

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**VICTOR'S MINI MARKET, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 820722  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period March 1, 2002 through December 31, 2004. :

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Petitioner, Victor's Mini Market, Inc., c/o Victor Bautista, 625 Coster Street, #3, Bronx, New York 10474, filed a petition 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, 2002 through December 31, 2004.

The Division of Taxation, appearing by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed March 29, 2006, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached thereto in support of the motion. Petitioner, appearing by Salvador Collazo, Esq., did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on April 28, 2006, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation ("Division") is the timeliness of petitioner's Request for Conciliation Conference filed in response to a Notice of Determination dated March 4, 2005 and addressed to petitioner, Victor's Mini Market, Inc., at 1053 Ogden Avenue, Bronx, New York 10452-4601.

2. The Notice of Determination assesses additional sales and use taxes in the amount of \$50,604.07, plus penalty and interest, for a total amount due of \$73,255.12 for the period March 1, 2002 through December 31, 2004. The notice bears assessment identification number L-025107411-1 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0581 3304.

3. Petitioner filed a Request for Conciliation Conference which was signed by petitioner's former representative, David Fonseca of Fonseca & Co., Inc., and was dated June 3, 2005. The United Parcel Service ("UPS") mailing envelope containing the Request for Conciliation Conference indicates that it was mailed on June 6, 2005 and it was received by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on June 7, 2005 as evidenced by the indated stamp of BCMS.

4. On June 24, 2005, BCMS issued a Conciliation Order Dismissing Request (CMS No. 209865) which denied petitioner's request for a conciliation conference, stating:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on

March 4, 2005, but the request was not mailed until June 6, 2005, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review, signed and dated by petitioner's former representative, David Fonseca of Fonseca & Co., Inc., on September 20, 2005 was received by the Division of Tax Appeals on September 22, 2005.

6. In response to the petition, the Division filed an answer dated December 28, 2005. The Division subsequently brought this motion, dated March 29, 2005, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter on the basis that petitioner's protest of the statutory notice was filed more than 90 days from the date of issuance of the statutory notice.

In support of its motion for summary determination, the Division submitted: the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of the Notice of Determination; a copy of the certified mail record ("CMR") containing a list of statutory notices allegedly issued by the Division on March 4, 2005; a copy of the Request for Conciliation Conference filed by petitioner including a copy of the envelope in which it was mailed; the Conciliation Order Dismissing Request; petitioner's final sales tax return dated March 21, 2005; and the affidavits of John E. Matthews, Esq., the Division's representative, as well as affidavits of Geraldine Mahon and Bruce Peltier, employees of the Division.

7. Notices of determination, such as the one at issue, are computer-generated by the Division's Case and Resource Tracking System ("CARTS"). The notices are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is

generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address.

Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (hereinafter "certified mail record" or "CMR"). The CMR lists each statutory notice in the order that it is generated in the batch. The certified control numbers appear on the CMR under the first heading, entitled "CERTIFIED NO." The assessment numbers are listed under the second heading, entitled "REFERENCE NO." Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

8. The CMR for the block of statutory notices issued on March 4, 2005, including the Notice of Determination issued to petitioner, Victor's Mini Market, Inc., consists of five connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service ("USPS") and the pages remain connected when the postmarked document is returned to CARTS.

With respect to the CMR prepared for the statutory notices mailed by certified mail on March 4, 2005, each of the pages consists of 11 entries with the exception of the last page, page 5, which contains 2 entries.

In the upper left corner of each page of the CMR is a "run" date which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of "20050531700" was the date and time that the entire CMR was printed. The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division's Mail Processing

Center. In the upper left corner of page one of the CMR, the date that the notices were mailed, “3/4/05,” was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and CMR were delivered into the possession of the USPS.

9. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for “Outgoing Certified Mail.” Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the Mail Processing Center staff operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows. The staff member then weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against information contained on the CMR. The clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and envelopes is completed, a member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area.

10. The postal service representative then affixes his or her initials/signature and/or a U.S. postmark to a page or pages of the CMR. In this case, the postal service representative affixed a postmark of the Colonie Center Branch of the USPS dated March 4, 2005 to each page of the CMR, circled “46” on page 5 of the CMR and initialed or signed pages 1 through 5 of the CMR.

The total number of statutory notices mailed pursuant to the CMR was 46 which was the total number of pieces of certified mail listed on the CMR.

11. As a matter of standard procedure, to ensure accountability, the CMR may be left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff whereupon it is delivered to the CARTS Control Unit.

12. Page two of the CMR indicates that one Notice of Determination with Notice No. L-025107411 was sent to “Victor’s Mini Market, Inc., 1053 Ogden Ave., Bronx, NY 10452-4601” by certified mail using control number “7104 1002 9730 0581 3304.” A USPS postmark on each page of the CMR confirms that the Notice of Determination was sent on March 4, 2005.

13. In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

14. The facts set forth in Findings of Fact “7” through “13” were established through affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon is employed as the Principal Clerk of the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of determination. Mr. Peltier is employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. Peltier’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS. The procedures described in Mr. Peltier’s affidavit are the regular procedures followed by Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and Mr. Peltier

stated that such procedures were followed on March 4, 2005 in mailing the pieces of certified mail described in his affidavit.

15. The fact that the postal service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Peltier. Mr. Peltier's knowledge is based upon his familiarity with the fact that the Mail Processing Center has requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing such number on the CMR.

16. Petitioner's quarterly sales and use tax return for the period December 1, 2004 through February 28, 2005 was marked "Final" and was filed on March 21, 2005. On this return, petitioner listed its address as 1053 Ogden Avenue, Bronx, New York 10452, which was the address to which the subject Notice of Determination was sent.

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

A. 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]).

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, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural

equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). 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 (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

“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,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner did not respond to the Division’s motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania, supra*).

D. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination or, alternatively, a request for conciliation conference with BCMS *within 90 days of the mailing of the notice of determination* (*see, Tax Law § 1138[a][1]; § 170[3-a][a]*). The Division of Tax



Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer 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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices 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 Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

H. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated March 4, 2005 was mailed, by certified mail, to petitioner at its last known address. The 5-page document lists 46 certified control numbers with corresponding names and

addresses, and there are no deletions from those listed thereon. Each page of the CMR bears a USPS postmark dated March 4, 2005 and the initials of a postal service employee. The postal employee also circled the entry “46” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office. Accordingly, the Division has established that it mailed the Notice of Determination as claimed on March 4, 2005.

I. As previously noted, petitioner’s Request for a Conciliation Conference was mailed on June 6, 2005. In order to timely protest the Notice of Determination, petitioner was required to file the Request for a Conciliation Conference within 90 days of March 4, 2005, i.e., on or before June 2, 2005. Therefore, it is clear that petitioner filed its Request for a Conciliation Conference beyond the statutory 90-day period. As a result, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner’s protest (*Matter of Sak Smoke Shop, supra*) and the petition must, therefore, be dismissed.

J. The Division of Taxation’s motion for summary determination is granted and the petition of Victor’s Mini Market, Inc. is dismissed with prejudice.

DATED: Troy, New York  
June 29, 2006

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE