

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**COLLIE BREWER** : **ORDER**  
 : **DTA NO. 825818**  
for Revision of Determinations or for Refund of Sales and :  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period March 1, 2001 through May 31, 2007. :

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Petitioner, Collie Brewer, 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 period March 1, 2001 through May 31, 2007.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), brought a motion on July 2, 2014 seeking dismissal of the petition, or in the alternative, summary determination in its favor pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Anita Luckina, dated July 2, 2014, and annexed exhibits. On August 1, 2014, petitioner, appearing by Matthews and Grieco (Robert C. Grieco, Esq., of counsel) submitted the affirmation of Robert C. Grieco, Esq., and additional documents in opposition to the motion, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Taxation's motion to dismiss or, in the alternative, motion for summary determination should be granted.

***FINDINGS OF FACT***

1. On May 4, 2009, petitioner, Collie Brewer, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination numbers L-031602448, dated December 31, 2008, and L-031612153, dated March 5, 2009.<sup>1</sup> Petitioner's address as printed on his request is 11 Hudson Lane, Ulster Park, New York 12487.

2. Petitioner listed Henry A. Gleich, CPA, with an address of 144 Pine Street, Suite 210, Kingston, New York 12401, as his representative on his Request for Conciliation Conference.

3. In response to petitioner's request, BCMS issued to petitioner two conciliation orders dated February 5, 2010 and bearing CMS numbers 232285 and 232286. Each conciliation order recomputed the tax and interest on the statutory notices.

4. On August 1, 2013, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review notices of determination L-031602448 and L-031612153, as modified by conciliation orders numbers 232285 and 232286.<sup>2</sup> The envelope in which the petition was delivered to the Division of Tax Appeals bears a United States Postal Service

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<sup>1</sup> Copies of notices number L-031602448 and L-031612153 were not attached to the petition or request for conference. The latter document, however, identifies the dates of the notices as described in Finding of Fact 1.

<sup>2</sup> Initially, petitioner filed a combined petition with an associated company named Rondout Lift, Inc. On August 13, 2013, the petition was amended and divided into a separate case for each petitioner. Rondout Lift, Inc.'s case proceeded separately under DTA number 825852 and was the subject of a determination dated March 27, 2014 by the Division of Tax Appeals.

(USPS) postmark dated August 1, 2013.

5. On November 6, 2013, Daniel J. Ranalli, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that conciliation orders numbers 232285 and 232286 appeared to have been issued on February 5, 2010 and the petition appeared to have been filed on August 13, 2013, or 1,285 days later and was, therefore, untimely.<sup>3</sup>

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted documents in support of dismissal of the petition. Among the documents submitted was an eight-page Certified Mail Record (CMR) relevant to this matter attached to an affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS dated December 30, 2013 (First Farrelly Affidavit). The First Farrelly Affidavit adequately set forth the Division's general procedure for preparing and mailing conciliation orders. Mr. Farrelly also attested to the truth and accuracy of the copy of the attached CMR, which, according to Mr. Farrelly, contains a list of the conciliation orders issued by the Division on February 5, 2010.

7. Mr. Farrelly also made a point to attest to the issuance of one, rather than two conciliation orders to petitioner in the First Farrelly Affidavit. Similarly, he asserted that a copy of only one conciliation order was sent to Mr. Gleich, as petitioner's representative. In describing these mailings, Mr. Farrelly averred:

[i]n this case certified control number 7104 1002 9730 1776 0672 was used for the Conciliation Order mailed to Rondout Lift, Inc. and certified control number 7104

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<sup>3</sup> As noted in Finding of Fact 4, the petition actually was filed on August 1, 2013. August 13, 2013 is the date of amendment of the petition referenced in Footnote 2. This difference does not effect the result in this case.

1002 9730 1776 0634 was used for the copy of the Conciliation Order mailed to Henry A. Gleich. The CMS number is 232284.

8. Contrary to Mr. Farrelly's statement, on page six of the CMR, certified control number 7104 1002 9730 1776 0672 corresponds with the name and address of petitioner as set forth on his Request for Conciliation Conference, rather than those of Rondout Lift, Inc. The referenced certified control number also corresponds with CMS number 232286, not 232284, on the CMR.

9. The First Farrelly Affidavit did not mention the conciliation order issued under CMS number 232285. Likewise, there is no evidence of CMS number 232285 on the CMR attached to the First Farrelly Affidavit.

10. Based on these discrepancies, the Notice of Intent to Dismiss Petition was withdrawn by order of the Division of Tax Appeals dated March 27, 2014.

11. In support of the instant motion, the Division submitted another affidavit of Mr. Farrelly, dated July 1, 2014 (Second Farrelly Affidavit). The Second Farrelly Affidavit also sets forth the Division's general procedure for preparing and mailing conciliation orders and attests to the truth and accuracy of the copy of the CMR, which, according to Mr. Farrelly, contains a list of the conciliation orders issued by the Division on February 5, 2010.

12. The Second Farrelly Affidavit also contains the following statement:

[i]n this case certified control numbers 7104 1002 9730 1776 0665 and 7104 1002 9730 1776 0672 were used for the Conciliation Orders mailed to Collie Brewer and certified control numbers 7104 1002 9730 1776 0627 and 7104 1002 9730 1776 0634 were used for the copies of the Conciliation Orders mailed to Henry A. Gleich. The CMS numbers are 232285 and 232286.

13. The CMR attached to the Second Farrelly Affidavit is consistent with the statement referenced in Finding of Fact 12.

14. In the First Farrelly Affidavit, Mr. Farrelly stated that “[p]ortions of [the CMR] have been redacted to preserve the confidentiality of information relating to other taxpayers.” The taxpayer information adjoining certified control numbers 7104 1002 9730 1776 0665 and 7104 1002 9730 1776 0627 was redacted on the CMR attached to the First Farrelly Affidavit.

15. Nowhere in the Division’s motion papers, and in particular the Second Farrelly Affidavit, is there an explanation for the contradictions between the two Farrelly affidavits.

16. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. The 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 letters. A clerk then counts the envelopes and verifies the names and certified mail 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.

17. In this particular instance, according to Mr. Peltier, the postal employee affixed a postmark dated February 5, 2010 to each page of the eight-page CMR. On page eight, the postal employee also wrote his or her initials and the number “83” near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

18. Based upon his review of the Second Farrelly Affidavit, the exhibits attached thereto and the CMR, Mr. Peltier states that on February 5, 2010, an employee of the Mail Processing

Center delivered to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail 1) two pieces of certified mail to petitioner at his Ulster Park, New York, address; and, 2) two pieces of certified mail to Henry A. Gleich at his Kingston, New York, address. 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 February 5, 2010 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 his representative on February 5, 2010. Mr. Peltier does not identify the contents of the pieces of certified mail in his affidavit.

19. In opposition to the Division's motion, petitioner submitted his affidavit and that of Mr. Gleich. Both affiants state that they did not receive the conciliation orders in question. Petitioner also maintains that the First Farrelly Affidavit contradicts, without explanation, the Second Farrelly Affidavit.

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

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

The motion shall be granted if, upon all 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. The standard with regard to a motion for summary determination is well settled. A motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999). Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, *affd* 26 AD2d 729 [1966]). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from the undisputed facts, the motion must be denied (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

C. As petitioner correctly points out in the instant case, the Second Farrelly Affidavit directly contradicts certain material statements in the First Farrelly Affidavit. In particular, the First Farrelly Affidavit identifies that certified control number 7104 1002 9730 1776 0672 was used for a mailing to Rondout Lift, Inc., while the Second Farrelly Affidavit states that the same certified control number was associated with a mailing to petitioner. Similarly, the First Farrelly Affidavit identifies that certified control number 7104 1002 9730 1776 0634 was used for mailing an item associated with CMS number 232284 to Mr. Gleich, while the Second Farrelly

Affidavit states that this certified control number was associated with mailing an item associated with CMS number 232286. Furthermore, the First Farrelly Affidavit identifies certified control numbers 7104 1002 9730 1776 0665 and 7104 1002 9730 1776 0627 as having been redacted from the CMR because they contain information relating to other taxpayers, and not petitioner. Meanwhile, the Second Farrelly Affidavit identifies the same certified control numbers with mailings to petitioner and his representative. Critically, despite ample opportunity, Mr. Farrelly and Ms. Luckina fail to give any explanation in their affidavits for these discrepancies, which go to the heart of proper mailing of the conciliation orders at issue here. Unfortunately for the Division, the record contains two affidavits by the same affiant that directly and without explanation contradict each other. As a result, several triable issues of fact are, at a minimum, arguable, making summary determination inappropriate (*see* 20 NYCRR 3000.9[b][1]; *see also Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

D. The Division of Taxation's motion to dismiss the petition or for summary determination is denied, and a hearing in this matter will be scheduled in due course.

DATED: Albany, New York  
October 23, 2014

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE