

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition   | : |                |
| of  | : |                |
| <b>CLIFF PREEFER</b>  | : | DETERMINATION  |
|   | : | DTA NO. 830096 |
|   | : |                |
| for Revision of a Determination or for Refund of New<br>York State Sales and Use Taxes under Articles 28 and 29<br>of the Tax Law for the Tax Period December 1, 2016<br>through November 30, 2018. | : |                |
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Petitioner, Cliff Preefer, 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 December 1, 2016 through November 30, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Aliza J. Keen, Esq., of counsel), brought a motion, dated March 29, 2022, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (i) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. At the request of petitioner, appearing pro se, an extension of time was granted to respond to the Division of Taxation’s motion. Petitioner filed a response on May 17, 2022. Upon extension, the 90-day period for issuance of the order commenced on May 30, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, 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 a notice of determination.

**FINDINGS OF FACT**

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference filed by petitioner, Cliff Preefer, protesting a notice of determination, dated February 20, 2020, and bearing assessment identification number L-051275817 (notice). The notice is addressed to petitioner as an officer/responsible person of Sacred Chow, Inc.,<sup>1</sup> at an address in Brooklyn, New York. Under the heading, “EXPLANATION AND INSTRUCTIONS,” the notice states:

“To request a Conciliation Conference, complete the Request for Conciliation Conference (Form CMS-1) available at [www.tax.ny.gov](http://www.tax.ny.gov) or call us at (518) 457-3280.

To request a Petition for a Tax Appeals Hearing, complete form TA-10 available at [www.nysdta.org](http://www.nysdta.org) or call (518) 266-3000.

**NOTE: You must file the Request for Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 5/20/20** (emphasis in original).”

2. Petitioner filed a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request, signed by petitioner and dated June 9, 2020, was stamped as received by BCMS on June 10, 2020.

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<sup>1</sup> As president of Sacred Chow, Inc., petitioner also filed a separate but associated petition on the behalf of that entity. That matter has been issued DTA # 830095 and will be addressed in a separate determination.

3. On July 17, 2020, BCMS issued a conciliation order dismissing request (CMS 000320696) (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice 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 February 20, 2020, but the request was not received until June 9, 2020, or in excess of 90 days, the request is late filed.”<sup>2</sup>

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order. The petition is dated as signed by petitioner on October 15, 2020, was mailed via the United States Postal Service (USPS) Certified Mail on October 15, 2020, and is stamped as received by the Division of Tax Appeals on October 19, 2020.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affirmation of Aliza J. Keen, Esq., dated March 29, 2022; (ii) an affidavit, dated March 17, 2022, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a document entitled, in part, “CERTIFIED RECORD FOR PRESORT MAIL – ASSESSMENTS RECEIVABLE” (CMR) postmarked February 20, 2020; (iv) an affidavit, dated March 17, 2022, of Susan Ramundo, a supervisor in the Division's mail room; (v) a copy of the February 20, 2020 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on June 10, 2020; and (vii) a copy of petitioner's address summary from the Division's e-MPIRE database showing

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<sup>2</sup> The request for the BCMS conciliation conference at issue was date stamped as received by BCMS on June 10, 2020, not June 9, 2020, as indicated on the relevant conciliation order. Given that both dates fall beyond the 90-day threshold within which petitioner had to protest the notice, the discrepancy is deemed to be a typographical error and is of no consequence.

petitioner's address as updated via the USPS National Change of Address (NCOA) database, effective April 23, 2017, which lists the same Brooklyn, New York, address for petitioner as that listed on the notice. This address also matches the address listed on the petition and conciliation conference request, except that they lack the additional four zip code digits added to petitioner's five-digit zip code listed on the notice and NCOA database.

6. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. CARTS generates the CMR. Each page of the CMR lists an initial date ("run date") in the upper left corner 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 of the CMR in the present case to the actual mailing date of "2/20/20." In addition, as described by Ms. Picard, 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. 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 Departmental return address. 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 P.O. ADDRESS."

8. The CMR in the present matter consists of 29 pages and lists 317 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 29, which has 9 entries. 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.

9. A USPS representative affixed the USPS Colonie Center, New York, postmark, dated February 20, 2020, to the pages of the CMR, handwrote the number "317" on page 29, to the left of the heading "Total Pieces Received at Post Office," and initialed or signed page 29 of the CMR.

10. Page 13 of the February 20, 2020 CMR indicates that a notice with certified control number 7104 1002 9730 0109 9696 and reference number L-051275817 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. The CMR and the corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bear this same certified control number and petitioner's name and address, as noted.

11. The affidavit of Susan Ramundo describes the general operations and procedures within the Division's mail room. Ms. Ramundo has been in her position as a manager in the Division's mail room since 2017, has been employed in the mail room since 2012, and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "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. Staff members then weigh, seal and place postage on each envelope. A clerk checks the first and last pieces of mail against the information on the CMR. The clerk 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. 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. According to Ms. Ramundo, the affixation of the USPS postmark on each page of the CMR and the USPS employee's handwritten number "317" on the last page of the CMR, together with the employee's initialing of that page indicate that all of the 317 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on February 20, 2020.

12. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on February 20, 2020, as claimed.

13. Petitioner responded to the Division's motion by "affirmation"<sup>3</sup> and attached documents. Included in the attached documents was a copy of an email exchange between petitioner and a Division employee, Mr. Kazanjian, wherein they discuss how to properly file petitioner's BCMS request for conciliation conference. Petitioner's affirmation, and the

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<sup>3</sup> It is noted that only attorneys, physicians, osteopaths, dentists, or individuals physically located outside the United States are authorized to submit affirmations (*see* CPLR § 2106). It does not appear that Mr. Preefer satisfies any of these requirements.

corresponding documents, summarize particular challenges the COVID-19 pandemic placed on his ability to file said request.

### **CONCLUSIONS OF LAW**

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Because 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 section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination 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 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557 [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 Vil. of Patchogue Fire*

*Dept.*, 146 AD2d 572 [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*).

D. 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 (*see* 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).

E. 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 (*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).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on February 20, 2020. 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 the USPS NCOA database which satisfies the "last known address" requirement (*see Tax Law § 1138 [a] [1]*, *see also Snodgrass v Commr. of Internal Revenue*, T.C. Memo 2016-235, 112 T.C.M. 711 [2016]). The Division's proper issuance of the notice gives rise to a rebuttable presumption that the notice was received by the taxpayer in due course (*see Tax Law § 1147 [a] [1]*; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011). Petitioner made no assertion in either his request for a BCMS conference, or in his petition, that the notice was not received. Moreover, petitioner does not contend that the notice was improperly addressed, and confirms receipt of the notice (*see finding of fact 13*). Accordingly, with no claim and no evidence that the properly issued notice was not received, there is no basis upon which to conclude otherwise so as to rebut the presumption of receipt (*see Matter of T. J. Gulf v State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]). It is therefore concluded that the Division properly mailed the notice on February 20,

2020, 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 §§ 170 [3-a] [a]; 1138 [a] [1]). Petitioner's request for conciliation conference, filed on June 10, 2020, was thus untimely and properly dismissed by BCMS.

G. Petitioner convincingly asserts that his efforts to timely respond to the notice were severely hindered by the COVID pandemic and asks for that to be taken into account in determining the timeliness of the related filing. As a forum of limited jurisdiction, the Division of Tax Appeals has no flexibility with regard to the Tax Law's 90-day limitations period for protesting a notice (*see Matter of American Woodcraft*). Moreover, Executive Order 202.8, dated March 20, 2020, which provided relief from statutes of limitation in certain circumstances, does not apply here. That order provided, in relevant part, as follows:

*“In accordance with the directive of the Chief Judge of the State to limit operations to essential matters during the pendency of the COVID-19 health crises, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020 [emphasis added].”*

The italicized language of the Executive Order indicates that such provisions do not apply to the administrative procedures of the Division of Tax Appeals, as such procedures are not governed by the Chief Judge of the State (*see* Judiciary Law § 211; Tax Law §§ 2004, 2006).

H. Accordingly, the Division's motion for summary determination is granted, the petition of Cliff Preefer, is denied, and the July 17, 2020 conciliation order issued by BCMS is sustained.

DATED: Albany, New York  
August 25, 2022

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE