

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PRIMA PASTA &amp; CAFE, INC.</b>	:	DETERMINATION
		DTA NO. 816693
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, 1993 through August 31, 1996.	:	

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Petitioner, Prima Pasta & Cafe, Inc., 161 50B Cross Bay Boulevard, Howard Beach, New York 11414-3441, 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, 1993 through August 31, 1996.

On November 20, 1998, the Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Margaret T. Neri, Esq., of counsel) filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for a conciliation conference within 90 days of the issuance of a notice of determination. Petitioner, appearing by Richard F. Ambrosio, CPA, did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on December 20, 1998, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents

submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference within 90 days after the issuance of a notice of determination.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to Prima Pasta & Cafe, Inc. (“petitioner”), a Notice of Determination dated January 12, 1998 which was addressed to petitioner at “161 50B Cross Bay Blvd, Howard Beach, NY 11414-3441.” The notice bears assessment identification number L-014573437-4, and the covering letter, also dated January 12, 1998, contains certified control number P 911 002 248. The notice asserted a total amount due of \$89,546.18 which consisted of tax due in the amount of \$50,838.17, plus penalty of \$15,992.81 and interest of \$22,715.20.

A copy of the Notice of Determination was issued to petitioner’s former representative, Irving Baum, at 1931 E 27<sup>th</sup> Street, Brooklyn, NY 11229-2536, on January 12, 1998. The covering letter, also dated January 12, 1998, contained certified control number P 911 170 796.

2. Petitioner’s former representative, Irving Baum, filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the January 12, 1998 Notice of Determination. The request, dated April 12, 1998 and signed by Mr. Baum, was received by BCMS on April 20, 1998.<sup>1</sup>

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<sup>1</sup>Both the affidavit of the Division’s representative, Margaret T. Neri, and the Conciliation Order Dismissing Request indicate that the request was mailed on April 15, 1998. However, the postmark on the copy of the envelope which was attached to the Division’s motion papers as Exhibit “6” is illegible.

3. On May 8, 1998, BCMS issued a Conciliation Order Dismissing Request (CMS No. 167786) which 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 was issued on January 12, 1998, but the request was not mailed until April 15, 1998, or in excess of 90 days, the request is late filed.”

4. In support of its motion for summary determination, the Division submitted: its answer to the petition; an affidavit of its representative, Margaret T. Neri, Esq.; the affidavits of Geraldine Mahon and James Baisley, employees of the Division; a copy of two of the Division’s certified mail records for January 12, 1998; a copy of the Notice of Determination issued to petitioner; a copy of the Notice of Determination issued to petitioner’s former representative; and a copy of the envelope which contained petitioner’s Request for Conciliation Conference.

5. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division’s general procedure for processing notices of deficiency and determination prior to shipment to the Division’s mechanical unit for mailing.

She explained that she receives a computer printout or certified mail record (“CMR”) and the corresponding statutory notices, each predated with the anticipated date of mailing and each notice assigned a certified control number. The CMR for the block of notices issued on January 12, 1998, including the notice issued to petitioner, consisted of 51 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service (“USPS”). The pages remain connected when the CMR is returned to Ms. Mahon’s office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on January 12, 1998, including the notice issued to petitioner, bears certified control numbers which run consecutively. Each page contains 11 entries, with the exception of the last page (page 51) which contains 4 entries.

In the upper left hand corner of page 1 of the CMR, the date "01/01/98" was manually changed to "1/12/98." The original date of "01/01/98" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "01/01/98" to "1/12/98" was made by personnel in the Division's Mail Processing Center. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative initialed page 51 of the CMR, affixed a postmark to each page of the CMR and circled "554" to indicate that the total number of pieces listed on the CMR was the total number of pieces received and mailed.

Page 23 of the CMR indicates that a Notice of Determination, with notice number L 014573437, was sent to Prima Pasta & Cafe, Inc., 161 50B Cross Bay Blvd., Howard Beach, NY 11414-3441, by certified mail using control number P 911 002 248. A U.S. postmark on each page of the CMR indicates a date of January 12, 1998.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on January 12, 1998.

6. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to indicate the total number of pieces received by either circling the number of pieces received or writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the

following day by a member of the staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch office of the USPS by the Mail Processing center staff on January 12, 1998. The review confirmed that a USPS employee initialed page 51 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 554 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit, and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered a piece of certified mail addressed to Prima Pasta & Cafe, Inc., 161 50B Cross Bay Blvd., Howard Beach, NY 11434-3441, to the Colonie Center branch of the USPS in Albany, New York in a sealed, postpaid windowed envelope for delivery by certified mail. Based upon his review of the CMR, he could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on January 12, 1998 for the records of the Division's CARTS Control Unit. Mr. Baisley stated that these procedures which were described in his affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed on January 12, 1998.

7. With respect to the copy of the Notice of Determination which was sent by the Division to petitioner's former representative, Irving Baum, the Division submitted affidavits of Geraldine

Mahon and James Baisley along with portions of the CMR which contained the notice sent to Mr. Baum.

The affidavit of Geraldine Mahon again set forth the procedures employed by the Division's CARTS Control Unit (*see*, Finding of Fact "5") which Ms. Mahon states were also followed in the Division's mailing of a copy of petitioner's notice to Mr. Baum. In this instance, the CMR for the block of notices which included the one sent to Irving Baum consisted of 88 fan-folded pages. Attached to Ms. Mahon's affidavit were pages 1, 10, 20, 30, 40, 50, 60, 70, 80 and 88 of the CMR. The certified control numbers run consecutively. Each page consists of 11 entries, with the exception of the last page which contains 7 entries (the total number of entries would, therefore, be 964).

As was the case with the CMR for the block of notices which included the notice issued to petitioner (*see*, Finding of Fact "5"), in the upper left hand corner of page 1 of the CMR, the date "01/01/98" was manually changed to "1/12/98." The USPS representative initialed page 88 of the CMR, affixed a postmark to each page and circled "964" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 72 of the CMR indicates that a Notice of Determination, with notice number L 014573437, was sent to "Baum-Irving, 1931 E 27 St., Brooklyn, NY 11229-2536," by certified mail using control number P 911 170 796.<sup>2</sup> A U.S. postmark on each page of the CMR indicates a date of January 12, 1998.

8. The affidavit of James Baisley again set forth the procedures employed by the Division's Mail Processing Center (*see*, Finding of Fact "6") which Mr. Baisley states were also

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<sup>2</sup>This control number appears on the covering letter which accompanied the Notice of Determination sent to Irving Baum.

followed with respect to the copy of the notice sent to petitioner's former representative, Irving Baum. Based upon his review of Ms. Mahon's affidavit, including the exhibits attached to the affidavit (the CMR and the copy of the notice), and his personal knowledge of the procedures of the Mail Processing Center, Mr. Baisley was able to determine that an employee of the Mail Processing Center delivered a piece of certified mail addressed to Baum-Irving, 1931 E 27 St., Brooklyn, NY 11229-2536, to the Colonie Center branch of the USPS in Albany, New York in a sealed, postpaid windowed envelope for delivery by certified mail. In addition, a member of his staff obtained a copy of the CMR (containing the notice issued to Mr. Baum) delivered to and accepted by the USPS on January 12, 1998 for the records of the CARTS Control Unit.

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

A. 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]).

B. Here, petitioner did not respond to the Division's motion; it is, therefore, deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Since petitioner presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170,173).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return when



filed is incorrect or insufficient. Pursuant to such section, the determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation’s Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] 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.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice 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 (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and James Baisley (Chief Mail Processing Clerk in the Division's Mail Processing Center) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the Notice of Determination and the certified mail record submitted as evidence of actual mailing of the notice to petitioner. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner. Petitioner's name and address appear on page 23 of the CMR which bears a USPS postmark of January 12, 1998. There are 554 certified control numbers listed on the 51 pages of the CMR and the USPS employee who initialed the CMR on the last page thereof indicated that he or she received 554 items for mailing. The covering letter which accompanied the Notice of Determination contained the same certified control number (P 911 002 248) which was set forth on the CMR. The Division has, therefore, established that it mailed the Notice of Determination to petitioner, by certified mail, on January 12, 1998. Accordingly, the 90-day period for the filing of petitioner's Request for Conciliation Conference commenced on January 12, 1998; official notice is taken that such 90-day period expired on April 12, 1998.

F. As indicated in Findings of Fact "7" and "8", the Division also submitted, as part of its motion papers, affidavits of Geraldine Mahon and James Baisley along with a CMR and a copy of the Notice of Determination, in support of its position that it also mailed a copy of the Notice of Determination to petitioner's former representative, Irving Baum. While the Tax Law does

not specifically provide for the service of a statutory notice on a taxpayer's representative, case law has held that the 90-day period for filing a petition (or request for conciliation conference) is tolled if the taxpayer's representative is not served with the statutory notice (*Matter of Multi Trucking, Inc.*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v. Frank*, 43 NY2d 162, 401 NYS2d 29).

The affidavits of Geraldine Mahon and James Baisley, the CMR which contained the notice sent to Irving Baum and the copy of the notice and covering letter sent to Mr. Baum provide sufficient proof that a copy of the Notice of Determination was sent to petitioner's former representative. The affidavits describe the procedures employed and attest to the authenticity and accuracy of the copy of the notice as well as the CMR which included the notice sent to Mr. Baum. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice mailed to Mr. Baum. Irving Baum's name and address appear on page 72 of the CMR which bears a USPS postmark of January 12, 1998. There are 964 certified control numbers listed on the 88 pages of the CMR and the USPS employee who initialed the CMR indicated that he or she received 964 items for mailing. The covering letter which accompanied the Notice of Determination contained the same certified control number (P 911 170 796) as was set forth on the CMR. The Division has, therefore, established that on January 12, 1998, it mailed to petitioner's then representative, by certified mail, a copy of the Notice of Determination which it issued to petitioner. As a result, the 90-day period for the filing of a request for conciliation conference was not tolled and such request had to have been filed by petitioner on or before April 12, 1998.

G. As indicated in Finding of Fact “2”, the Request for Conciliation Conference filed on behalf of petitioner by Irving Baum was dated April 12, 1998, but was not received by BCMS until April 20, 1998. While both the affidavit of Margaret T. Neri, Esq. (the Division’s representative) and the Conciliation Order Dismissing Request state that the request was mailed on April 15, 1998, the postmark on the copy of the envelope which was attached to the Division’s motion papers is illegible.

As indicated in Conclusion of Law “F”, the 90-day period for the filing of the request for a conciliation conference expired on April 12, 1998. However, official notice is taken that in 1998, April 12<sup>th</sup> fell on a Sunday. Accordingly, the last day within which petitioner could timely file its request was April 13, 1998 (General Construction Law § 20).

If, as maintained by the Division (in the affidavit of Margaret T. Neri, Esq. and in the Conciliation Order Dismissing Request), petitioner’s request was mailed on April 15, 1998, it was, clearly, untimely. However, since the U.S. postmark on the copy of the envelope containing petitioner’s request is illegible, it is the Division’s regulations which must be consulted herein.

20 NYCRR 4000.7(a)(2)(iii)(a) provides that if the postmark made by the United States Postal Service on the envelope or wrapper containing the document is not legible, the provisions of 20 NYCRR 4000.7(c) apply. This regulation states that in such case, the document:

must be received not later than the time when an envelope or wrapper which has sufficient postage prepaid and is properly addressed, mailed and sent by the same class of mail would ordinarily be received at the address designated . . . if it were postmarked at the same point of origin by the United States Postal Service on the last day of the prescribed period or on the prescribed date for filing.

The regulation further provides that, in a case where the document is received *after* the prescribed date for filing, the document will be treated as having been received at a time when a

document so mailed and postmarked would ordinarily have been received, if the person who is required to file the document establishes:

- (i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing or paying;
- (ii) that the delay in receiving the document or payment was due to a delay in the transmission of the mail; and
- (iii) the cause of the delay (20 NYCRR 4000.7[b][2]).

In *Matter of Harron's Electric Service, Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal, citing subdivision 2 of section 2103 of the Civil Practice Law and Rules which recognizes five days as the ordinary time of mailing, stated that “[f]ive days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service.”

In the present matter, if petitioner mailed the request for conciliation conference on the last day (April 13, 1998), it should have been received by BCMS within 5 days, or on or before April 18, 1998. However, it was not received until April 20, 1998 (*see*, Finding of Fact “2”). Petitioner offered no evidence as to the actual date on which the request was deposited in the mail or as to any delay in transmission of the mail or reasons therefore as required by the provisions of 20 NYCRR 4000.7(b)(2). Petitioner did not respond to the Divisions’s motion in any respect. Therefore, it must be found that petitioner’s request for a conciliation conference was untimely and, as such, the Division of Tax Appeals does not have jurisdiction to entertain the merits of petitioner’s case. Accordingly, the Division’s motion for summary determination must be granted.

H. The petition of Prima Pasta & Cafe, Inc. is dismissed.

DATED: Troy, New York

March 4, 1999

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE