

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TITANIUM CONSTRUCTION CORP.</b>	:	DECISION
	:	DTA NO. 823183
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, 2000	:	
through November 30, 2005.	:	

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Petitioner, Titanium Construction Corp., filed an exception to the determination of the Administrative Law Judge issued on July 29, 2010. Petitioner appeared by Mark A. Samuel, P.C. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

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

The Division of Taxation (Division) issued to petitioner, Titanium Construction Corp., a Notice of Determination, dated February 2, 2009, which assessed sales and use taxes for the period December 1, 2000 through November 30, 2005, in the amount of \$1,112,769.01 plus penalty and interest for a balance due of \$2,822,016.64. The notice was mailed to 305 Madison Avenue, suite 1523, New York, New York 10165-1532.

Petitioner filed a Request for a Conciliation Conference, dated June 8, 2009, which asserted that petitioner did commercial work and that sales tax is not collected on such work. Petitioner also stated that it had records to prove its assertion. The request was sent via the United States Postal Service in an envelope that bore a postmark dated June 19, 2009.

The Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request, dated July 10, 2009, which denied the request for a conciliation conference. The order stated, in pertinent part: “[s]ince the notice(s) was issued on February 9, 2009,<sup>1</sup> but the request was not mailed until June 19, 2009, or in excess of 90 days, the request is late filed.”

On August 3, 2009, the Division of Tax Appeals received the petition in this matter. Petitioner’s address is listed on the petition as 305 Madison Avenue, #1523, New York, New York 10165.

To show proof of proper mailing of the notices dated February 2, 2009, the Division provided the following: (i) an affidavit, dated February 12, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division’s mail processing center; (ii) an affidavit, dated February 9, 2009, of Patricia Finn Sears, the supervisor of the control unit of the

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<sup>1</sup> This appears to be a typographical error because the certified mailing log clearly shows that the notices were mailed on February 2, 2009.

Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 2, 2009; and (iv) a copy of portions of an audit report pertaining to the assessment in issue.

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 36-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing.<sup>2</sup> Following the Division's general practice, this date was manually changed on the first page to "2-2-09," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified 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. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." The fourth page of the CMR contains information on the subject notice and establishes that on February 2, 2009 a notice with the control number 7104 1002 9730 1144 4028 and assessment number L 031537900, was sent to petitioner at its Madison Avenue, New York, address. A copy of the notice with control number 7104 1002 9730 1144 4011 was sent to

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<sup>2</sup> Ms. Sears affidavit states that the CMR consists of 25 pages. This appears to be an inconsequential typographical error.

petitioner's representative, John Dash, III, at 60 E. 42<sup>nd</sup> Street, Suite 1523, New York, N.Y. 10165.<sup>3</sup>

The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 387. Here, the Postal Service representative wrote 387 on page 36 of the certified mail record and added his initial or signature on each page of the CMR, confirming that 387 notices were received. The USPS

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<sup>3</sup> This is also the same address as on the petition filed with the Division of Tax Appeals.

postmark on each page of the certified mailing record is from the Colonie Center branch and bears the date February 2, 2009, confirming that the notices were mailed on that date.

At the time of the assessment, petitioner had not filed any tax returns. However, the address appearing on the audit report is 305 Madison Avenue, Suite 1523, New York, N.Y., 10165. This is the same address appearing on the Notice of Determination, the request, the mailing cover sheet and the petition.<sup>4</sup>

In response to the Division's motion, petitioner submitted an affidavit by Anthony O'Donnell, who was petitioner's chief executive officer. It was Mr. O'Donnell's understanding that petitioner was a commercial construction corporation that was not required to collect or remit sales tax. In or about 2005, petitioner ceased doing business. According to Mr. O'Donnell, petitioner paid sales tax on the supplies that it purchased and never resold or used for its own purposes. Mr. O'Donnell further explains that all supplies were delivered to the job site for which they were purchased. It is submitted that petitioner has invoices that reflect the amount of sales taxes paid to its suppliers but, because of the period of time that petitioner has been inactive, it needs additional time to locate and submit them. Mr. O'Donnell does not recall when he received the Notice of Determination but contends that it was received at his home address in Staten Island, New York.

Petitioner also submitted the affidavit of Mr. John Dash, who was petitioner's accountant. To the extent pertinent, Mr. Dash states that his office did not receive the Notice of Determination that was sent on February 2, 2009. It is the standard procedure for Mr. Dash's

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<sup>4</sup> Petitioner included sales tax returns for the period in issue with its motion. These returns also show petitioner's Madison Avenue, New York, address.

receptionist and office manager to deliver any mail from the taxing authorities directly to him. Mr. Dash contends that his receptionist did not receive a copy of the Notice of Determination. He also maintains that on or about March 26, 2009, Mr. O'Donnell brought the Notice of Determination to his office at 60 East 42<sup>nd</sup> Street, Suite 1523, New York, New York 10165, for his review. According to Mr. Dash, on June 1, 2009 he sent a letter to the Division that stated that petitioner engaged in commercial construction work and has not been in operation since 2005. The remainder of his affidavit is repetitive of facts that have already been stated.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if it is established that no material and triable issue of fact is presented and that a determination can be issued, as a matter of law, in favor of any party.

The Administrative Law Judge found that where the timeliness of a petition or request for a conciliation conference is at issue, the Division has the burden of proving the fact and date of mailing of a statutory notice to petitioner's last known address. The Administrative Law Judge noted that the Division must prove a standard procedure used by it for the issuance of a notice of determination by one with knowledge of the relevant procedures, and must also prove that the standard procedure was followed in the particular instance in question.

Based on the submitted affidavits of two of its employees, the Administrative Law Judge concluded that the Division had established that it mailed the notice of determination to petitioner by certified mail on February 2, 2009 at its last known address. As petitioner's request for a conciliation conference was not mailed until June 19, 2009, which was beyond the 90-day

period, the Administrative Law Judge held that the Division of Tax Appeals has no jurisdiction over this matter and summary determination was granted in favor of the Division.

The Administrative Law Judge also rejected petitioner's allegation that it filed a timely request for a conciliation conference but did not receive any response from BCMS because it is devoid of any evidence, such as a certified mail receipt to show that there was a timely mailing of a request to BCMS. The Administrative Law Judge found petitioner's argument that the presumption that the notice was properly mailed is rebutted by the absence of Postal Service Form 3877 was without merit.

The Administrative Law Judge determined that petitioner has not offered any evidence to rebut the presumption of receipt other than the assertions of petitioner and its representative that they never received the notices that were mailed on February 2, 2009. The Administrative Law Judge rejected this argument because a denial, absent proof, is not sufficient to rebut the presumption of receipt.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues, as it did below, that the Division cannot verify when or if petitioner received the Notice of Determination and, thus raises a triable issue of material fact that precludes a summary determination. Petitioner contends that there is no evidence to establish that the Notice of Determination was properly delivered into the custody of the USPS for mailing in that there is no Postal Service Form 3877 in the record. Petitioner also disagrees with the Administrative Law Judge that it received the Notice of Determination because the same address appeared on the Notice of Determination, the request, the mailing cover sheet and the

petition. Rather, petitioner argues that there is no evidence to contradict the facts set forth in the affidavits of John Dash and Anthony O'Donnell.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and the determination should be affirmed.

### ***OPINION***

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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]).

That section further 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 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*see Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276 [1978]).

Petitioner claims that neither it nor its representative received the Notice of Determination. While the taxpayer has the right to rebut the presumption of delivery, the rebuttal must consist of more than a mere denial of receipt (*Matter of American Cars “R” Us v. Chu.*, 147 AD2d 797 [1989]). The Division has submitted sufficient evidence of the mailing of the Notice of Determination to raise the presumption, under section 1147(a)(1) of the Tax Law, that the Notice of Determination was received. Under these circumstances, the Division need not



prove actual receipt by the taxpayer, and petitioner's mere denial of receipt is not sufficient to rebut the presumption (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]). Accordingly, we find that petitioner has not provided any evidence to establish that he did not receive the notice mailed to him on February 2, 2009, other than the mere statement itself.

A notice of determination is mailed when it is delivered into the custody of the United States Postal Service for mailing (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of determination to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv., supra*). We find that the Division has met its burden to establish proper mailing of the notice of determination to petitioner on February 2, 2009, by submitting affidavits describing its general mailing procedures and the relevant mailing record, which showed that the procedure was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Tax Law § 1138(a)(1) requires that the Notice of Determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.” We agree with the Administrative Law Judge that the address to which the Notice of Determination was sent was petitioner’s last known address, as it was the same address that appeared on the field audit report. The same address was also on the request for a conciliation conference, the mailing cover sheet and the petition.

We next address petitioner’s argument that the absence of Postal Service Form 3877 rebuts the presumption that the notice was properly mailed. We have found that a properly

completed certified mail record is substantively the same as the Postal Service Form 3877 (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). This Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

We agree with the Administrative Law Judge that a review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and his/her initials on each page of the CMR. Further, the USPS employee also wrote "387" (the number of pieces of mail going out) on page 36 of the CMR, confirming that 387 notices were received by the USPS. Each page of the CMR has a USPS postmark of February 2, 2009, confirming that the notices were mailed on that date. Accordingly, we find that the Notice of Determination was properly mailed on February 2, 2009.

As petitioner's request for a conciliation conference was not mailed until June 19, 2009, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Titanium Construction Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Titanium Construction Corp. is dismissed.

DATED: Troy, New York  
May 5, 2011

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner