

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EDELWEISS CATERING, INC.</b>	:	<b>ORDER</b>
	:	DTA NO. 825963
	:	
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 March 1, 2005	:	
through November 30, 2007.	:	

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Petitioner, Edelweiss Catering, 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 March 1, 2005 through November 30, 2007.

On February 21, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 26, 2014, petitioner, appearing by its president, Juergen Staeckeler, submitted a letter in opposition to dismissal. On April 8, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich, of counsel) submitted a letter, together with an affidavit and accompanying documents in support, agreeing with the proposed dismissal of the petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced May 7, 2014.<sup>1</sup> After due consideration of the documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following order.

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<sup>1</sup> By a letter dated March 19, 2014, the due date for the parties to submit responses to the Notice of Intent to Dismiss was extended until May 7, 2014.

**ISSUE**

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a Conciliation Order.

**FINDINGS OF FACT**

1. Petitioner, Edelweiss Catering, Inc., filed a petition with the Division of Tax Appeals. The petition, signed and dated October 30, 2013 by Juergen Staeckeler, references notice/assessment number L-031595923 and petitions for “reopening of conciliation order.” Page one of the petition lists petitioner’s name and address as follows:

Edelweiss Catering, Inc.  
Juergen Staeckeler  
2897 North Wading River Road  
Wading River, New York 11792

2. Page two, item six, of the petition, setting forth petitioner’s allegations of error and assertions of fact, provides:

Never received any documents of the conciliation order so I could not file a petition with Division of Tax Appeals.

According to New York State Taxation and Finance, all documents were returned to them, for wrong address. My mailing address is:

Edelweiss Catering  
PO Box 154  
Yaphank, New York 11980

I respectfully request reopening of the conciliation order, and a hearing before the New York State Division of Tax Appeals.

3. The envelope in which the petition was mailed bears a United States Postal Service (USPS) post mark dated October 31, 2013 and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on November 5, 2013. The return address on the

envelope is:

Edelweiss Catering  
PO Box 154  
Yaphank, NY 11980

4. Included with the foregoing petition was a cover letter and an accompanying Conciliation Order from the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division), both dated September 10, 2010. The cover letter is addressed to:

Edelweiss Catering, Inc.  
Wildwood Deli  
908 Main Street  
Yaphank, NY 11980

The cover letter references CMS No. 233008–Sales & Use Tax Period 3/1/05 - 11/30/07 and advises “Please take notice of the enclosed Conciliation Order.” The Conciliation Order itself (CMS No. 233008) is captioned as pertaining to Edelweiss Catering, Inc., and references the same tax (Sales and Use Tax per Tax Law Articles 28 & 29), tax period (3/1/05 - 11/30/07) and notice number (L-031595923) as are set forth on the petition. The Conciliation Order states that a conciliation conference was conducted on April 28, 2010, that petitioner appeared by Alvin Silverman, and that the request was denied and the statutory notice was sustained. The cover letter states that the Order will be binding unless a petition is filed with the Division of Tax Appeals within 90 days from the date of the Order. Finally, the cover letter indicates that a copy was being sent to:

Alvin Silverman, CPA  
One Beatrice Lane  
Glen Cove, NY 11542-1201.

5. On February 21, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, advising the parties that the Conciliation Order appeared to have been issued on September 10, 2010, the petition was not filed thereafter until October 31, 2013, or some 1,147 days later, and therefore was untimely and subject to dismissal. The parties were afforded 30 days within which to submit comments on the proposed dismissal of the petition. By a letter dated March 19, 2014, the Division's request for an extension of the time within which to respond was granted and thereby extended to May 7, 2014.<sup>2</sup>

6. To show proof of proper mailing of the Conciliation Order on September 10, 2010, the Division provided the following: (i) an affidavit, dated April 7, 2014, of Leo Gabovich, Law Clerk; (ii) an affidavit, dated March 24, 2014, of Robert Farrelly, the Assistant Supervisor of the BCMS; (iii) an affidavit, dated March 26, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) the "Certified Record for Presort Manual Mail - BCMS Cert. Letter" (CMR); and (v) a copy of petitioner's Request for Conciliation Conference (Request), the Notice of Determination being challenged via the Request, and the Conciliation Order and cover letter issued in response thereto.

7. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Management Services Unit prepared and forwarded the conciliation orders, together with their accompanying cover letters, to the

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<sup>2</sup> Consistent with the advice and information set forth in the petition, the Notice of Intent to Dismiss Petition as well as the letter extending the parties' time to respond thereto were addressed by the Division of Tax Appeals to: Edelweiss Catering, Inc., Attn: Juergen Staeckeler - President, PO Box 154, Yaphank, NY, 11980.

particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

8. 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), which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

9. The BCMS clerk's regular duties included associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The run of orders to be mailed, denominated "Total Pieces and Amounts," is indicated on the last page of the CMR, along with the preprinted heading "Total Pieces Received at Post Office." The BCMS clerk is directed to stamp the bottom left corner of the last page of the CMR "MAIL ROOM: RETURN LISTING

TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT”, and to stamp the bottom right corner of the last page “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.” The clerk then inserts on the top of each page of the CMR the date that the conciliation orders were mailed.

10. In this instance, certified control number 7104 1002 9730 0173 1237 was assigned to the conciliation order to be mailed to petitioner, Edelweiss Catering, Inc., and certified control number 7104 1002 9730 0173 1145 was assigned to the conciliation order to be mailed to petitioner’s representative, Alvin Silverman, CPA. The CMS reference number is, in each instance, 000233008. The foregoing information appears on page three of the six-page CMR pertaining to these mailings. Petitioner’s address is listed as Edelweiss Catering, Inc., Wildwood Deli, 908 Main Street, Yaphank, NY, 11980, and the address One Beatrice Lane, Glen Cove, NY, 11542-1201 is listed for petitioner’s representative, Mr. Silverman. The date “09/10/10” is handwritten in the upper right corner of each of the six pages of the CMR, signifying the date on which the conciliation orders set forth on the CMR were mailed.

11. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for correction and issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

12. The CMR in this case reflects that four pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office

(*see* Finding of fact 13). The specific pulled items appear on pages two (one item), three (two items) and six (one item), and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listings pertaining to petitioner and to petitioner's representative.

13. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center (mail room), describes the mail room's general operations and procedures. The mail room receives the items to be mailed in an area designated for "Outgoing Certified Mail." A staff member retrieves the windowed envelopes, containing the cover sheet, covering letter and conciliation orders to be mailed, and then weighs, seals and affixes postage and fee amounts on each envelope. A clerk counts the envelopes and verifies the names and certified mail numbers on 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 signature or initials on the CMR, indicating receipt by the post office. In this case, the USPS employee affixed a postmark dated September 10, 2010 and initialed each page of the CMR. The Center 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 last page of the CMR. Here, the USPS employee complied with this request by crossing out the preprinted number 64, as appearing next to the heading "Total Pieces and Amounts," and thereafter both wrote and circled the number "60" on the last page next to the heading "Total Pieces Received at Post Office." This change was made to reflect that four pieces of certified mail had been "pulled" from that particular run, as described.

14. 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 Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

15. The facts set forth above in Findings of Fact 7 through 14 were, as noted, established through the affidavits of Robert Farrelly and Bruce Peltier, as well as the documentary evidence presented by the Division. Mr. Farrelly's affidavit avers that he is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of conciliation orders by BCMS for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavit avers that he has been a supervisor in the Division's mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the past and present operations and procedures concerning the mailing of conciliation orders.

16. The record includes a copy of the conciliation order, bearing CMS No. 233008, allegedly mailed by certified mail to petitioner, Edelweiss Catering, Inc., as well as to petitioner's representative, Alvin Silverman, CPA, on September 10, 2010. The record also includes a copy of petitioner's Request for Conciliation Conference, dated May 6, 2009. Included with the Request was a copy of the Notice of Determination (Assessment ID No. L-031595923), dated March 2, 2009, being challenged by the Request. Each of these items, as well as the envelope in which they were mailed to BCMS, is date stamped as received by BCMS on May 28, 2009. The Request and the Notice of Determination list petitioner's address as Edelweiss Catering, Inc., Wildwood Deli, Main St. Yaphank, N.Y., 11980. This address differs from that set forth on the

cover letter accompanying the Order and on the CMR, in that it does not include the number 908 preceding Main Street (*see* Findings of Fact 4 and 10).

17. The Request form includes, at item two thereof, the heading “Change of Address, if applicable,” followed by spaces to provide a new or changed address. While the balance of items on the Request form were completed, Item two pertaining to a change of address was left blank. The Request, as well as the return address portion of the envelope in which the Request was mailed to BCMS, list the same address for petitioner’s representative is set forth above at Finding of Fact 4 (to wit, Alvin Silverman, CPA, 1 Beatrice Lane, Glen Cove, N.Y., 11542-1201).

18. The area where the printed address for petitioner appears on page three of the CMR (*see* Finding of Fact 10) includes the following handwritten note:

“9/20/10 Order Returned ‘not deliverable’. Remail to address correction on envelope.”

Mr. Farrelly’s affidavit states that BCMS mailed a copy of the Conciliation Order to petitioner by regular mail, in accordance with BCMS’ policy to remail by regular mail any orders returned by the USPS.

19. In response to the Notice of Intent, petitioner submitted a photocopy of Page two of the petition (*see* Finding of Fact 2).

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

A. There is a 90-day statutory time limit, measured from the issuance of a conciliation order, for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond such 90-day statutory time limit (*see Matter of Sak Smoke*

*Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review. Accordingly, the instant matter shall be treated as a motion for summary determination.

C. 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]).

D. Section 3000.9(c) of the Rules of Practice and Procedure 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 v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [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 [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, 448-449 [1992] citing *Zuckerman* at 562).

E. Where, as here, the timeliness of a petition challenging a conciliation order is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the conciliation order by mailing the same, by certified or registered mail, to petitioner’s last known address (20 NYCRR 4000.7[c][6]; see *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A conciliation order is issued when it is properly mailed, and it is properly mailed when it is delivered, properly addressed, into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a conciliation order, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of [a conciliation order] by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; see *Matter of Katz*).

When an order is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

F. In this case, through the affidavits of Robert Farrelly and Bruce Peltier, the Division has established a standard mailing procedure and through the same affidavits and the CMR has shown that the subject Order was in fact mailed as claimed on September 10, 2010. However, there remains the question of whether the Order issued to petitioner was *properly* mailed. This question, in turn, distills specifically to whether the Order was mailed to petitioner at its last known address, as is required in order to effect proper mailing. Here, the record does not establish that the Order was mailed to petitioner's last known address.

G. The phrase "last known address," for purposes of the Division's issuance of statutory notices carrying with them the right to a hearing, has been defined and consistently interpreted to mean "the address given in the last return filed by [the taxpayer] . . . or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." (*see* Tax Law § 1147[a][1]; *Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012, *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). Thus, a taxpayer's last known address is that provided to the Division by the taxpayer through its own filings or applications, or if there were no filings or applications, then such address as the Division may obtain through other means, methods, or efforts undertaken with reasonable diligence (*id.*).

H. As explained, the Division is held to the initial standard of using the address supplied to it by the taxpayer. In this case, the record does not include any tax returns filed by petitioner, which would typically be the starting point for discerning petitioner's address. However, the record does include the Notice of Deficiency issued to petitioner by the Division. The address utilized by the Division on the notice specifies only "Main Street" but does not bear any street number. The next filing was petitioner's Request. This form, supplied to petitioner by the Division carried on it a preprinted address for petitioner that, like the notice, specified only "Main Street" but without any street number. Petitioner returned this Request to the Division (BCMS), apparently in a timely manner. Though afforded the opportunity to change, update or clarify its address as set forth on the Request (e.g., by adding a street number), petitioner clearly did not do so (*see* Finding of Fact 17). Thus, the address supplied to the Division by petitioner (or at a minimum found and used by the Division in view of the address set forth on the Notice of Determination and preprinted on the Request form and left unchanged by petitioner) did not include the number "908." On these facts, then, petitioner's "last known address," as set forth on petitioner's own then most-recent filing, was simply "Main Street," and the Division thus was obligated to either use this address, or furnish some explanation as to why it deviated therefrom.

I. At some point, and for reasons unknown, the Division added the street number 908 as a part of petitioner's address.<sup>3</sup> The record includes no evidence or explanation as to why the Division, apparently unilaterally changed petitioner's address, as set forth and utilized in prior

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<sup>3</sup> Paragraph five of the Division's affidavit in support of dismissal erroneously states that the address appearing on the Division's proof of mailing, including specifically on the cover letter accompanying the Order and on the CMS, is the same as the address appearing on the Request, Notice of Determination and Petition. In fact, the number "908" appears only on the cover letter and the CMS, and is not present on any of the latter three documents.

mailings, by adding the number 908. While the addition of a street number might or might not make for a “better,” “more proper” or “more accurate” address depending upon the particular circumstances, the Division’s obligation of mailing to the taxpayer’s last known address remains. There are any number of possible reasons why the Division might have added the street number, including oral advice provided by the taxpayer or its representative at conference or at some other point in time, or via written communication, or as the result of the Division’s own investigation or other initiative. Nonetheless, there is no basis or explanation in support of such addition set forth in the record, and simply accepting that the addition of a street number, as here, resulted in a “better” or “more correct” address, would constitute a conclusion premised solely on speculation. While it is likely that the Division would seek to ascertain the most correct address for a taxpayer so as to maximize the probability of proper delivery, such well-intentioned likelihood is insufficient to countenance the unilateral addition of information (here a street number) to an address without some explanation of the basis for doing so, or to dismiss the same as merely inconsequential error.<sup>4</sup>

J. Under the foregoing circumstances, the Division cannot be said to have mailed the Order to petitioner’s last known address, and thus the Order was not properly mailed as required (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1999). In turn, without proper mailing

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<sup>4</sup> In reaching this result, cognizance is given to Domestic Mail Manual 600 (Mailing Standards of the USPS), 602 (1.3) (Address Elements) and (1.4.2[c]) (Complete Address Elements) regarding the inclusion of a secondary address unit designator (such as a street, apartment, unit or suite number) as a required element of an address *as applicable*. However, and noting that the source of the address appearing on the Notice of Deficiency and pre-printed on the Request was not specified in the record, there remains no evidence that a street number was supplied by petitioner (including by correction on the Request form notwithstanding the clear opportunity to do so), and the Division has not provided any explanation or reason for its addition of the number “908” as part of petitioner’s address.

the 90-day period for filing a petition is tolled until such time as petitioner actually received notice of the Order (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]). Petitioner has denied receipt of the Order. While the record includes evidence establishing the mailing of the Order, the same was not effected as a proper mailing, as explained. In turn, with no evidence of delivery of the Order to petitioner (e.g., a USPS delivery record for certified mail showing delivery, or any information concerning attempts at delivery), nor any evidence (including any admission by petitioner) of any particular date on which petitioner received actual notice of the Order, it cannot be concluded that the petition was not timely filed (i.e., filed with the Division of Tax Appeals within 90-days of receipt of actual notice of the Order).<sup>5</sup> Accordingly, the petition is deemed to have been timely filed (within 90 days of actual receipt of notice thereof), and the Notice of Intent to Dismiss petition is properly rescinded.

K. The Notice of Intent to Dismiss Petition issued to Edelweiss Catering, Inc., dated February 21, 2014, is hereby rescinded and the Division of Taxation shall have 75 days from the date of this Order to file its answer in this matter.

DATED: Albany, New York  
July 31, 2014

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>5</sup> Item seven of the petition states that the Order was issued on 9/10/10. This statement is accurate as to the date of mailing, but does not establish that the Order was “properly” issued, a matter placed in question by petitioner’s denial of receipt and subject to being proven by the Division via proof of “proper” mailing.

