

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KHAYER KAYUMI	:	
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 Ended June 30, 2010 and December 20, 2010.	:	DECISION DTA NO. 825953

Petitioner, Khayer Kayumi, filed an exception to the determination of the Administrative Law Judge issued on April 21, 2016. Petitioner appeared by Mumtaz Alvi, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel). In a decision dated July 14, 2017, this Tribunal remanded the matter for a hearing (or submission in lieu thereof) and the issuance of a supplemental determination limited to the issues delineated in our decision.

A hearing on remand was held before the Administrative Law Judge on January 25, 2018, and a supplemental determination was issued on November 29, 2018. This Tribunal retained jurisdiction over petitioner's original exception during this process. Petitioner was granted until December 29, 2018 to make additional filings in response to the supplemental determination, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner filed a timely request for conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services (BCMS), such that the Division of Tax Appeals has jurisdiction to address the substantive issues set forth by the parties.

II. Whether, if so, petitioner is liable for sales tax due on the transfer of tangible personal property, consisting of furniture, fixtures and equipment, based on the amounts he paid for the purchase or transfer of such tangible personal property.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge on remand.¹ These facts are set forth below.

1. BK Inner City Chicken, Inc. (the seller), operated Popeye's Chicken & Biscuit (Popeye's Chicken) located at 290 Livingston Street, Brooklyn, New York.

2. On December 31, 2010, the Division of Taxation (Division) received a notification of sale, transfer or assignment in bulk (notification) regarding the proposed sale of Popeye's Chicken on January 10, 2010 for \$160,000.00. The notification included a copy of the agreement of sale (agreement) and a rider to the agreement (rider) wherein petitioner agreed to purchase the business assets, inventory, accounts receivable and goodwill of Popeye's Chicken for \$160,000.00. The agreement states that the consideration was due at the time of the closing, but that the details of the disbursement of funds were set forth in the rider. With regard to the disbursement of funds, the rider provides that the \$160,000.00 consideration was to be disbursed

¹ In our July 14, 2017 decision, this Tribunal found the facts as set forth in the determination dated April 21, 2016, except that certain findings of fact (numbered 2, 6, 8, 10, 14 and 15) were modified and additional findings of fact, numbered 16 through 19, were made. The Administrative Law Judge, in his determination on remand, set forth the findings of fact in this Tribunal's July 14, 2017 decision and followed the same with additional findings of fact, numbered 20 through 31, based on the existing record and the record on remand.

as follows: (1) a down payment of \$80,000.00 in the form of a certified check made payable to the seller at the time of signing the agreement and rider, with the seller having the option of requesting that the check be made out to "New York State sales tax;" (2) a payment of \$20,000.00 in the form of a certified check made payable to a creditor of the seller at the closing; and (3) the balance of \$60,000.00 to the seller in monthly payments of \$2,000.00 each for a period of 30 months. The agreement, by its terms effective as of September 20, 2010, was signed by the seller on October 30, 2010 and by petitioner on December 1, 2010. Neither the agreement nor the rider mentioned any franchise related to the business. Thus, the agreement did not require the franchisor's approval of the purchaser.

3. The rider was also signed by the seller on October 30, 2010 and petitioner on December 1, 2010. The first paragraph of the rider provided, in part:

"At the time of the signing of the contract, the Purchaser shall pay to the Seller by Certified Check an amount of \$80,000 However, at seller's request, such check may be made payable to the New York State Sales Tax Department which shall be applied towards payment of sales tax due by the seller. Seller shall immediately remit such funds to the New York State Sales Tax Department and apply such amount as down payment toward the total purchase price of \$160,000."

4. The second paragraph of the rider acknowledged that there was a sales tax liability of at least \$200,000.00 and that the agreement was expressly conditioned upon the seller's payment of this obligation. In addition, the seller acknowledged that the sales tax liability was the seller's responsibility.

5. The third paragraph stated:

"Business shall be delivered free of any liabilities including but not limited to any tax liability due by seller to any governmental authority and seller shall be absolutely and unconditionally responsible for payment of any such amounts to any governmental authority. **This clause shall survive closing.**"

6. On January 3, 2011, the Division issued a notice of claim to purchaser advising petitioner that the Division had received information indicating that he was a purchaser in a bulk sale and that there was a possible claim for sales and use taxes. Among other things, the notice stated that although not required by law, in order to be protected from incurring the seller's sales tax liability, he should place the entire amount for the purchase in an escrow fund for the purpose of satisfying the sales tax liabilities.

7. On January 7, 2011, the Division sent a follow-up letter to petitioner pointing out that sales tax is imposed on the transfer of tangible personal property and that, according to its records, the Division had not received the tax due on the same of \$10,338.67. The Division also noted that the sales tax liability of the seller could be passed on to the purchaser in a bulk sale and that it was advisable to maintain an escrow account until he received releases from the Division.

8. As of July 26, 2010, the seller had an outstanding assessed sales tax liability of \$116,397.65. As of March 29, 2011, the seller had an outstanding assessed sales tax liability of \$262,535.90.

9. By a notice of determination dated March 29, 2011 (assessment ID No. L-035572504), the Division assessed tax due against petitioner, for the period ended June 30, 2010, in the amount of \$160,000.00. The notice explained that the Division determined taxes are due from BK Inner City Chicken and that, as a purchaser, petitioner is liable for the same taxes under Tax Law § 1141 (c). The amount of the assessment was premised upon the amount tendered for the restaurant. The Division issued a second notice of determination to petitioner, also dated March 29, 2011 (assessment ID No. L-035572505), assessing tax due, for the period ended December 20, 2010, in the amount of \$10,338.67, plus penalty and interest for a total due of

\$11,908.83. The second notice explained that petitioner was liable on the transfer of tangible personal property in accordance with the provisions of Tax Law §§ 1133, 1138 and 1141 (c). This assessment was premised upon the amount paid for the furniture, fixtures and equipment.

10. Petitioner was a 25% shareholder of a firm known as Ariana Management Corp. (Ariana). Ariana authorized petitioner to obtain a check drawn in the amount of \$80,000.00. Accordingly, petitioner secured a check from TD Bank, dated October 28, 2010, for the amount authorized by Ariana payable to “New York State sales tax” and delivered the check to Kevin Davis, a shareholder of the seller. Another payment of \$20,000.00 was made to a creditor of the seller as required in the Rider. It is not possible to discern from the record the exact dates these two payments were made. According to the agreement, petitioner was to pay the remaining \$60,000.00 of the purchase price through 30 monthly payments of \$2,000.00 each. Petitioner never made any of these monthly payments. Petitioner did not place any of the consideration in escrow in order to satisfy the seller’s outstanding sales tax liability.

11. At the end of 2010 or beginning of 2011, petitioner began operating the business and filed sales and use tax returns beginning with the period December 1, 2010 through February 28, 2011. The returns were filed in the name of 290 Livingston Chicken, LLC. At least two of the returns were signed by petitioner.

12. In August of 2012, petitioner was notified by the Division that it had not received the check for the payment of sales tax. Thereafter, petitioner contacted Mr. Davis regarding the disposition of the check, and he replied that it had been sent to the New York sales tax unit. In November 2013, petitioner contacted TD Bank regarding what became of the check and learned that the check had been deposited into a business account under the name of Platinum Properties at the Hackensack Courthouse TD branch. Upon learning that the check had been converted,

petitioner filed a complaint with the Hackensack Police Department. The criminal complaint led to an indictment against Mr. Davis for unlawful deception and theft.²

13. In or about 2013, Bank of America took possession of the restaurant because of an unpaid debt that the seller had with the bank.

14. The franchisor of the restaurant refused to give permission to petitioner to close on the restaurant because it had an issue and did not want to become involved in the situation, although it refused to inform petitioner of the exact nature of the issue.

15. Neither the lease of the restaurant nor title to any of the equipment was ever transferred to petitioner's name.

16. A petition was received by the Division of Tax Appeals on November 6, 2013. Among other documents attached to the petition was a copy of a conciliation order dismissing request dated August 23, 2013 (conciliation order). The conciliation order indicated that, as the notices of determination involved were issued on March 29, 2011, but the request for conciliation conference was not received by BCMS until August 8, 2013, or in excess of the required 90-day filing window, the request was dismissed as late filed. A cover letter issued with the conciliation order states that “[I]f you wish to contest the timeliness of your filing, you may file a petition within ninety (90) days from the date of this order with the Division of Tax Appeals.” The petition filed with the Division of Tax Appeals contains a request that the timeliness requirement be waived in the interests of justice. It is further asserted in the petition that petitioner was the victim of poor professional advice and therefore should be allowed to either present his

² The record does not reveal the disposition of the indictment.

substantive case to the Division of Tax Appeals, or have his case referred back to BCMS for a conference.

17. Paragraph 15 of the Division's answer affirmatively states that as petitioner did not file a request for conciliation conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days of the issuance of the notices of determination at issue, "the Division of Tax Appeals has no jurisdiction to review the petition herein."

18. Petitioner filed a document (denominated an "opposition to answer") in response to the Division's answer, essentially a reply, wherein he agrees with paragraph 15 of the answer, but again asserts that because of poor professional services, he missed the deadline to file his request or petition and a gross injustice will result if he is unable to present his case.

19. There is no further mention in the record, as defined in Tax Law § 2016, of the apparently late-filed request for conciliation conference or the effect of the same on the scope of the review allowed the Division of Tax Appeals in this matter. Furthermore, a review of the complete file of the Division of Tax Appeals, including documents such as correspondence, computer records and briefs, reveals no further mention of the apparently late-filed request for conciliation conference or the effect of the same on the scope of the review allowed the Division of Tax Appeals in this matter.

20. At the hearing on remand, the Division submitted affidavits made by Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), and Fred Ramundo, a supervisor in the Division's mail room since December 2013, and currently a Stores and Mail Operations Supervisor. These affidavits detail the regular process by which the Division creates and thereafter effects the issuance of notices of determination by delivery of the same, properly

addressed and with appropriate postage affixed, into the custody of the United States Postal Service (USPS) for mailing via certified mail. Each affiant made a separate affidavit pertaining to each of the two notices of determination at issue in this matter, so as to detail the process and particular information relative to the Division's regular process as it relates to each such separate notice. Both affiants aver to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those at issue herein, as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

21. Included with the Picard and Ramundo affidavits were copies of two certified mail records (CMRs) for the blocks of notices to be issued by the Division on March 29, 2011, including the subject notices of determination to be issued to petitioner on such date. Each such separate CMR includes one of the two notices at issue. The facts set forth hereinafter concerning the preparation and issuance of the subject notices are taken from the affidavits, as verified by the documents included therewith.

22. The Picard and Ramundo affidavits explain the Division's general process for the electronic generation and subsequent issuance of notices, such as the notices of determination at issue herein, summarized as follows:

a) The generation of notices of determination involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "mailing cover sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice and each notice, with its accompanying mailing cover

sheet and appropriate enclosures, is a discrete unit with the batch of notices. The mailing cover sheet is the first sheet in the unit.

b) The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each CMR and its associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

c) Each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, Julian day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

d) Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is

instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The USPS employee is further instructed to either circle the number of pieces received or indicate the total number of pieces by writing the number of pieces on the CMR. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

Notice Number L-035572505

23. The affidavits and the 28-page CMR for notice number L-035572505 provide information specific to the issuance of that notice, summarized as follows:

The CMR for the block of notices to be issued on March 29, 2011, including notice number L-035572505, consists of 28 cut-sheet pages, and reflects 11 entries on each of its pages except for page 28 (the final page) on which there are 6 entries, for a total of 303 entries. This total is preprinted on the last page of the CMR under the heading "pieces," which is located immediately to the right of the preprinted line "total pieces and amounts." Directly beneath the heading "total pieces and amounts" is the preprinted line "total pieces received at post office." The area immediately to the right of this preprinted line and directly below the preprinted heading "pieces" is blank. The date on which the CMR was printed (its "run" date) appears as "20110811700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notices set forth therein. In the upper right corner of the first page of the CMR, the date March 29, 2011 has been handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. This handwritten addition does not appear on the last page of the CMR, notwithstanding the assertion of that fact in the Picard affidavit.

Page 27 of the CMR reflects that notice, numbered L-035572505 was to be sent by certified mail under certified mail control number 7104 1002 9730 0543 5285 to petitioner, Khayer M. Kayumi, at his address in Bensalem, Pennsylvania. This address and certified control number appear on the mailing cover sheet accompanying Notice L-035572505, and the same address appears on such notice of determination, as well as on the balance of documents in the record concerning petitioner, including the power of attorney, request for conference, cover letter accompanying the conciliation order, and the petition.

Each page of the CMR bears the stamped postmark of the Colonie Center, New York branch of the USPS (zip code 12205), dated March 29, 2011, including the last page, which also includes the following stamped instruction:

POST OFFICE

Hand write total # of pieces and initial.

Do Not stamp over written areas.

24. The aforementioned March 29, 2011 postmark, together with the initials of the USPS employee receiving the items for mailing, appear on the last page (page 28) of the CMR.

However, the number of pieces of mail is not hand written, per the specific direction set forth in the Division's stamped instruction. The stamped instruction, and the apparent failure to comply therewith, is not mentioned or addressed in any manner in the Picard or Ramundo affidavits.

Similarly, the preprinted total number of items of mail, 303, is not circled or handwritten in accord with the terms of the standard mailing procedures as described in the foregoing affidavits (*see* finding of fact 22 [d]). This failure is likewise not mentioned in the Picard or Ramundo affidavits.

Notice Number L-035572504

25. The affidavits and the one-page CMR for notice number L-035572504 provide information specific to the issuance of that notice, summarized as follows:

The one page CMR for notice number L-035572504, to be issued on March 29, 2011 reflects one entry thereon, and the number "1" is preprinted on this one-page CMR under the heading "Total Pieces And Amounts." The date on which the CMR was printed (its "run" date) appears as "20110811700" (the year, Julian day of the year and military time of the year) in the upper left corner of the CMR. This run date is approximately 10 days in advance of the anticipated date of mailing of the notice set forth on the CMR. In the upper right corner of the CMR the date "3/29/11" has been handwritten by Division mail room personnel in order to ensure that the date on the CMR conforms with the actual date of mailing. The one-page CMR bears the stamped postmark of the Stuyvesant Plaza branch office of the USPS (zip code 12203), dated March 29, 2011, together with the initials of the USPS employee receiving the one item being mailed. The CMR reflects that only one notice, numbered L-035572504, was being sent by certified mail, under certified mail control number 7104 1002 9730 0543 5407, to petitioner, Khayer

M. Kayumi, at his address in Bensalem, Pennsylvania. This address and certified control number appear on the mailing cover sheet accompanying notice L-035572504, and the same address appears on such notice of determination, as well as on the balance of documents in the record concerning petitioner, including the power of attorney, request for conciliation conference, cover letter accompanying the conciliation order, and the petition.

All notices targeted for manual review are printed in one run. The page number of the CMR pertaining to such notices is noted in the upper right corner of each CMR page. Each unit which has notices selected for manual review receives a separate and complete CMR for their notices. The notice numbered L-035572504 was selected for manual review by the Audit Division-Sales Tax-Desk Audit-AG2, and was printed on page 5 of the run. This number ("5") appears in the upper right corner of the CMR, and directly above this number is the handwritten date "3/29/11," indicating the manually inserted date of actual mailing.

26. Unlike the multiple-page, multiple-notice, CMR described above and pertaining to notice number L-035572505, this one-page CMR lists and pertains to only one notice. As described above, the number "1" is preprinted on this single-page CMR, under the heading "pieces," which is located immediately to the right of the preprinted line "total pieces and amounts." Directly beneath the heading "total pieces and amounts" is the preprinted line "total pieces received at post office." The area immediately to the right of this preprinted line and directly below the preprinted heading "pieces" is blank. Also, unlike the multiple-page, multiple-notice CMR regarding notice number L-035572505, there is no stamped instruction on this one-page CMR directing the USPS employee to handwrite the number of pieces of mail thereon.

27. As to actual receipt of the notices at issue, petitioner stated in testimony that he received a "certified mailing," which he generically referred to as a "tax letter" and as "documents from New York State." Petitioner could not remember the date of receipt. In particular, petitioner testified on direct examination as follows:

“Q. Mr. Khayumi, do you remember receiving a letter from the New York State tax department approximately in the end of March 2011 or the beginning of April 2011?”

A. Yes I do. I remember I received by certified mail. It would be for - - I don’t remember the date, it was sometime, I was at work - - I received certified mail from the New York State Department of - -

Q. That would be notice of determination; correct?

A. I don’t really know. A couple of letters I received, yes, sir.

Q. What did you do with the letter?

A. By certified mail, I received the tax letter, I dropped off to my accountant or my attorney; the accountant” (transcript of proceedings on remand, pp 28, 29).

28. Petitioner noted that he gives such tax documents that he receives to his accountant.

In this case, petitioner stated that he gave “whatever he received” to his accountant, Akshay Dudani, CPA. Thereafter, believing that Mr. Dudani was not acting on his accounting matters, including his tax matters, in a sufficiently expeditious manner, petitioner transferred his accounting business, including his tax matters, to another, un-named, accountant. In similar fashion, and upon the same perceived delay in acting, petitioner thereafter re-engaged Mr. Dudani as his accountant for all matters, including his tax matters.

29. Upon additional questioning, petitioner testified as follows:

“JUDGE GALLIHER: Mr. Khayumi, you initially said that you received the document, back around March of 2011, the notices of determination that are here. Those are dated on their face March 29, 2011.

Your answer was somewhat general. Do you recall what document you received and the date on which you received it?

THE WITNESS: It was from New York State.

JUDGE GALLIHER: Okay.

THE WITNESS: Again, some of the paperwork I can’t understand what is that for. That’s why I involved the accountant and then I worked with him.

JUDGE GALLIHER: Is it your general practice when you receive documents from a taxing authority, either the IRS, or the State of New York, you get any return documents over to your accountant?

A. Yes, sir.” (transcript of proceedings on remand, pp 38, 39).

30. In the request for a BCMS conference, signed by Mr. Dudani on August 7, 2013, petitioner specified four assessment numbers (notices) as at issue, including the two notices of determination identified herein. The August 23, 2013 conciliation order dismissing request, on the basis that the request was untimely, was captioned as pertaining specifically, by assessment number, to only the two notices of determination at issue in this matter.³ The petition, also signed by Mr. Dudani, likewise specifies that it pertains only to the two notices of determination identified as at issue herein. In addition to the substantive arguments asserted therein, the petition addresses itself to the issue of timeliness in essentially the same manner as the request for conference, as follows:

“This office requests to waive timeliness of filing requirement, in ‘INTEREST OF JUSTICE’. The taxpayer is victim of poor professional advice and has a just cause. We believe that the taxpayer should be granted an opportunity to present his case with Division of Tax Appeals.”

31. The notification of sale, transfer or assignment in bulk (form AU-196.10) in this matter specifies, at section III-f thereof, a sales price of \$116,492.00 for the tangible personal property included in the subject transaction (*see* exhibit G at p 43; exhibit H). Petitioner stated that the tangible personal property consisted of “five tables and 20 chairs,” and alleged that the equipment was “beat up.” He also stated that he took physical possession of the premises (the building), and of the tangible personal property therein (the furniture, fixtures and equipment such as tables, chairs and ovens) at the end of 2010 or beginning of 2011, and used the same in

³ The record does not disclose the disposition of the other two assessments listed as being protested under the request for BCMS conference.

operating the business known as 290 Livingston Chicken, LLC (*see* finding of fact 11), for approximately two years thereafter.

THE SUPPLEMENTAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began the supplemental determination in this matter by noting the narrow scope of the issues on remand; namely, whether petitioner timely protested either or both of the notices of determination here at issue, and whether petitioner was liable for sales tax determined by the Division on the bulk transfer of tangible personal property pursuant to the sale of the restaurant.

Regarding the first issue on remand, the Administrative Law Judge described the statutory requirement of timely filing a petition to protest a notice of determination within 90 days of the mailing of such notice, or, in the alternative, filing a request for a conference with BCMS if the time for filing a petition for such a hearing has not elapsed. He observed that the timeliness requirement is strictly enforced and a petition filed even one day late is considered untimely, leaving the Division without jurisdiction to consider the merits of the petition.

The Administrative Law Judge found that where timeliness of a request for a BCMS conference is at issue, the initial inquiry is whether the Division carried its burden of proving proper mailing of the notice by certified or registered mail to petitioner's last known address. The Division can prove the fact and date of mailing by submitting proof of a standard mailing procedure by someone with knowledge of the relevant procedures and that such a procedure was followed in this particular instance. According to the Administrative Law Judge, an affidavit from someone with the requisite knowledge of the Division's mailing procedure accompanied by a properly completed CMR satisfies the Division's burden of proof. Establishing proper mailing serves to toll the period of limitations for assessment of tax and triggers the 90-day period in

which to bring a protest of the statutory notice. The Administrative Law Judge noted that it is the Division's burden to show proper mailing of the statutory notice in the first instance.

The Administrative Law Judge found that while the Division was able to prove its standard mailing procedures through the affidavits of its employees, the CMR with respect to notice L-035572505 was not properly completed and thus flawed. As such, according to the Administrative Law Judge, the CMR in that case fails to provide verification of the total number of pieces of mail delivered into the custody of the USPS on March 29, 2011, and thus does not establish mailing of that statutory notice. The Administrative Law Judge concluded that as a consequence, the period within which to protest a statutory notice did not commence. However, other evidence establishing actual receipt of the statutory notice by a taxpayer can overcome a flawed CMR, in which case the date of receipt commences the 90-day period in which to file a protest of the statutory notice.

The Administrative Law Judge found that in the present case, there was no unequivocal acknowledgment of receipt of the notice by petitioner, and actual receipt thereof could only be inferred from petitioner's August 7, 2013 request for a BCMS conference. The Administrative Law Judge found that this fact distinguished the present case from other situations in the case law in which taxpayers have acknowledged receipt of the notice as of a date certain. The Administrative Law Judge found this difference significant and determined that it effectively negated petitioner's admission that he had not filed a protest within 90 days of the purported issuance date of the statutory notice. Based on the evidence in this record, the Administrative Law Judge concluded that the earliest date of petitioner's actual receipt of the statutory notice was August 7, 2013, which date commenced the period within which to bring a challenge. Because petitioner's August 8, 2013 request fell within the following 90-day period, the

Administrative Law Judge concluded that the conciliation order improperly dismissed petitioner's request as untimely. Because petitioner filed a timely protest of BCMS's dismissal of his request, the Administrative Law Judge found that the Division of Tax Appeals had jurisdiction to address the merits of petitioner's claim with respect to notice number L-035572505.

Next, the Administrative Law Judge addressed the propriety of the proposed assessment in the statutory notice, which determined sales tax due based on the bulk transfer of tangible personal property in connection with the sale of the restaurant. The Administrative Law Judge considered the notice of sale, transfer or assignment in bulk filed by petitioner, the value of the property purported to be transferred and petitioner's subsequent use of that property. The Administrative Law Judge found that a sale of the equipment and fixtures reported in the notice of bulk sale did occur, based on petitioner's possession of and use of the property, and sustained notice L-035572505 on that basis.

The Administrative Law Judge then addressed notice of determination number L-035572504, which determined derivative liability against petitioner based on the seller's prior sales tax liability and limited to the purchase price for the restaurant. The Administrative Law Judge concluded that although the CMR for this notice likewise was missing a handwritten number of articles acknowledging the number of notices delivered into the USPS' possession on March 29, 2011, such failure was inconsequential because notice L-035572504 was the only piece of mail listed on the CMR, leading to the reasonable inference that this particular notice was mailed on the date indicated on the CMR. Taken together with the affidavits of the Division employees describing the Division's regular mail procedures, the Administrative Law Judge concluded that the Division bore its burden of showing proper mailing of this statutory notice on

March 29, 2011. As a consequence, according to the Administrative Law Judge, petitioner was required to file a protest of that notice within the 90-day period following its mailing. However, the Administrative Law Judge found that petitioner did not provide any basis to rebut the presumption of receipt and thus the notice became fixed and final.

The Administrative Law Judge concluded by granting the petition to the extent that the request for a BCMS conference was timely, thereby finding that the Division of Tax Appeals had jurisdiction to address the substantive merits of notice number L-035572505, but denied the same on the basis that the Division properly assessed tax on the tangible personal property transferred pursuant to the purchase of the restaurant. The Administrative Law Judge also denied the petition on the basis that a timely protest against notice number L-035572504 was not filed, thus leaving the Division of Tax Appeals without jurisdiction to address the substantive merits of that notice.

THE PRIOR DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In the prior determination, the Administrative Law Judge initially discussed the provisions of Tax Law § 1141 (c) regarding the obligations of a purchaser in a bulk sale transaction, specifically that a purchaser: (1) provide the Division with 10 days' notice prior to taking possession of, or making payment for, the business assets that are the subject of the bulk sale; and (2) thereafter withhold payment of any consideration to the seller pending receipt from the Division of a release of its claim for any outstanding sales tax liabilities due from the seller. The Administrative Law Judge explained that if the purchaser fails to meet these obligations, the purchaser becomes liable for the sales and use taxes owed by the seller in an amount limited only by the greater of the fair market value or the sales price of the business assets sold.

The Administrative Law Judge concluded that even though petitioner had met his obligation to notify the Division of the proposed bulk sale of assets as required by Tax Law § 1141 (c), he had failed to meet his obligation to withhold payment from the seller as required by the same statute. Thus, the Administrative Law Judge concluded that petitioner was personally liable for the payment of the seller's outstanding sales tax.

The Administrative Law Judge also concluded that although petitioner appears to have been taken advantage of by the seller, such circumstances alone did not result in petitioner's liability pursuant to Tax Law § 1141 (c). Rather, petitioner's liability was based upon his own failure to withhold payment from the seller. The Administrative Law Judge rejected petitioner's contention that the imposition of liability on him was in violation of fundamental principles of fairness for the following reasons: (1) there was a provision in the rider clearly stating that the seller had a substantial sales tax liability; and (2) the Division had notified petitioner on several occasions that placing any funds due the seller in escrow until the sales tax liabilities were resolved would release petitioner from personal liability for such taxes.

Finally, the Administrative Law Judge addressed petitioner's arguments that because there was no transfer of the lease or title to other assets of the business, nor approval of petitioner's purchase of the assets by the franchisor, there was no bulk transfer. The Administrative Law Judge concluded that based upon petitioner's actual possession of the assets of the business, a bulk transfer of the assets occurred, thus subjecting petitioner to the provisions of Tax Law § 1141 (c) and 20 NYCRR 525.2 (a) (2) and 537.1 (a) (1).

ARGUMENTS ON EXCEPTION

Petitioner argues that no legal transfer of property occurred because a term of the rider to the contract of sale, namely delivering the business to petitioner free of any state tax liabilities,

was not met. In support, petitioner asserts that the seller defrauded petitioner by diverting a check that petitioner had delivered to the seller in the amount of \$80,000.00 made payable to “New York State sales tax.” Petitioner also asserts that approval of the transfer by the franchisor was required. As no such approval was obtained, petitioner would have this Tribunal conclude that no taxable bulk sale of tangible personal property took place.

Additionally, petitioner argues that based upon the fraudulent acts of the seller, the application of the doctrine of equitable estoppel against the Division is appropriate in this matter. Petitioner’s position is that the imposition of personal liability on him under the circumstances presented herein is inequitable, unfair and does not serve either the underlying purpose of Tax Law § 1141 (c) or the interests of justice.

Petitioner also argues that he is not liable for penalties and interest that accrue from the seller’s unpaid taxes.

The Division argues that contrary to petitioner’s assertion, a transfer of the business assets of Popeye’s Chicken did occur. The Division points to the fact that petitioner operated the business for more than two years as evidence that such a transfer occurred. The Division further argues that petitioner did not comply with his obligations under Tax Law § 1141 (c) in that he did not timely notify the Division of the sale and did not withhold payment from the seller. The Division notes that as it was not a party to the agreement, the doctrine of equitable estoppel may not be asserted against it and it is not bound by the terms of those documents.

The Division explains that because petitioner was aware of the seller’s outstanding sales tax liabilities of over \$200,000.00 prior to his transfer of any funds to the seller, holding petitioner personally liable for the outstanding sales tax liabilities of the seller is not an unfair or unjust result.

With regard to the penalty issue, the Division notes that two separate notices of determination were issued in this matter, one dealing with the outstanding tax liability of the seller and one based upon the value of the tangible personal property transferred. The Division does not disagree that petitioner is not liable for interest and penalties on the seller's outstanding tax liabilities up until the notice of determination was issued to petitioner. However, it is the Division's position that after the notice was issued, the liability accrued interest. The Division argues that interest and penalty are appropriate with regard to petitioner's sales tax liability on the purchase of tangible personal property pursuant to Tax Law § 1105 (a). Finally, the Division asserts that petitioner failed in his burden to show reasonable cause or lack of willful neglect upon which this Tribunal could abate penalties.

OPINION

We begin with the question that we remanded to the Administrative Law Judge for supplemental determination; namely, whether petitioner timely protested either or both notices of determination here at issue.

Under 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 (Tax Law § 1138 [a] [1]), or, in the alternative, by filing a request for a BCMS conference if the time to petition for such a hearing has not elapsed (Tax Law § 170 [3-a] [a]). It is well established that this statutory time limit is strictly enforced and protests of statutory notices filed even one day late are considered untimely (*Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). If a protest is not filed within the 90-day statutory period, the notice of determination becomes a fixed and final liability, leaving the Division of Tax Appeals without jurisdiction to consider the

substantive merits of the protest (Tax Law § 1138 [a] [1]; *see also Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where timeliness of a protest of a statutory notice is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the statutory notice by mailing the same by certified or registered mail to a taxpayer's last known address (Tax Law § 1138 [a] [1]; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing, the Division must show proof of a standard mailing procedure used by the Division by one with knowledge of the relevant procedures and 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). The Division may meet this burden by providing affidavits from its employees with knowledge of the Division's standard mailing processes and a properly completed CMR (*Matter of Western Aries Construction, LLC*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

Where the Division shows proper issuance of a notice of determination, a rebuttable presumption of receipt by the taxpayer to whom the notice is addressed arises (Tax Law § 1147 [a] [1]; *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Shanghai Pavilion, Inc.*, Tax Appeals Tribunal, June 10, 2010; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). Upon the Division's showing of proper issuance of the statutory notice, the taxpayer then bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

With respect to notice number L-035572505, the notice of determination the Division issued to petitioner based on the taxable transfer of tangible personal property, we agree with the Administrative Law Judge that the Division failed to establish proper mailing of the notice. Specifically, the CMR that the Division offered as part of the proof that it followed its own mailing procedures with respect to this notice was flawed insofar as it failed to verify the number of pieces of mail delivered into the custody of the USPS for mailing on the date of its alleged issuance. Specifically, the stamped instruction to the USPS employee to hand-write or circle the number of pieces of mail on the CMR was not completed. Completion of this instruction confirms that the Division did not withhold any articles of mail from the multi-piece mailing and, in turn, establishes which specific pieces of mail were in fact delivered into the custody of the USPS for mailing on a specific date.

In a case such as this, where the Division has failed to establish the date of mailing, this Tribunal has held that the period within which a protest must be filed does not commence and the presumption of receipt does not attach (*Matter of Sugranes*, citing *Matter of Katz*). However, other evidence establishing the date of actual receipt of the notice, thereby commencing the 90-day period within which to bring a protest thereof, can overcome the Division's failure to prove the date of mailing of the statutory notice in the flawed CMR (*Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). In this case, we agree with the Administrative Law Judge that petitioner's request for a BCMS conference, filed on August 8, 2013, established August 7, 2013 as the earliest date for actual receipt of the notice and triggered the 90-day period for filing a protest thereof. In the absence of conclusive proof that petitioner received the notice earlier, the filing date of petitioner's request

for a BCMS conference is the first unequivocal evidence of actual receipt of the notice. Thus, it was that date that triggered the 90-day period within which to bring a protest of the notice (*Matter of Brager*). We do not find petitioner's testimony regarding having received some mailing from the Division to rise to the level of an admission of actual receipt of the statutory notice on a specific date (*cf. Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *rearg denied* 80 NY2d 893 [1992] [holding that an unequivocal admission of actual receipt of a notice of determination on a specific date is sufficient to trigger the protest period]). As petitioner's request for a BCMS conference fell within 90 days of the earliest date of actual receipt of the notice, we agree with the Administrative Law Judge that petitioner's request was improperly dismissed as untimely. As petitioner challenged BCMS' dismissal of his request within 90 days of the issuance of the conciliation order, the Division of Tax Appeals has jurisdiction to address the merits of his protest (Tax Law 170 [3-a]; 20 NYCRR 4000.5 [c] [4]).

Turning to petitioner's substantive arguments regarding the assessment of tax on the bulk transfer of tangible personal property pursuant to the purchase of Popeye's Chicken, petitioner asserts that the sale was never completed because title to the tangible personal property was never transferred.

We do not agree. A completed transfer of title is unnecessary to impose sales tax because sales tax is defined as a tax on a transaction resulting in the transfer of title or possession (or both) of tangible personal property (Tax Law §§ 1101 [b] [5], 1141 [c]; 20 NYCRR 525.2 [a] [2]). Petitioner testified that he took possession and used the property in subsequent years, thus establishing the transfer of possession of the tangible personal property upon which sales tax was due. Furthermore, we agree with the Administrative Law Judge that the notification of sale,

transfer or assignment in bulk (form AU-196.10) filed by petitioner established the value of certain tangible personal property transferred to petitioner pursuant to the sale of the restaurant's assets, thus forming the basis for the Division's determination of sales tax thereon.

Consequently, we sustain the Division's assessment of sales tax, notice number L-035572505, on the transfer of tangible personal property to petitioner.

We have also considered petitioner's argument that penalties and interest be abated. Penalties and interest on past due amounts of sales tax are provided for under Tax Law § 1145 (a) (1). Penalty and interest may be abated if petitioner shows that his past-due sales tax liability is due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [iii]; 20 NYCRR 536.1; *Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). However, in light of the record taken as a whole, we do not agree that petitioner had reasonable cause in failing to pay sales tax on the transfer of tangible personal property pursuant to the sale of the restaurant's assets. Of particular note is the fact that petitioner reported the value of the tangible personal property on the notification of sale, transfer or assignment in bulk regarding the sale of Popeye's Chicken. Furthermore, petitioner was made aware of the fact that sales tax was due, and the amount thereof, on the transfer of the tangible personal property by the Division's correspondence dated January 7, 2011. The record also shows that petitioner used the tangible personal property in operation of the business for two years after transfer of the tangible personal property at issue. We find that petitioner failed to bear his burden of showing reasonable cause and lack of willful neglect in remitting his sales tax liability and thus sustain the penalties and interest assessed in notice of determination L-035572505.

We now turn to the jurisdictional question on remand regarding notice number

L-035572504, the notice of determination the Division issued to petitioner based on derivative liability for the transferor's own outstanding and unpaid sales tax liability. As discussed with respect to notice number L-035572505, we have held that the Division can prove the fact and date of mailing of a statutory notice by providing affidavits from its employees with knowledge of the Division's standard mailing processes and a properly completed CMR (*Matter of Western Aries Construction, LLC*; *Matter of DeWeese*). A failure to comply precisely with the mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (*Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2011, citing *Coleman v Commr.*, 94 TC 82, 91 [1990]). The CMR in this case had the same flaw as the CMR for notice number L-035572505 in that the preprinted number of items being mailed was not circled or hand written on the CMR itself. However, the CMR in this case indicated only one item being mailed, notice number L-035572504, and bore the stamped USPS postmark dated March 29, 2011 and the initials of the USPS employee receiving the article of mail. Such a flaw in the CMR, without other evidence of mailing, would be fatal in a case where multiple pieces of mail are being delivered into the custody of the USPS (*see Matter of Rakusin*). However, due to the fact that there is only one piece of mail listed on the CMR, we agree with the Administrative Law Judge that the presence of the USPS postmark and the initials of the receiving USPS employee indicate that the lone article of mail indicated on the CMR was delivered into the USPS' custody for mailing on March 29, 2011. We agree that it can be inferred from the presence of the postmark and the USPS employee's initials on the CMR that the only article of mail listed thereon was delivered into the USPS' custody for mailing on the date indicated.

Thus, we agree with the Administrative Law Judge that under the specific circumstances outlined above, the Division has proven the date and fact of mailing by and through the affidavits

of its employees and a CMR that is sufficient to prove mailing of notice number L-035572504 on March 29, 2011. We also agree with the Administrative Law Judge that petitioner has failed to rebut the presumption of receipt that attaches upon a showing of proper mailing (*see Matter of Ruggerite, Inc. v. State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.*). As the record does not indicate that petitioner filed any protest of the notice of determination until well after the end of the 90-day period within which to file a protest, the notice became a fixed and final liability. As previously discussed, this Tribunal has no jurisdiction to consider the substantive merits of protests of assessments that have become fixed and final (Tax Law § 1138 [a] [1]; *Matter of Lukacs; Matter of Sak Smoke Shop*). In light of the foregoing, we do not reach the substantive merits of petitioner's arguments regarding his derivative sales tax liability pursuant to Tax Law § 1141 (c).

Accordingly, it is ORDERED, ADJUDGED and DECREED that

1. The exception of Khayer Kayumi with respect to notice of determination L-035572505 is granted with respect to the question of timeliness, but is otherwise denied;
2. The exception of Khayer Kayumi with respect to notice of determination L-035572504 is denied;
3. The determination of the Administrative Law Judge on remand is affirmed;
4. The petition of Khayer Kayumi with respect to notice of determination L-035572505 is denied; and
5. The petition of Khayer Kayumi with respect to notice of determination L-035572504 is dismissed.

DATED: Albany, New York
June 27, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner