

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition                          | : |                       |
| of   | : |                       |
| <b>WEST 20<sup>TH</sup> ENTERPRISES</b>                | : | <b>DETERMINATION</b>  |
|  | : | <b>DTA NO. 821688</b> |
| 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 June 1, 2002 through November 30, 2005. | : |                       |

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Petitioner, West 20<sup>th</sup> Enterprises Corp., 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 June 1, 2002 through November 30, 2005.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 1, 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)(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 Hodgson Russ, LLP (Alvan L. Bobrow, Esq., of counsel), had 30 days, or until August 31, 2007, to respond to the motion but did not do so. Thus, August 31, 2007 began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, 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 September 28, 2006, and addressed to petitioner, West 20<sup>th</sup> Enterprises Corp., at 1160 E. Jericho Tpk, STE 117, Huntington, NY 11743-5400.

2. The Notice of Determination assessed additional sales and use taxes in the amount of \$2,269,275.13, plus interest and penalties, for a total amount due of \$4,067,288.60 for the period June 1, 2002 through November 30, 2005. The notice bears assessment identification number L-027740782-8 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 1422 6348.

3. Petitioner filed a Request for Conciliation Conference which was signed by Anthony Capeci, CPA, and was dated December 30, 2006. The mailing envelope containing the Request for Conciliation Conference bore a metered postmark of January 3, 2007, and the Request for Conciliation Conference was received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on January 16, 2007, as evidenced by the in-date stamp of BCMS.

4. On February 2, 2007, BCMS issued a Conciliation Order Dismissing Request (CMS No. 217362) 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

September 28, 2006, but the request was not received until January 16, 2007, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review, signed and dated by petitioner's representative, Alvan L. Bobrow, Esq., on April 24, 2007, was received by the Division of Tax Appeals on May 1, 2007. It sought review of the Conciliation Order Dismissing Request, which asserts that the Division issued the Notice of Determination to petitioner on October 5, 2006, and that a timely request for a Conciliation Conference before BCMS was made. Petitioner does not allege that the Division mailed its Notice of Determination to an incorrect address.

6. In response to the petition, the Division filed an answer dated June 27, 2007. The Division subsequently brought this motion, dated August 1, 2007, 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 because 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 allegedly sent to petitioner; a copy of the certified mail record (CMR) containing a list of statutory notices allegedly issued by the Division on September 28, 2006; a copy of the Request for Conciliation Conference filed by petitioner and the envelope in which it was mailed; the Conciliation Order Dismissing Request; a copy of United States Postal Service form 3811-A requesting a return receipt for the mailing of the Notice of Determination; a copy of the delivery information received from the United States Postal Service relating to the Notice of Determination; a copy of petitioner's part-quarterly sales and use tax return for the period April 1, 2005 through April 30, 2005, dated May 20, 2005; and the affidavits of John E. Matthews,

Esq., the Division's representative, as well as affidavits of Heidi Corina, James Steven Vanderzee and Patricia Finn Sears, employees of the Division.

7. Petitioner did not respond to the Division's motion.

8. The CMR for the block of statutory notices issued on September 28, 2006, included the Notice of Determination issued to petitioner. With respect to the CMR prepared for the 2,230 statutory notices mailed by certified mail on September 28, 2006, each of the pages consists of 11 entries with the exception of the last page, page 203, which contains 8 entries.

9. When the statutory notices are delivered into the possession of a USPS representative, the USPS employee affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR, and lists the number of notices or circles the number printed, to indicate the total number of pieces received. In this case, the postal representative affixed a postmark to each page of the CMR and beside each postmark initialed each of the 203 pages of the CMR. However, the USPS employee failed to circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. Notwithstanding this omission, the Division provided an affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares USPS form 3811-A, which is a form used by a mailer to request return receipts after mailing and can be used for registered, certified, insured and express mail. In this particular case, the form 3811-A was mailed to Gary Chiboucas, Claims and Inquiry of the U.S. Postal Service-Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288. The response which was received indicates that a piece of certified mail bearing number 7104 1002 9730 1422 6348 was delivered on "10/02/06 at 11:13 AM in HUNTINGTON, NY 11743." The scanned signature image of the recipient was "P. Knoll"

which was above the handwritten name “P. Knoll” and the address of the recipient was written in as “1160 E Jericho Tpke Ste 117.”

10. The copy of the corresponding Notice of Determination (L-027740782) bears the certified control number of “7104 1002 9730 1422 6348,” which is identical number to that which appears on the USPS form 3811-A.

11. Petitioner’s New York State sales and use tax return (form ST-100), signed by petitioner on May 20, 2005, was the last return filed by petitioner prior to the issuance of the Notice of Determination on October 2, 2006, according to the Division’s records. This return indicated that petitioner’s address was West 20<sup>th</sup> Enterprises Corp, 1160 E. Jericho Tpke., Ste. 117, Huntington, NY 11743.

### ***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, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). 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 if the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]). 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 [2d Dept 1960]).

“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 [1<sup>st</sup> Dept 1992], *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner presented no evidence to contest the facts alleged in the Sears, Vanderzee and Corina affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671[1975]; *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).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears, Mr. Vanderzee and Ms. Corina, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. However, one of the key procedures in the process which exists in order to verify the mailing of notices by the USPS was not performed, i.e., the circling of the number of notices delivered to the USPS. The Division took steps to correct this flaw by its procedure of issuing USPS form 3811-A, which strives to verify delivery of the notice when the mailing proof is flawed. Where the exact date of mailing cannot be proved, but receipt of the notice can be established, the 90-day statutory period for filing a protest begins to run from the date of receipt

of the notice (*Matter of Green Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

While Anthony Capeci, whose name appears in connection with petitioner in this matter, did not sign for the piece of certified mail, a person by the name of P. Knoll signed for and received the document at the Huntington, New York address on October 2, 2006. By virtue of the mailing by Heidi Corina and the response received thereto, the Division established that the notice in issue herein was delivered on October 2, 2006; the 90-day protest period commenced on such date, and thus, the 90-day protest period expired thereafter on December 31, 2006. Inasmuch as December 31, 2006 was a Sunday, and January 1, 2007 a legal holiday, the last day prescribed for proper protest was January 2, 2007 (20 NYCRR 4000.7[b]).

G. As previously noted, petitioner's Request for a Conciliation Conference was dated December 30, 2006, mailed on January 3, 2007, bearing not a USPS postmark, but a metered one, and received by the Division on January 16, 2007. In order to timely protest the Notice of Determination, petitioner was required to file the Request for Conciliation Conference within 90 days of October 2, 2006, i.e., on or before January 2, 2007. Thus, the question that remains is whether petitioner met the mailing procedures required of it to properly protest the notice in a timely manner, and request the conciliation conference.

Pursuant to 20 NYCRR 4000.7(a)(2)(iii)(b), the regulations which specify the mailing requirements for documents served on or filed with BCMS, if the postmark on the envelope containing the exception is not made by the United States Postal Service (e.g., metered mail), the following rules apply: 1) the postmark must bear a date which falls within the prescribed period or on or before the prescribed date for filing; and 2) must be received by BCMS not later than the time when an envelope which has sufficient postage prepaid and is properly addressed is



mailed and sent by the same class of mail would ordinarily be received in order to be considered timely filed. Neither the postmark nor the date of receipt by BCMS meets the regulatory criteria. The metered postmark was after January 2, 2007, and untimely. Additionally, the document was not received by BCMS allegedly until after 13 days, which is not within the time that a document mailed and postmarked by the USPS would ordinarily be received (*see Matter of Brenner*, Tax Appeals Tribunal, March 1, 1990; *cf. Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988 [five days was found to be an appropriate amount of time in which a document would ordinarily be received]). Accordingly, since the request was untimely, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*see Matter of Sak Smoke Shop, supra*), and the petition must, therefore, be dismissed.

H. The Division of Taxation's motion for summary determination is granted and the petition of West 20<sup>th</sup> Enterprises Corp. is dismissed with prejudice.

DATED:Troy, New York  
November 29, 2007

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE