

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DAVID MITCHELL</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 850281</b>
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, 2018 through August	:	
31, 2019.	:	

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Petitioner, David Mitchell, filed a petition for revision of determinations or for refund of sales and use tax under articles 28 and 29 of the Tax Law for the period December 1, 2018 through August 31, 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Laura Krzeminski, Esq., of counsel), brought a motion on August 10, 2023, seeking dismissal or, in the alternative, summary determination, in the above-captioned matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules).

Petitioner, appearing by DDK and Company, LLP (Nicholas A. Nesi, CPA), did not file a response by September 11, 2023, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

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

1. The subject of the Division of Taxation's (Division) motion is the timeliness of petitioner's protest of three notices of determination all dated June 18, 2020, bearing assessment identification numbers L-051544171, L-051544170 and L-051544169 (the notices). The notices are addressed to petitioner, David J. Mitchell, at a New York, New York, address. The notices assert sales tax, penalty, and interest for the period December 1, 2018 through August 31, 2019, as a responsible person/officer of Life Hotel One, LLC.

2. On May 3, 2022, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On July 8, 2022, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notices 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 6/18/2020, but the request was not mailed until 5/3/2022, or in excess of 90 days [sic], the request is late filed."

4. On October 4, 2022, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

5. In support of its motion and to show proof of proper mailing of the notice, the Division provided the following documents: (i) an affirmation of Laura Krzeminski, Esq., an attorney in the Office of Counsel of the Division, dated August 10, 2023; (ii) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Management Analysis and Project Services Bureau (MAPS), sworn to on July 25, 2023; (iii) a "Certified Record for Presort Mail – Assessments Receivable" postmarked June 18, 2020; (iv) copies of the notices mailed to petitioner with the associated mailing cover sheets; (v) an affidavit of Susan

Ramundo, a manager of the Division's mail room, sworn to on July 25, 2023; (vi) a copy of petitioner's request; (vii) copies of the notices; and (viii) a copy of petitioner's electronically filed 2017 New York State personal income tax return, form IT-201 (the 2017 return), filed on October 13, 2018, listing the same New York, New York, address as is listed on the notices and the petition.

6. Ms. Krzeminski asserts in her affirmation that the New York, New York, address listed on the 2017 return was petitioner's last known address when the notices were issued to him.

7. Marianna Denier has served as the Director of the Division's Management Analysis and Project Services Bureau (MAPS) since July of 2022. Prior to that, she was a supervisor in MAPS since October of 2004. She is also a Principal Administrative Analyst and has held that position since August of 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July of 2019 through August of 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency and notices of determination. As the Director of MAPS, which is responsible for the receipt and storage of certified mail records (CMRs), Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

8. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and

the Division's return address. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

All pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. 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.

10. Here, the CMR for the notices issued by the Division on June 18, 2020, including the notices at issue here, consists of 18 pages with 194 certified control numbers and corresponding assessment numbers, names, and addresses. Ms. Denier 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.

11. Each page of the CMR listed 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 to the actual date of mailing. The actual mailing date as handwritten on the first and last page of the CMR was "6/18/20." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and

the CMR were delivered into the possession of the United States Postal Service (USPS). On page 18, corresponding to “Total Pieces and Amounts” is the preprinted number 194. A USPS representative affixed a postmark, dated June 18, 2020, to each page of the CMR. All of the postmarks included the following language: “Colonie Center Albany NY 12205.” A USPS representative wrote “194” on page 18 next to the heading “Total Pieces Received at Post Office,” and initialed or signed the page.

12. Pages 4 and 5 of the CMR indicate that the notices with reference numbers L 051544169, L 051544170, and L 051544171 with certified control numbers 7104 1002 9730 0155 5994, 7104 1002 9730 0155 6007, and 7104 1002 9730 0155 6014, respectively, were mailed to petitioner at his New York, New York, address. The corresponding mailing cover sheets, attached to the Denier affidavit with the notices as exhibit “B,” bear these certified control numbers and petitioner’s name and address as stated above.

13. Ms. Denier states that the notices were mailed on June 18, 2020, as indicated by the CMR, as well as the USPS postmark on each of the 18 pages of the CMR.

14. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on June 18, 2020.

15. Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures in her affidavit as they relate to statutory notices. Ms. Ramundo has been a manager in the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Ramundo’s official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the USPS.

16. The mail room receives statutory notices that are ready for mailing in an “Outgoing Certified Mail” area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed 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.

17. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon.

18. Ms. Ramundo avers that each page of the CMR in exhibit “A” of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 18 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

19. Based on her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo stated that on June 18, 2020, an employee of the mail room delivered three pieces of

certified mail addressed to petitioner at his New York, New York, address in sealed postpaid envelopes for delivery by certified mail. She also stated the CMR delivered to the USPS on June 18, 2020, was returned to the Division. Ms. Ramundo attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on June 18, 2020.

20. Petitioner did not file a response to the Division's motion.

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

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules or a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* findings of fact 3 and 4), the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper motion for relief where the Division asserts petitioner's request for conciliation conference was untimely (*see Matter of Panco Equip. Corp.*, Tax Appeals Tribunal, May 24, 2021).

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" (20 NYCRR 3000.9 [b] [1]).

Under the Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). "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 judgment is the procedural equivalent of a trial, it should be denied if there is any doubt whether a material issue of fact exists or if there is even arguably such an issue (*Bershaw v Altman*, 100 AD2d 642, 643 [3rd Dept 1984]). 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 by motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2nd Dept 1960]). “To defeat a motion for summary judgment, 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,’ . . . ‘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 v city of New York*, 49 NY2d at 562).

C. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one date 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). 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. Where the timeliness of a taxpayer's request is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of determination of sales and use tax is properly mailed, it creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*). 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 (*id.*). To meet its burden, the Division must show proof of a standard mailing procedure and that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

E. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on June 18, 2020. The CMR has been properly completed and, together with proof of the Division's standard mailing procedure, constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Mostovoi*, Tax Appeals Tribunal, August 10, 2017). The affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see e.g. Matter of*

*Western Aries Constr.; Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and the CMR conform with the address listed on petitioner's 2017 return. Thus, petitioner had 90 days, or until September 16, 2020, to file either a request for a conciliation conference or a petition with the Division of Tax Appeals to challenge the notices (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]).

F. Petitioner's request was filed on May 3, 2022. This date falls well after the 90-day period of limitations for the filing of such a request for the notices (*see* Tax Law §§ 170 [3-a] [b]; 1138 [a] [1]). Consequently, the request was untimely and the same was properly dismissed by the July 8, 2022 conciliation order issued by BCMS.

G. Accordingly, the Division's motion for summary determination is granted, the petition of David Mitchell is denied, and the notices of determination, dated June 18, 2020, are sustained.

DATED: Albany, New York  
December 7, 2023

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE