

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TE YU LEE** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NO. 827530  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period December 1, 2011 through May 31, 2013. :

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Petitioner, Te Yu Lee, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2011 through May 31, 2013.<sup>1</sup>

On May 4, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). On October 13, 2016, Administrative Law Judge Winifred M. Maloney issued an Order sustaining the notice of intent to dismiss petition and dismissing the petition as to the four notices of estimated determination (assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819), and withdrawing the notice of intent to dismiss petition with respect to the Conciliation Order Dismissing Request at issue in the petition.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion on January 13, 2017 seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affidavit of Anita

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<sup>1</sup> Assessments challenged by the subject petition included assessment numbers L-041453926 and L-041313884 that have been petitioned previously and are currently pending before the Division of Tax Appeals under DTA No. 827519. The petition filed in this matter sought review of four notices of estimated determination and a Conciliation Order Dismissing Request.

K. Luckina, Esq., dated January 13, 2017, and annexed exhibits. Petitioner, appearing by Jamie Lee, submitted a letter and attached documents in opposition to the motion of the Division of Taxation on February 8, 2017, which date commenced the 90-day period for issuance of this determination. After due consideration of the motion papers, attached affidavits and annexed exhibits, petitioner's response in opposition, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. The Division of Taxation issued to petitioner, Te Yu Lee, at a Woodside, New York, address, four notices of estimated determination, each dated September 10, 2013, assessing sales and use tax due as follows:

a. Notice number L-040079816-8, assessing sales and use tax due in the amount of \$750.00, plus penalty and interest, for the period March 1, 2013 through May 31, 2013;

b. Notice number L-040079817-7, assessing sales and use tax due in the amount of \$18,257.52, plus penalty and interest, for the period December 1, 2012 through February 28, 2013;

c. Notice number L-040079818-6, assessing sales and use tax due in the amount of \$18,257.52, plus penalty and interest, for the period September 1, 2012 through November 30, 2012;

and

d. Notice number L-040079819-5, assessing sales and use tax due in the amount of \$18,257.52, plus penalty and interest, for the period June 1, 2012 through August 31, 2012.

Each of these notices of estimated determination was issued because petitioner was

determined to be an officer or responsible person of 888 Orient Express Inc. (888 Orient), and such corporation had failed to file a required return.

2. The Division also issued to petitioner, as an officer or responsible person of 888 Orient, Notice of Determination, number L-040079820-5, dated September 10, 2013, assessing sales and use taxes due in the amount of \$18,257.52, plus penalty and interest, for the period December 1, 2011 through February 29, 2012. The Notice of Determination was addressed to petitioner at the same Woodside, New York, address.

3. The record includes a request for conciliation conference (Request), hand dated as signed by petitioner on December 14, 2014, and date stamped as received on September 15, 2015 by the Division's Bureau of Conciliation and Mediation Services (BCMS). The Request protested, among other notices of determination, Notice number L-040079820. Attachments to the Request included, among others documents, a letter dated August 14, 2014, to the Division's Sales Tax Audit Section. On the Request, petitioner's address is listed as the Woodside, New York, address listed on the subject notices.

4. On October 2, 2015, BCMS issued a Conciliation Order Dismissing Request (Conciliation Order) to petitioner. Bearing CMS No. 267901 and referencing Notice number L-040079820, the Conciliation 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(s) was issued on September 10, 2013, but the request was not mailed until August 23, 2014, or in excess of 90 days, the request is late filed.”

5. On March 4, 2016, the Division of Tax Appeals received a petition seeking review of the four notices of estimated determination (assessment numbers L-040079816, L-040079817, L-04007918 and L-040079819) and the Conciliation Order (CMS No. 267901) issued in this matter.

The envelope in which the petition was sent by United States Postal Service (USPS) Priority Mail bears a USPS stamp dated March 2, 2016.

6. On May 4, 2016, Daniel J. Ranalli, then Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of notices of estimated determination, L-040079816-8, L-040079817-7, L-040079818-6, and L-040079819-5, and a conciliation order, CMS No. 267901, issued to petitioner on September 10, 2013 and October 2, 2015, respectively, and that the petition was not filed until March 2, 2016. After further proceedings and consideration by the undersigned, an Order, dated October 13, 2016, was issued sustaining the notice of intent to dismiss petition and dismissed the petition as to the four notices of estimated determination, and also withdrew the notice of intent to dismiss petition as to the Conciliation Order. That order also directed the Division to file an answer to the petition within 75 days. Said answer was filed on December 21, 2016. This motion for summary determination was filed on January 13, 2017.

7. In support of the motion and to prove proper and timely mailing of the Conciliation Order under protest, the Division submitted the following: (i) the affidavit of Anita K. Luckina, Esq., the Division's representative, dated January 17, 2017; (ii) the affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated January 6, 2017; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated October 2, 2015; (iv) the affidavit of Melissa Kate Koslow, a supervisor in the Division's Mail Processing Center, dated January 9, 2017; (v) a copy of the petition filed with the Division of Tax Appeals on March 2, 2016; (vi) a copy of a request for conciliation conference, and attached documents, received by BCMS on September 15, 2015; and

(vii) a copy of the Conciliation Order and cover sheet, dated October 2, 2015, and a copy of the three-windowed mailing envelope.

8. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the USPS via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

9. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

10. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

11. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeroes. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk, as part of her regular duties, associates each cover sheet, conciliation order and cover letter. The clerk verifies the name and address of the taxpayer with the information listed on the CMR and cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

13. Pursuant to the general office practice, the BCMS clerk stamped “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas” on the last page of the CMR and also stamped “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on each page of the CMR.

14. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case, “10-2-15” is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of October 2, 2015, and the initials or signature of a postal employee.

15. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders is picked up in BCMS by an employee of the Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

16. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR, which contains a list of conciliation orders issued by the Division on October 2, 2015. The CMR lists 46 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference/CMS number, the name and address of the addressee. There are

no deletions from the list. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

17. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0593 1282 is reference/CMS number 000267901 along with petitioner's name and a Woodside, New York, address that is identical to petitioner's address contained in the request for conciliation conference received by BCMS on September 15, 2015. The cover sheet bears petitioner's name and the same Woodside, New York, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0593 1282 , as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. The Division also submitted the affidavit of Melissa Kate Koslow, a supervisor in the Division's Mail Processing Center since April 2010 and currently a head mail and supply clerk. This affidavit attests to the regular procedures followed by Ms. Koslow's staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. After a Conciliation Order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

19. In this case, the postal employee affixed a postmark dated October 2, 2015 to, and also

wrote his or her initials on, pages one through five of the CMR. The postal employee also wrote and circled the number “46” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” contained on the fifth and last page of the CMR. The postal employee wrote and circled the number “46” at the Division’s specific request, and this was intended to indicate that all of the 46 pieces of mail listed on the CMR were received at the post office.

20. Ms. Koslow’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 Processing Center, the CMR is picked up at the post office by a member of Ms. Koslow’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

21. Based upon her review of the affidavit of Robert Farrelly, the exhibits attached thereto, and the CMR, Ms. Koslow avers that on October 2, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Woodside, New York, address, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the USPS on October 2, 2015 for the records of BCMS. Ms. Koslow asserts that the procedures described in her affidavit were the regular procedures followed by the Mail Processing Center 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 petitioner on October 2, 2015.

22. In response to the instant motion, petitioner addressed the merits of his status as a

responsible person of 888 Orient and his documentary submissions made to the Division in protest of various notices of determination issued against him. Petitioner also requested that the resolution of this motion be postponed, because the petition assigned DTA No. 827519 is still under review.

None of the documents attached to petitioner's response contest the Division's motion.

### **CONCLUSIONS OF LAW**

A. 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 of fact or where a material fact is “arguable” (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 (*see Gerard v. Inglese*, 11 AD2d 381 [2d Dept 1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary

proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman* at 562).

C. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced and protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals.

D. Where the timeliness of a taxpayer's petition following issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly mailed. (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*). When an order is found to have been properly mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first,

there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the CMR, along with the affidavits of Mr. Farrelly and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, establishes the Division's standard mailing procedure. Additionally, the CMR has been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). "A conciliation order is mailed when it is delivered into the custody of the USPS for mailing" (*Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011). The Division has thus met its burden of proof and established that the Conciliation Order was mailed as addressed to petitioner on October 2, 2015.

G. The address to which the Conciliation Order was mailed is the address designated by petitioner on his request for conciliation conference. The Conciliation Order was thus properly addressed and petitioner does not dispute that the Conciliation Order was mailed to the proper address.

H. When an order is found to have been properly mailed by the Division, a presumption arises that it was delivered to the intended recipient (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). That is, "[o]nce the Division has introduced adequate proof to establish a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by

introducing evidence of non-receipt” (*Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011). In this case, however, petitioner did not introduce evidence of non-receipt. The attached documents to petitioner’s response merely addressed the merits of various notices of determination issued against him as a responsible person of 888 Orient and his protest of the same, including the notices of determination being protested under the petition assigned DTA No. 827519.

I. The Conciliation Order was properly mailed, as noted above, when it was delivered into the custody of the USPS on October 2, 2015, and it is this date that triggered the 90-day period within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). In turn, 90 days after the October 2, 2015 date of mailing of the Conciliation Order was December 31, 2015. The documents show that the Conciliation Order was mailed on October 2, 2015, but petitioner’s petition was mailed on March 2, 2016, a date well beyond the 90-day period within which a timely protest had to have been filed. Thus the petition was not timely filed. As a matter of law, there is no jurisdiction to address the merits of petitioner’s protest (*see Matter of Sak Smoke Shop*).

J. The Division of Taxation’s motion for summary determination is granted, and the petition of Te Yu Lee is hereby dismissed.

DATED: Albany, New York  
May 4, 2017

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE