

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:
of	:
<b>BEAVER STREET PIZZA, LLC</b>	:
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 of August 31, 2015 through May 31, 2018.	:

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ORDER  
DTA NO. 830580

Petitioner, Beaver Street Pizza, LLC, 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 periods August 31, 2015 through May 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), brought a motion on April 15, 2022, seeking to have the petition dismissed or, in the alternative, granting summary determination in the above-captioned matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Weinberg Law Firm, P.A. (John Weinberg, Esq., of counsel), upon extension, filed a response to the motion. The 90-day period for issuance of this order began on June 14, 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 order.

***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 Division of Taxation (Division) brought a motion dated April 15, 2022, for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner, Beaver Street Pizza, LLC's protest of a notice of determination in a bulk sale case dated June 11, 2019, bearing audit case number X-188170506 and containing assessment numbers L-050005475, L-050005476, L-050005477, L-050005478, L-050005479 (notice). The notice is addressed to both petitioner and "LALITHARUBEN SINGARASAN" at an address in Manhattan, New York.

2. On June 5, 2021, petitioner mailed a request for conciliation conference to the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On July 2, 2021, BCMS issued a conciliation order dismissing request, CMS No. 000330330 (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 June 11, 2019, but the request was not mailed until June 5, 2021, or in excess of 90 days, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on August 16, 2021.

5. In support of the motion and to show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to on April 12, 2022, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Non-Presort Manual Mail – Assessment Receivable" (CMR) postmarked June 11,

2019; (iii) an affidavit, sworn to on April 14, 2022, of Susan Ramundo, a manager in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; (v) an affirmation of Elizabeth Lyons, Esq., the Division's representative in this matter, dated April 15, 2022; and (vi) a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return, form ST-100, for the period of December 1, 2018 through February 28, 2019, filed on March 20, 2019, which, according to the Lyons affirmation, was the last return filed with the Division before the notice was issued. The names<sup>1</sup> and address on the return list the same names and Manhattan, New York, address as listed on the notice.

6. The affidavit of Deena Picard, who has been in her current position since February 2006, and Acting Director since May 2017, 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 from CARTS and are 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 page 3 of the CMR in the present case to the actual mailing date of "6-11." In addition, as described by Ms. Picard, 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

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<sup>1</sup> Petitioner's name as well as the name "LALITHARUBEN SINGARASAN."

mailing address and the Departmental return address on the front, and 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 ADDRESSEE, STREET, AND PO ADDRESS."

8. Ms. Picard avers that the CMR for the batch of notices to be issued on June 11, 2019, including the notice addressed to petitioner, consists of one cut sheet page. Ms. Picard states that this is because the notices set forth on this one-page CMR were selected for manual review and all notices targeted for manual review are printed in one run. Each unit within the Division that has notices selected for manual review receives a separate and complete CMR for its manual review notices.

In this case, the notices selected for manual review by the Civil Enforcement-District Office unit were printed on Page 3 of the run. The CMR for these notices indicates "Non-Presort Manual Mail" in its title so that the two certified mail items listed on page 3, which includes the notice addressed to petitioner, could be pulled for manual review prior to mailing. Ms. Picard states that "In this case, the certified mail was not pulled for manual review." Ms. Picard notes that the copy of page 3 of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to the taxpayer who is not involved in this proceeding.

9. Page 3 of the CMR indicates that a notice with certified control number 7104 1002 9730 0384 0371 and reference number X-188170506 was mailed to petitioner at the Manhattan,

New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 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. Ms. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the information 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 CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of June 11, 2019. The one-page CMR in this case lists two certified control numbers along with corresponding assessment numbers, names and addresses. On this same page, the postal service clerk wrote and circled “2” on the page next to the box titled “POST OFFICE Hand write total # of pieces and initial,” to indicate 2 pieces of mail were received by the USPS. There is also a set of initials or a signature on page 3 of the CMR.

11. According to the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on June 11, 2019, as claimed.

12. Petitioner filed a response in opposition to the Division's motion on June 13, 2022. In its response, petitioner advances two arguments. First, it asserts that it is not liable for the assessments because it did not acquire the assets of another entity, Manhattan's Best Pizza, in a bulk sale. Second, it argues that it did not receive the notice. Petitioner's response also includes an affidavit from Dipak Banik, who identifies himself as a member of Beaver Street Pizza, LLC and an affidavit from Vasanthakumaran Selvarajah, who identifies himself as a member of Manhattan's Best Pizza.

### ***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 (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order, 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 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]). 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 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*).

C. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. 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 the 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).

D. Where, as here, the timeliness of a request for conciliation conference 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).

E. The Division has failed to offer sufficient proof to establish the fact and date of the mailing of the statutory notice to petitioner's last known address on June 11, 2019. Though the Picard affidavit shows proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, it fails to show proof that the standard procedure was followed in this particular instance and in fact, shows that the standard procedure was not followed in this particular instance. Ms. Picard states that the CMR for the batch of notices to be issued on June 11, 2019, including the notice addressed to petitioner, consists of one cut sheet page because when units within the Division have mail selected for manual review, they receive a separate and complete CMR for their manual review notices. Ms. Picard also states that all notices targeted for manual review are printed in one run. These statements appear to establish that the standard procedure of the mail room is to manually review



all notices printed on these separate and complete unit CMRs that are designated for manual review. However, Ms. Picard later states that “In this case, the certified mail was not pulled for manual review.” This statement seems to indicate that the standard procedure established by Ms. Picard’s earlier statements was not followed in this particular instance. This discrepancy is further compounded by the affidavit of Ms. Ramundo, who states that the first and last pieces of mail are checked against the information on the CMR. As this separate and complete CMR contains only two pieces of mail, it would appear that these notices would represent both the first and last pieces of mail and would have been checked, contrary to Ms. Picard’s statement that the mail was not pulled for manual review in this case. The affidavits of Ms. Picard and Ms. Ramundo do not offer any clarification for this apparent contradiction. Thus, there remains a material issue regarding the fact and date of the mailing to petitioner’s last known address because the Division failed to show proof that the standard mailing procedure was followed in this particular instance. Where material facts are in dispute, summary judgement is improper.

F. Accordingly, the Division of Taxation’s motion for dismissal of the petition, or in the alternative, for summary determination in its favor, dated April 15, 2022, is denied and a hearing on the merits of the case will be scheduled in due course.

DATED: Albany, New York  
September 08, 2022

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE