavit, dated September 17, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (vi) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked June 2, 2017; (vii) an affidavit, dated September 18, 2018, of Fred Ramundo, a supervisor of the Division’s

mail room; (viii) a copy of a conciliation order issued by the Division's Bureau of Conciliation and Mediation Services (BCMS) on February 23, 2018 (CMS No. 000301491); (ix) a copy of petitioner's request for conciliation conference, filed with BCMS via facsimile on February 8, 2018; and (x) a copy of petitioner's Quarterly ST-100 New York State and Local Sales and Use Tax Web Filed Return, for the filing period of 12/01/16 - 02/28/17, filed on March 17, 2017, bearing stamp number SW1705806221. This tax return lists the same address for petitioner as that listed on the notice of determination and the petition, and was the last tax return filed with Division before the notice of determination was issued.

6. In response to the issuance of the notice of intent, petitioner's representative provided a letter, dated October 2, 2018, from the Bulk Sale Unit at the Department of Taxation and Finance dated April 10, 2017, and a copy of a conciliation order dated February 23, 2018 (CMS No. 000301491). Petitioner claims he did not receive the notice of determination, and the petition was filed timely following the issuance of the conciliation order.<sup>1</sup>

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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

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<sup>1</sup> Petitioner checked the box on the petition indicating that a conciliation conference was not requested. Unbeknown to the Division of Tax Appeals, petitioner filed a simultaneous request for conciliation conference with BCMS on February 8, 2018. BCMS issued a conciliation order (CMS No. 000301491) on February 23, 2018, dismissing petitioner's request for conciliation conference on the grounds that the request was untimely. The petition in this case was filed prior to BCMS issuing the conciliation order. Petitioner has not filed a petition challenging the conciliation order.

from CARTS and are predated with the anticipated date of their mailing. 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 page of the CMR in the present case to the actual mailing date of "6/2/17." The pages of the CMR stay banded together unless 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.

8. 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 the 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 Address, Street, and PO Address."

9. The June 2, 2017 CMR consists of 19 pages and lists 199 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 19, which contains 1 entry. Ms. Picard 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 June 2, 2017 to each page of the CMR, wrote the number "199" next to the heading "Total Pieces Received at Post Office" on page 19, and initialed or signed each page of the CMR.

10. Page 4 of the CMR indicates that a notice with a certified control number 7104 1002

9730 0134 0484 and reference number X-685865875 was mailed to petitioner at the New York, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. 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, so that the address and certified number from the mailing cover sheet shows through the window. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee 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 of the CMR. As noted, the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark dated June 2, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicates that all 199 articles of mail listed on the CMR, including the article addressed to petitioner, were

received by the USPS for mailing on June 2, 2017.

12. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on June 2, 2017, as claimed.

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

A. In ***Matter of Victory Bagel Time, Inc.*** (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the receipt of a notice and the consequent timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see* Tax Law § 1147 [a] [1]; ***Matter of Azzato***, Tax Appeals Tribunal, May 19, 2011; ***Matter of Sugranes***, Tax Appeals Tribunal, October 3, 2002). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

E. 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.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on June 2, 2017. 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 establishes 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 sheets and CMR conforms with the address listed on petitioner's last Quarterly ST-100 New York State and Local Sales and Use Tax Web Filed Return, which satisfies the "last known address" requirement (*see* Tax Law § 1138 [a] [1]). It is thus concluded that the Division properly mailed the notice on June 2, 2017, 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 (*see* Tax Law § 1138 [a] [1]).

G. In sum, the Division has established that notice of determination X-685865875 was properly mailed as addressed to petitioner at its last known address on June 2, 2017. Having established that the notice of determination was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until February 8, 2018, a date that falls beyond 90 days after the date of issuance of the notice of determination. Petitioner has claimed that it did not receive the notice of determination at issue. A mere assertion of non receipt is insufficient to rebut the presumption of receipt that attaches to a properly mailed notice of determination (*see Matter of Ahmed Nagi Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition of Clinton Gourmet Corp. is dismissed.

DATED: Albany, New York  
January 10, 2019

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE