

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
STEVEN GANIN	:	DECISION
	:	DTA NO. 823542
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 March 1, 2006	:	
through November 30, 2008.	:	

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Petitioner, Steven Ganin, filed an exception to the determination of the Administrative Law Judge issued on November 24, 2010. Petitioner appeared by Allan D. Poval, CPA. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his 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 timely protested the 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, Steven Ganin, at his Jericho, New York, address a Notice of Determination, dated June 8, 2009, which assessed sales and use

taxes for the period March 1, 2006 through November 8, 2009 (Notice, L-032028651-7). The notice assessed tax in the amount of \$782,680.70, plus penalty and interest, for a balance due of \$1,332,346.48.

On November 25, 2009, petitioner mailed a request for conciliation conference. It was received by the Bureau of Conciliation and Mediation Services (BCMS) on November 27, 2009. BCMS issued to petitioner, on December 18, 2009, a Conciliation Order Dismissing Request, which stated that as the request was filed in excess of 90 days from the date of the issuance of the statutory notice, the request was late filed and was therefore denied.

To show proof of proper mailing of the notice, dated June 8, 2009, the Division provided the following: (i) an affidavit, dated August 2, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated July 26, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 8, 2009; and (iv) and a copy of petitioner's New York State Resident Income Tax Return for the year 2005, dated October 30, 2006.

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices, as follows. 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 16-page CMR lists an initial date, which 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 to "6-8-09," 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 numbers, the assessment numbers and the names and addresses of the recipients are listed on the CMR. The ninth page of the CMR contains information on the subject notice and establishes that, on June 8, 2009, a notice with control number 7104 1002 9730 1349 5424 and assessment number L 032028651 was sent to petitioner at his Jericho, New York, address.

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 follows. 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 174. The number 174 is handwritten and circled and the page is initialed, confirming

that 174 notices were received. The USPS postmark is from the Colonie Center branch and bears the date June 8, 2009, confirming that the notices were mailed on that date.

Petitioner's Jericho, New York, address on the CMR and Mailing Cover Sheet matches the address listed on petitioner's New York State income tax return for 2005. This is also the address on the request for conference and petition.

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

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

The Administrative Law Judge pointed out that where the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the notice to petitioner's last known address pursuant to Tax Law § 1138(a)(1). To prove the fact and the date of mailing of the subject Notice, the Administrative Law Judge noted that the Division must provide proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures and proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that the Division had offered proof sufficient to establish the mailing of the statutory notice on June 8, 2009, to petitioner's last known address. As a result, the Administrative Law Judge found that the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on June 8, 2009.

The Administrative Law Judge determined that the request for a conciliation conference was not filed until November 25, 2009, which was well beyond the 90-day period. The Administrative Law Judge noted that the affidavit of petitioner's representative alleges that there exists another Notice of Determination at BCMS that may contain overlapping periods, and that the process therein may have an impact on the tax due in this matter. The Administrative Law Judge determined that these assertions by petitioner have no bearing upon the timeliness of this petition. The Administrative Law Judge granted summary determination in favor of the Division and dismissed the petition.

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

On exception, petitioner argues that there is a material issue of fact to be decided. Petitioner asserts that the Notice of Determination in this case duplicates periods under review in a different Notice of Determination, which is currently at BCMS. Petitioner argues that the Notice of Determination at issue should be cancelled and combined with the Notice of Determination currently at BCMS.

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

### ***OPINION***

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax, which will become an assessment unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of determination is to be mailed by certified or registered mail to the person for whom it is intended

“at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.”

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 June 8, 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).

We next address petitioner’s argument that material questions of fact are raised because the Notice of Determination in this case duplicates periods under review in a different Notice of Determination currently at BCMS. As the Administrative Law Judge noted, section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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]).

That section further provides that a motion for summary determination is subject to the same provision 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 [1980]).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

In this case, the Administrative Law Judge determined that the Division had proven both the fact and date of mailing of the Notice of Determination dated June 8, 2009. Based upon our review of the record herein, we agree with his conclusion. Petitioner’s attempt to raise substantive issues is precluded by his failure to establish that he timely filed a petition that would confer jurisdiction upon the Division of Tax Appeals to deal with such issues. Further, petitioner has not presented any arguments on exception that are relevant to the issue of timeliness. Although we do not have jurisdiction to address this matter, if the assessment in issue, or an assessment for the same taxes for the same periods, are indeed under review at BCMS, as alleged by petitioner, we are confident that BCMS will take appropriate action with regard to the taxes due. As the Administrative Law Judge adequately and correctly addressed the issue presented to him, we affirm the determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Steven Ganin is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Steven Ganin is dismissed.

DATED: Troy, New York  
July 14, 2011

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

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