

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition  | : |   |
| of   | : |   |
| <b>CONNECTICUT INSULATION<br/>DISTRIBUTORS CORPORATION</b>   | : | <b>DETERMINATION<br/>DTA NO. 827415</b> |
| for Revision of a Determination or for Refund of Sales<br>and Use Taxes under Articles 28 and 29 of the Tax Law<br>for the Period December 1, 2008 through<br>February 28, 2011. | : |   |

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Petitioner, Connecticut Insulation Distributors Corporation, 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 December 1, 2008 through February 28, 2011.

On April 7, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Howard S. Beyer, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i) and 3000.9 (b). Accompanying the motion was the affidavit of Howard S. Beyer, Esq., dated April 6, 2017, and annexed attachments. Petitioner, appearing by Mark S. Burns, CPA, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on September 29, 2017, the extended due date for petitioner's response. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of determination, dated May 1, 2015, and addressed to petitioner, Connecticut Insulation Distributors Corporation, "c/o Richard Shupe 1038 Georges Hill Rd, Southbury, CT 06488-2616." The notice of determination, number L-042823005, asserted additional New York State sales and use tax for the period December 1, 2008 through February 28, 2011 in the amount of \$56,345.26, plus interest and penalty. The mailing cover sheet of the notice of determination contains the certified control number 7104 1002 9730 0455 4154.

2. Petitioner protested the notice of determination by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a request for conciliation conference (Request) hand-dated and signed by its representative, Richard Shupe, on September 17, 2015.<sup>1</sup> The Request was mailed by United States Postal Service (USPS) Priority Mail Express on September 21, 2015. BCMS received the Request on September 22, 2015. The Request lists petitioner's address as 1038 Georges Hill Road, Southbury, CT 06488.

3. On October 9, 2015, BCMS issued a conciliation order dismissing request (Order) to petitioner. Bearing CMS No. 267976 and referencing notice number L-042823005, the Order determined that petitioner's protest 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 was issued on May 1, 2015, but the

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<sup>1</sup> The exact nature of Mr. Shupe's relationship to petitioner was not disclosed on the Request.

request was not received until September 21, 2015, or in excess of 90 days, the request is late filed.”

4. On January 5, 2016, the Division of Tax Appeals received a petition seeking redetermination of the deficiency issued in this matter.<sup>2</sup> The envelope in which the petition was sent by USPS Priority Mail Express bears a metered stamp dated January 4, 2016. There is no dispute that the petition was filed within 90 days after the issuance of the Order, and constitutes a timely challenge thereto. In its petition, petitioner asserts, among other things, that “[r]econciliation conference requested too late. Lost original & requested new & received after due date. Filed anyway.” The petition was signed by Mr. Shupe, president of Connecticut Insulation Distributors Corporation. On the petition, petitioner’s address is listed as “1038 Georges Hill Road Southbury, CT 06488.”

5. In support of the motion and to prove proper and timely mailing of the notice of determination under protest, the Division submitted the following: (i) the affidavit of Howard S. Beyer, Esq., the Division’s representative, dated April 6, 2017; (ii) the affidavit, dated September 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) two copies of a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated May 1, 2015; (iv) the affidavit, dated September 22, 2016, of Bruce Peltier, Stores and Mail Operations Supervisor in the Division’s mail room; (v) the affidavit, dated March 30, 2017, of Heidi Corina, Legal Assistant 2 in the Division’s Office of Counsel involved in making requests to the USPS for delivery information; (vi) Postal Service Form 3811-A (Request for Delivery Information/Return

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<sup>2</sup> The Division of Tax Appeals stamped an erroneous received date of “JAN 05 2015” on the petition. Given the date of mailing of the petition, January 4, 2016, the correct date of receipt of the petition by the Division of Tax Appeals was January 5, 2016.

Receipt After Mailing) and the USPS response to such request dated March 29, 2017; (vii) the May 1, 2015 notice of determination with the associated mailing cover sheet; (viii) a copy of petitioner's request for a conciliation conference postmarked September 21, 2015; and (ix) a copy of an email, dated April 22, 2015, sent by Mr. Shupe, president of Connecticut Insulation Distributors Corporation, to a Division employee.

6. The affidavit of Ms. Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 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. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. 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 mailing address and the 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 within the batch of notices, and the mailing cover sheet is the first

sheet in the unit.

8. 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 are also listed on the CMR under the heading "Certified No." 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 P.O. Address." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

9. Each statutory notice is, as noted, 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. The CMR lists in its upper left corner the date, ordinal 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 is conformed 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).

10. In her affidavit, Ms. Nagengast attests that the attached "Exhibit 'A' is a true and accurate copy of the certified mail record prepared by the Department for the statutory notices mailed via certified mail on May 1, 2015, including the Notice of Determination issued to petitioner." According to the Nagengast affidavit, "[e]ach of the pages of the CMR consists of eleven entries, with the exception of Page 22 which contains six entries." Ms. Nagengast notes that the CMR attached to her affidavit contains portions that have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here. Ms. Nagengast

averred that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 22.

11. Attached to the Nagengast affidavit, as exhibit "A", are a light and dark copy of the CMR. Both copies of the CMR relevant to the notice of determination under protest consist of 22 cut sheet pages, including page 1, the page on which information pertaining to petitioner appears. Each page of both copies of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20151141700." Appearing in the upper right corner of the first and last pages of both copies of the CMR is the handwritten date of "5/1/15," reflecting the manual change made by the Division personnel to ensure that the preprinted date of the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS.

12. Page 1 of both copies of the CMR indicates that notice of determination assigned certified control number 7104 1002 9730 0455 4154 and reference number L-042823005, was mailed to "CONNECTICUT INSULATION DISTRIBUTORS CORP C/O RICHARD SHUPE" at the 1038 Georges Hill Rd, Southbury, CT 06488-2616 address listed thereon. The corresponding mailing cover sheet attached to the Nagengast affidavit as "exhibit B," bears this certified control number and petitioner's name and address as noted.

13. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Stores and Mail Operations Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover

sheet into a windowed envelope. That staff member then weighs, seals and places postage and fee amounts on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of mail listed on the CMR and of the CMR itself. 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 then delivered back to the Division for storage and retention in the regular course of its business.

14. The date "May 1, 2015" is stamped on all 22 pages of the light copy of the CMR. No legible postmarks appear on any pages of the light copy of the CMR. The date "May 1, 2015" is stamped on the last page of the light copy of the CMR, page 22, which contained a statement of the total number of pieces received by the USPS for mailing. On all pages of the dark copy of the CMR, including page 22, "COLONIE CENTER NY USPS 12205" is stamped; however, the stamped date is illegible. No legible postmarks appear on any of page of the dark copy of the CMR. On the last page of both copies of the CMR next to the preprinted heading "TOTAL PIECES AND AMOUNTS" appears the preprinted number 237. In addition, the handwritten circled number "237" appears on both copies of the CMR next to the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE." The initials of the USPS employee also appear next to the illegible postmark on page 22 of both copies of the CMR. The writing of the

number of pieces received on the mail record was done at the Division's specific request and was intended to indicate that all 237 pieces of mail listed on the CMR were received at the post office.

15. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's mail room, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

16. Mr. Peltier, in his affidavit, asserts that "[a] copy of the certified mail record listing the pieces of certified mail delivered to the USPS by the mail room staff on May 1, 2015 . . . is attached to the Affidavit of Mary Ellen Nagengast as Exhibit 'A'." He further asserts that:

"[a] review of this document confirms that a USPS employee initialed or signed Page 22 of the certified mail record, affixed a postmark to each page of the certified mail record and wrote and circled the total number of pieces of certified mail received."

17. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier avers that on May 1, 2015, an employee of the mail room delivered an item of certified mail addressed to "CONNECTICUT INSULATION DISTRIBUTORS CORP., C/O RICHARD SHUPE, 1038 GEORGES HILL RD., SOUTHBURY, CT 06488-2616, to the USPS in Albany, New York, in a sealed postpaid window envelope for delivery by certified mail." He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on May 1, 2015 to be kept as part of the records of the Department. Mr. Peltier asserts that the procedures described in his affidavit were the regular procedures followed by the mail room in

the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Connecticut Insulation Distributors Corporation on May 1, 2015.

18. Attachment 3 to Mr. Beyer's affidavit includes affidavits of Ms. Nagengast, Mr. Peltier and Ms. Corina, and exhibits attached to the same, submitted in support of the Division's proof of mailing and receipt of the subject notice of determination. In his affidavit, Mr. Beyer averred that Attachment 3 "contains two copies of the Division's mail log (a light copy and a dark copy) that, together, show both a complete postmark and a clear postmark date of May 1, 2015." He further averred that both of these copies were submitted because, due to factors beyond his control, he "was not able to contain a copy of the Division's mail log that copied well enough to show both of these things in a single copy."

19. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of PS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with regard to the notice of determination. Filing PS Form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation maybe obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed Form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0455 4154 on May 1, 2015 from the Colonie Center, Albany, New York, branch office of the USPS to "Connecticut Insulation Distributors Corp. c/o Richard Shupe" at 1038 Georges Hill Rd. Southbury, CT 06488-2616. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0455 4154 on May 5, 2015 at 8:58 a.m. in Southbury, CT 06488. The scanned image of the recipient's signature as shown on the USPS response is "Leanne Shupe." The scanned address of the recipient indicates "1038

Georges Hill Rd.”

20. The record includes a copy of an email, dated April 22, 2015, sent by Mr. Shupe, petitioner’s president, to a Division employee, Derrick F. Harper, which states, among other things, that Connecticut Insulation Distributors Corporation’s “current address is: 1038 Georges Hill Road, Southbury, CT 06488.”

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

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9 (a), or summary determination under 20 NYCRR 3000.9 (b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter, the Division’s motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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 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]).

C. Section 3000.9 (c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary determination 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 a material fact is “arguable” (*Glick &*

*Dolleck v Tri-pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village 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 [2d Dept 1960]). “To defeat a motion for summary determination, 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*).

D. Petitioner did not respond to the Division’s motion. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *Whelan v GTE Sylvania*).

However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v Village of Patchogue Fire Dept.*; *see also Weiss v Garfield*, 21 AD2d 156 [3d Dept 1964]).

E. Where, as here, the timeliness of a request for a conciliation conference or petition 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 (Tax Law § 1147 [a] [1]; *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 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).

F. In this case, the Division has introduced adequate proof of its standard mailing

procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

G. However, the Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the notice of determination was mailed as addressed to petitioner on May 1, 2015. In this instance, the Division, in support of the motion, submitted two copies of the CMR. Neither of these copies contain legible USPS postmarks on each page, indicating the mailing date of May 1, 2015.<sup>3</sup> Specifically, on all of the pages of the light copy of the CMR, the date “May 1 2015” was stamped. On all pages of the dark copy of the CMR, “COLONIE CENTER NY USPS 12205” was legibly stamped, but the date was totally illegible. It is noted that no legible USPS postmarks appeared on any page of either the light or dark copy of the CMR, including the last page, page 22, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Raskusin*, Tax Appeals Tribunal, July 26, 2001).

H. An inadequacy in the evidence of mailing, as in Conclusion of Law G, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing, the 90-day

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<sup>3</sup> USPS Domestic Mail Manual § 503 [5.1.1] provides that each individual firm sheet (form 3877) is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer’s receipt, i.e., certificate of mailing. A “local” postmark shows the full name of the Post Office, a two-letter state abbreviation, “ZIP CODE,<sup>TM</sup>” and date of mailing (*see* USPS Handbook PO-408 [1-1.3]).

period for filing either a Request or a petition is tolled until such time as the taxpayer actually receives the notice (*see 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]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the described evidentiary failure with regard to the mailing of the notice of determination, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS Form 3811-A and the USPS response thereto, that the notice was mailed by certified mail and was, in fact, thereafter received by petitioner on May 5, 2015 (*see* Finding of Fact 19). As a result, the period within which to challenge the notice of determination commenced to run on the date of such actual receipt, i.e., May 5, 2015, and in order to be timely, a request for a conciliation conference with BCMS, or a petition with the Division of Tax Appeals, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). In turn, 90 days after the May 5, 2015 date of actual receipt of the notice of determination was August 3, 2015, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. However, petitioner's Request was not filed until September 21, 2015 (*see* Finding of Fact 2), a date that falls beyond the statutory period within which a timely protest had to have been filed. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

J. The Division's motion for summary determination is hereby granted, the petition of Connecticut Insulation Distributors Corporation is denied, and the notice of determination dated May 1, 2015 is sustained.

DATED: Albany, New York  
December 21, 2017

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE