

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAG MEDIA HOLDINGS, INC.	:	DETERMINATION
F/K/A JAGNOTES.COM INC.	:	DTA NO. 821561
	:	
for Redetermination of Deficiencies or for		
Refund of New York State and New York City :		
Personal Income Taxes Under Article 22		
of the Tax Law and the New York City :		
Administrative Code for the Years 2000 and		
2001.	:	

Petitioner, JAG Media Holdings, Inc. f/k/a JagNotes.com Inc., filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2000 and 2001.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, received on June 20, 2007, 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)(i);(b). Petitioner, appearing by Thomas J. Mazzarisi, Chairman and Chief Operating Officer, had 30 days, or until July 20, 2007, to respond to the motion, and the 90-day period for issuance of this determination commenced on July 20, 2007. After due consideration of the documents and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was filed in a timely manner.

FINDINGS OF FACT

1. The Bureau of Conciliation and Mediation Services ("BCMS") of the Division of Taxation ("Division") received from petitioner, JAG Media Holdings, Inc. f/k/a JagNotes.com, Inc., a Request for Conciliation Conference ("Request"). This Request identifies petitioner by name, lists its "current address" as 6865 S.W. 18th Street, Suite B13, Boca Raton, FL 33433 and lists the "address on notice/assessment" as 6865 S.W. 18th Street, Suite B13, Boca Raton, FL 33433. The Request is dated October 28, 2006.

2. The documents challenged by the Request are four statutory notices of deficiency addressed to petitioner at "6865 SW 18th ST STEB13 BOCARATON, FL 33433-7057." The notices were dated July 7, 2006 and asserted that New York State and New York City withholding taxes were due from petitioner for the years 2000 and 2001 as follows:

Tax Article	Assessment ID	Periods Ended	Balance Due
22	L-027365191-3	1/31/00 - 12/31/00	\$246,003.25
30	L-027365192-2	1/31/00 - 12/31/00	\$138,937.33
22	L-027365193-1	1/31/01 - 12/31/01	\$132,889.87
30	L-027365194-9	1/31/01 - 12/31/01	\$ 71,522.28

The notices provided, in their explanation and instructions sections, that to protest the notices a Request for Conciliation Conference or a Petition for a Tax Appeals hearing had to be filed by October 5, 2006.

3. The Division issued identical notices of deficiency to Thomas J. Mazzarisi as petitioner's representative. These notices were addressed "c/o JAG MEDIA HOLDINGS, INC., 6865 S.W. 18TH STREET, SUITE B 13, BOCA RATON, FL 33433."

4. In a Conciliation Order Dismissing Request (CMS No. 216400) dated November 17, 2006, BCMS advised petitioner that its request for a conciliation conference was denied. Specifically, the order stated that the notices were issued on July 7, 2006, but the request was not received until October 30, 2006. Therefore, the request was untimely since it was filed more than 90 days after the issuance of the notices.

5. On February 9, 2007, petitioner challenged this denial by filing a petition, dated February 8, 2007, with the Division of Tax Appeals. The petition stated that petitioner did not receive the July 7, 2007 deficiency notices and first became aware of the opportunity to request a conciliation conference when one of its officers, Mr. Schoepfer, received his deficiency notice. As a result, petitioner and Mr. Schoepfer filed their requests for a conciliation conference at the same time in reliance upon the July 31, 2006 date on Mr. Schoepfer's notices of deficiency. Petitioner requests that he be given a conciliation conference which would be held concurrently with Mr. Schoepfer's conference.

6. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division's computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number.

7. Each computer-generated notice of deficiency is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR. The

CMR also lists the assessment number assigned to each notice listed on the CMR, the names and addresses of the taxpayers to whom the notices are being issued, and the postage and fee amounts for the notices being mailed. The CMR also lists the date of its printing. The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the CMR in this case was manually changed at the time of mailing by Division personnel to July 7, 2006, in order to conform to the actual date of mailing.

8. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page "Mailing Cover Sheet" (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division. The reverse side of each such Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

9. After a notice of deficiency is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes "postage" and "fee" amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information

contained on the CMR and also performs a random review of up to 30 pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the United States Postal Service (“USPS”) located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his signature or initials to the CMR.

10. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control unit.

11. In the instant case, the CMR is a seven-page computer-generated document entitled “Certified Record for Presort Mail-Assessments Receivable.” The CMR lists 74 certified control numbers. Each such certified control number was assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains eleven entries, with the exception of the last page (page seven), which contains eight entries.¹

12. Information regarding the notices of deficiency issued to petitioner was contained on page seven of the CMR and lists the following certified numbers, reference numbers and names and addresses:

¹ The names, addresses and other identifying information with regard to taxpayers other than petitioner have been redacted from the CMR so as to preserve the confidentiality of the information relating to such other taxpayers.

Certified Number	Reference Number	Name and Address
7104 1002 9730 1308 2570	L 027365191	JAGNOTES.COM INC. 6865 SW 18 TH ST STEB13, BOCARATON FL 33433- 7057
7104 1002 9730 1308 2587	L 027365192	JAGNOTES.COM INC. 6865 SW 18 TH ST STEB13, BOCARATON FL 33433- 7057
7104 1002 9730 1308 2594	L 027365193	JAGNOTES.COM INC. 6865 SW 18 TH ST STEB13, BOCARATON FL 33433- 7057
7104 1002 9730 1308 2600	L 027365194	JAGNOTES.COM INC. 6865 SW 18 TH ST STEB13, BOCARATON FL 33433- 7057

13. Information regarding the notices of deficiency issued to petitioner's representative, Thomas J. Mazzarisi, was contained on pages six and seven of the CMR and lists the following certified numbers, reference numbers and names and addresses:

Certified Number	Reference Number	Name and Address
7104 1002 9730 1308 2532	L 027365191	Thomas J. Mazzarisi 6865 S.W. 18 th Street, SUITE B 13 BOCA RATON FL 33433
7104 1002 9730 1308 2549	L 027365192	Thomas J. Mazzarisi 6865 S.W. 18 th Street, SUITE B 13 BOCA RATON FL 33433
7104 1002 9730 1308 2556	L 027365193	Thomas J. Mazzarisi 6865 S.W. 18 th Street, SUITE B 13 BOCA RATON FL 33433

7104 1002 9730 1308 2563	L 027365194	Thomas J. Mazzarisi 6865 S.W. 18 th Street, SUITE B 13 BOCA RATON FL 33433
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The Certified Number and the Reference Number match the Certified Mailing Number and the Assessment ID Number set forth on the Mailing Cover Sheet and the notices of deficiency at issue herein.

14. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated July 7, 2006, and the initials of the postal employee verifying receipt of the items. The last page of the CMR contains a preprinted entry of “74” corresponding to the heading “Total Pieces and Amounts.” Appearing beneath this preprinted entry and corresponding to the heading “Total Pieces Received At Post Office” is the handwritten number “74” followed by the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the hand writing of the number “74” indicate that all 74 pieces listed on the CMR were received at the post office.

15. In the ordinary course of business, the CMR is returned to the Division’s CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “6” through “15” were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a Supervisor in the Division’s CARTS Control Unit. Ms. Sears’s duties include supervising the processing of notices of deficiency. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division’s Mail Processing Center. Mr. VanDerzee’s duties include

supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

17. The addresses on the notices of deficiency were the same as the address given on petitioner's withholding tax return for the period ending December 31, 2002. This return, dated January 31, 2003, was the last return filed by petitioner pursuant to Tax Law Article 22 and the New York City Administrative Code prior to the issuance of the subject notices.

18. Petitioner's only communication in this matter subsequent to the filing of its petition has been a letter stating that this matter has been settled. However, a signed withdrawal of petition or an executed stipulation of discontinuance has not been filed. Therefore, this matter may not be treated as a settled case.

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. Here, 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 Sears and VanDerzee affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is

concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Commissioner of Taxation to issue a Notice of Deficiency to a taxpayer where a deficiency of personal income tax has been determined. This section further provides that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the Notice of Deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. It is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed. Where, as here, a taxpayer files a request, but the timeliness of the request is at issue, the Division bears the burden of proving proper mailing of the statutory notice (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a Notice of Deficiency is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The mailing

evidence required of the Division in order to establish proper mailing is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of 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., supra*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerzee, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the particular notices at issue were actually mailed to petitioner on July 7, 2007, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notices and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Sears and VanDerzee affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and last known address at the time of mailing, as well as the Assessment ID numbers on the face of the notices in issue, appear on the CMR, which bears a USPS date stamp of July 7, 2006. There are 74 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "74," that 74 items were received for mailing. In short, the Division established that it mailed the notices of deficiency to petitioner by certified mail on July 7, 2006 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). In turn, in order to be considered timely, any protest against the notices had to have been filed within 90 days thereafter.

G. The Conciliation Order denied petitioner's request for a conciliation conference on the basis that the request was not filed within 90 days after the issuance of the notices. Petitioner did not provide any documents or other evidence to establish that any protest occurred within the requisite 90-day time period. Since the Request was not timely filed (i.e., within 90 days after July 7, 2006), the same was untimely and there is no jurisdiction to proceed with this matter.

H. The petition of JAG Media Holdings Inc. f/k/a JagNotes.com, Inc., is hereby dismissed.²

DATED: Troy, New York
October 18, 2007

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

² Petitioner is not entirely without recourse in this matter. Petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.