STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREGORY R. JONES	:	DETERMINATION DTA NO. 820786
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, 2001 through February 28, 2003.	:	

Petitioner, Gregory R. Jones, 29 Isabelle Road, Cheektowaga, New York 14225, 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, 2001 through February 28, 2003.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed March 31, 2006, seeking dismissal of the petition or, in the alternative, summary determination in this matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). On April 21, 2006, petitioner appeared by his representative, Jonathan H. Gardner, Esq., and submitted in response an affidavit in opposition to the Division's motion, beginning the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Thomas C. Sacca, 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 a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice of Determination of sales and use taxes due dated December 27, 2004 against petitioner, Gregory R. Jones (Assessment ID# L-024846316-1), asserting a total amount due of $54,826.53 for the period March 1, 2001 through February 28, 2003, consisting of tax due of $30,499.00 plus interest of $12,649.73 and penalty of $11,677.80. The Division, with its motion papers, provided an affidavit dated March 27, 2006 of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center, and an affidavit, also dated March 27, 2006, of Geraldine Mahon, the principal clerk of the Division's Case and Resource Tracking System ("CARTS").

2. The affidavit of Geraldine Mahon sets forth the Division's general practice and procedure for processing statutory notices. Ms. Mahon receives from CARTS a "certified mail record" consisting of a computer printout entitled "Certified Record for Presort Mail, Assessments Receivable" and corresponding notices. The notices are predated with the anticipated date of mailing. Each notice is assigned a certified control number which is recorded on a separate one-page "Mailing Cover Sheet" which also bears a bar code, the taxpayer's mailing address and a Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the certified mail record under the first heading entitled "Certified No." The assessment numbers are listed under the second heading entitled "Reference No." The names and addresses of the taxpayers are listed under the third heading, entitled "Name of Addressee, Street and PO Address." The certified mail record issued by the Department of Taxation and Finance on December 27, 2004 establishes that a Notice of Determination with "Notice Number L-024846316-1" was sent to "Gregory R. Jones, 29 Isabelle Road, Cheektowaga, New York 14225," by certified mail using

control number "7104 1002 9730 0500 8786." The United States postmark on each page of the certified mail record, including page 118 of the certified mail record on which the Notice of Determination at issue appears, confirms that such notice was sent on December 27, 2004. It is also observed that this control number, 7104 1002 9730 0500 8786, appears on the mailing cover sheet for Notice Number L-024846316-1 issued against petitioner.

3. The affidavit of Bruce Peltier, the mail and supply supervisor in the Division's mail processing center, describes the operations and procedures followed by the mail processing center. The notices are received by the mail processing center in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A member of the staff retrieves the notices and operates a machine that puts each statutory notice 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 places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to one of the various branch offices of the U.S. Postal Service ("USPS") located in the Albany, New York area. A postal employee affixes a postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. The USPS has further been requested by the mail processing center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. A review of the certified mail record listing the pieces of certified mail delivered to the USPS by the mail processing center staff on December 27, 2004 confirms that a USPS employee initialed pages 1 through 130 of the certified mail record,

affixed a postmark to each page of the certified mail record, and wrote 1,420 as the total number of pieces of certified mail received.

4. An examination of the envelope in which petitioner mailed his request for conciliation conference to the Bureau of Conciliation and Mediation Services ("BCMS") shows that it was mailed at Buffalo, New York 14202 on August 3, 2005 as indicated by the postal meter markings on the envelope.

5. On August 26, 2005, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination 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 was issued on December 27, 2004, but the request was not received until August 8, 2005, or in excess of 90 days, the request is late filed.

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 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]).

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, 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***).

B. In the instant matter, petitioner alleges in an affidavit that he filed a Request for a Conciliation Conference within 30 days of having received the Notice of Determination. The mere allegation of a timely filed request, without a postal receipt for certified or registered mail, is "insufficient, as a matter of law, to prove timely filing" (***Matter of Dattilo,*** Tax Appeals Tribunal, May 11, 1995, ***confirmed*** 222 AD2d 28, 645 NYS2d 352). 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,*** 36 NY2d 539, 544, 369 NYS2d 667, 671; ***Whelan v. GTE Sylvania***, ***supra***).

C. Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due shall be an assessment of the liability determined after ninety days from the mailing of the notice "except only for any such tax . . . as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing . . . ." In lieu of an application to the

Division of Tax Appeals for a hearing, the taxpayer has the alternative of filing a request for a conciliation conference since, under Tax Law § 170.3-a(b), "[a] request for a conciliation conference . . . shall suspend the running of the period of limitations for the filing of a petition protesting such notice and requesting a hearing." Consequently, a notice of determination of additional sales tax due does not become an assessment of the liability determined if the taxpayer within 90 days from the mailing of the notice files a request for conciliation conference. If a taxpayer fails to file a timely challenge by requesting a conciliation conference or a hearing within 90 days of the mailing of the notice of determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (***see, Matter of American Woodcraft, Inc.***, Tax Appeals Tribunal, May 15, 2003).

D. 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).

E. 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). Here, the Division has offered adequate proof, as detailed in Findings of Fact "2" and "3", to establish the mailing of the statutory notice on the same date that it was dated, i.e., December 27, 2004. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (***see, Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002). Given the metered postmark on petitioner's request for a conciliation conference, it may be concluded that it was filed beyond the 90-day statutory time period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (***see, Matter of American Woodcraft, Inc., supra***). Even *one* day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (***see, Matter of Maro Luncheonette, Inc.***, Tax Appeals Tribunal, February 1, 1996).

F. As noted herein, petitioner's request for a conciliation conference was filed on August 3, 2005. This date falls well beyond the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (***see***, Tax Law § 1138[a][1]; § 170[3-a][a]).

G. Finally, it is observed that with the 1996 amendment to Tax Law § 1138(a)(1), effective on or after January 1, 1997, the Notice of Determination at issue here is no longer treated as "finally and irrevocably fixing the tax" so that petitioner is not without some remedy (***see***, L 1996, ch 267). He may pay the tax and file a claim for refund. If the refund claim is disallowed, he may then seek to petition the Division of Tax Appeals or request a conciliation conference in order to contest such disallowance.

H. The Division of Taxation's motion for summary determination is granted, and the petition of Gregory R. Jones is dismissed with prejudice.

DATED: Troy, New York
July 20, 2006

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE