

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LAI Y. LEUNG** : **DETERMINATION**  
 : **DTA NO. 830230**  
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 :  
November 30, 2015 and for Redetermination or :  
Revision of the Notice of Proposed Driver :  
License Suspension Referral Under Article 8 :  
of the Tax Law for the Year 2019. :

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Petitioner, Lai Y. Leung, filed a petition for: (i) revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period November 30, 2015; and (ii) revision of the notice of proposed driver’s license suspension referral under article 8 of the Tax Law for the year 2019.

On October 15, 2021, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension until December 30, 2021 to respond to said notice. On December 21, 2021, the Division of Taxation, appearing by Amanda Hiller, Esq. (Patricia Heer, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by December 30, 2021, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a notice determination and a conciliation order.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner a notice of determination assessing sales and use taxes, dated August 14, 2018, bearing assessment number L-048696556, for the period ending November 30, 2015.

2. On December October 16, 2020, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 307877, to petitioner sustaining notice issued under article 8 of the Tax Law and dated February 28, 2019 for the year 2019.

3. Petitioner filed a petition that was received by the Division of Tax Appeals on January 20, 2021. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on January 15, 2021.

4. October 15, 2021, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition. The notice of intent to dismiss petition provided that the petition was filed more than 90 days after the issuance of the notice determination and conciliation order and, therefore, was not timely filed.

5. The petition also contained: (i) a consolidated statement of tax liabilities pertaining to assessment number L-044315841, dated August 5, 2019, issued to Mogu Sushi, Inc.; and (ii) a notice of adjustment pertaining to assessment number L-044402670, dated December 9, 2019, issued to Mogu Sushi, Inc. These notices were addressed in a different matter that was assigned to DTA number 830558.

6. In response to the issuance of the notice of intent to dismiss, to show proof of proper mailing of the notice of determination dated August 14, 2018 and conciliation order dated October 16, 2020, the Division submitted, among other documents: (i) an affidavit of Patricia Heer, an attorney employed in the Office of Counsel of the Division, dated December 21, 2021; (ii) an affidavit of Joseph DiGaudio, Assistant Supervisor of Tax Conferences of BCMS, dated November 29, 2021; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked October 16, 2020; (iv) a copy of the conciliation order, cover letter and cover sheet, dated October 16, 2020, as well as a copy of the three-windowed mailing envelope used to mail the order; (v) affidavits of Susan Ramundo, Manager of the Mail Room of the Department of Taxation and Finance, dated December 2, 2021 and December 10, 2021; (vi) an affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), dated December 7, 2021; (vii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked August 14, 2018; (viii) a copy of the notice of determination, dated August 14, 2018 together with associated mailing cover sheets; and (ix) a copy of the petitioner’s form IT-201 for the tax year 2017, filed March 29, 2018.

7. The affidavit of Joseph DiGaudio sets forth the Division’s general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the

conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

9. 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, taxpayers name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers 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 zeros (000). 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.

11. The clerk's regular duties including associating each cover sheet, cover letter, and conciliation order. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the 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 control number, bar code, and name and address of the taxpayer appear.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, "10-16-20" was written in the upper right corner of each page of the CMR.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division's Mail Processing Center.

15. Mr. DiGaudio attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by the Division on October 16, 2020. The CMR lists 52 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 is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

16. Information regarding the conciliation order issued to petitioner is contained on page on three of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 0244 9235 is reference for CMS number 000307877, along with the name and last known address of petitioner.

17. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She stated that 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 control

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.

18. In this particular instance, the postal employee affixed a postmark dated October 16, 2020, to each page of the five-page CMR. The postal employee wrote the number "52" and initialed page five to indicate the total pieces of mail received at the post office. The postal employee also circled the typed number "52" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

19. Ms. Ramundo stated 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. Ramundo 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.

20. Based upon her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo avers that on October 16, 2020, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at the New York, New York, address to a branch of the USPS in Albany, New York, in 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 post office on October 16, 2020, for the records of BCMS. Ms. Ramundo asserts that the procedures described in her affidavit are 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 and his representative on October 16, 2020.

21. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division's Case and Resource Tracking System (CARTS), and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of August 14, 2018. 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.

22. 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 the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Address, Street, and PO Address."

23. The August 14, 2018 CMR consists of 33 pages and lists 352 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 33 which contains 0 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated August 14, 2018 to each page of the CMR, wrote the number “352” next to the heading “Total Pieces Received at Post Office” on page 33, and initialed or signed the first and last page of the CMR.

24. Page 3 of the CMR indicates that a notice with reference number L-048696556 and certified control number 7104 1002 9730 0278 0265 was mailed to petitioner at 47 MARKET ST APT 4B NEW YORK, NY 10002-7284. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit A, bears this certified control number and petitioner’s name and address as noted.

25. The second affidavit of Susan Ramundo attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. 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 retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amount on each envelope. A mail processing clerk thereafter 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 listed on the CMR, by checking those envelopes against the 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 affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Picard affidavit as Exhibit A contains a USPS postmark dated August 14, 2018. In addition, she attests that the USPS employee's initials, or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 352 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on August 14, 2018.

26. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on August 14, 2018, as claimed.

27. Petitioner did not submit a response to the notice of intent to dismiss petition.

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

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. The petition in this matter seeks review of a notice of determination. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination

(*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment, and consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. The petition in this matter also seeks review of a conciliation order. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*).

E. Where, as here, the timeliness of a taxpayer’s protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation conference creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

F. The evidence required of the Division in order to establish proper mailing is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices

or orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. DiGaudio, Ms. Picard and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*). Further, petitioner's address on the subject notice of determination and conciliation order, the corresponding mailing cover sheets and the CMR all conform with the address listed on petitioner's form IT-201 for the tax year 2017, filed on March 29, 2018. This was the last return filed prior to the issuance of the notice of determination and conciliation order.

H. In sum, the Division has established that the notice of determination and conciliation order, with the accompanying cover sheets and cover letters, were properly mailed as addressed to petitioner at his last known addresses on August 14, 2018, and October 16, 2020. Having established that the notice and conciliation order, with the accompanying cover sheets and cover letters were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until January 15, 2021, a date that falls beyond 90 days after the issuance of the notice and

conciliation order. Accordingly, the petition is untimely, and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs.*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Lai Y. Leung is dismissed.

DATED: Albany, New York  
March 24, 2022

/s/ Herbert M. Friedman, Jr.  
SUPERVISING ADMINISTRATIVE LAW JUDGE