STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KOKO LOBO LLC	:	ORDER DTA NO. 821691
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 13, 2006.	:	

Petitioner, Koko Lobo LLC, 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 13, 2006.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 3, 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 in support of the motion. Petitioner, appearing by James F. Preston, CPA, PC, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this order commenced on November 2, 2007, 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, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days after the issuance of a notice of determination.

FINDINGS OF FACT

1. The petition of Koko Lobo LLC was filed with the Division of Tax Appeals on May 7, 2007. In it, petitioner challenges a determination of compensating use tax due made by the Division of Taxation (Division), and the denial of its request for conciliation conference. A Conciliation Order Dismissing Request (CMS No. 218385) dated April 6, 2007 is attached to the petition and states, in part:

> 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 October 30, 2006, but the request was not received until March 22, 2007, or in excess of 90 days, the request is late filed.

2. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The Division subsequently brought this motion, dated October 3, 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 the issuance of the statutory notice. Petitioner did not reply to the motion.

3. In support of its motion for summary determination, the Division submitted: copies of the Request for Conciliation Conference dated March 20, 2007 and the envelope bearing the machine meter (Neopost) postmark dated March 20, 2007, in which the request was mailed; a

copy of the Conciliation Order Dismissing Request; a copy of the certified mail record containing a list of the notices allegedly issued by the Division on October 30, 2006; and the affidavit of John E. Matthews, Esq., the Division's representative, as well as affidavits of James Steven VanDerzee and Patricia Finn Sears, employees of the Division.

4. In conjunction with the affidavit of Ms. Sears, the Division offered the certified mail record, a Notice of Determination and the associated Mailing Cover Sheet. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE CERTIFIED MAIL RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE." The upper right corners of the pages are consecutively numbered from page 1 to page 16. The upper left corner of each page contains a run date and time of "20062911700." On the first page, a handwritten date of "10-30-06" is written above the original run date. Each of the pages contains columns labeled "CERTIFIED NO," "REFERENCE NO," "NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS." Certified numbers are listed in a vertical column on the left side of each page. Page 12 shows an article of certified mail, certified control number 7104 1002 9730 1462 8357, notice number L 027835815, addressed to petitioner, KOKO LOBO LLC, 1800 COUNTRY CLUB DRIVE, CUTCHOGUE, NY 11935-1728. The notice and certified control numbers correspond with those found on the Notice of Determination and the associated Mailing Cover Sheet. On page 16, the phrases "TOTAL PIECES AND AMOUNTS" and "TOTAL PIECES RECEIVED AT POST OFFICE" appear. On that page, the number 167 is stated to be the number of pieces listed on the CMR. The number 167 is handwritten below the phrase "TOTAL PIECES RECEIVED AT POST OFFICE," and directly above the stamped phrase "POST

OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas." Illegible initials appear on each page of the CMR. A date stamp appears on each page of the CMR which accompanied the affidavit of Patricia Finn Sears. The stamp on page five is sufficiently legible to determine that it bears the date of October 30, 2006 and was from the Colonie Center Branch of the United States Postal Service. However, the date portion of the stamp is illegible on the remaining 15 pages of the certified mail record.

5. A Notice of Determination addressed to petitioner, KOKO LOBO LLC, 1800 COUNTRY CLUB DRIVE, CUTCHOGUE, NY 11935-1728, bears a date of October 30, 2006 and assessment identification number L-027835815-8, and the associated Mailing Cover Sheet addressed to KOKO LOBO LLC, 1800 COUNTRY CLUB DRIVE, CUTCHOGUE, NY 11935-1728, bears certified control number 7104 1002 9730 1462 8357.

6. The Bureau of Conciliation and Mediation Services received petitioner's Request For Conciliation Conference in protest of Notice of Determination L-027835815-8 on March 22, 2007. The request form signed by petitioner's representative, James F. Preston, is dated March 20, 2007. The envelope in which the request form was mailed bears the machine meter (Neopost) postmark dated March 20, 2007. On the request form, petitioner's address is listed as 1800 Country Club Drive, Cutchogue, New York 11935-1728.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]); ***see also*** Tax Law § 2006[6]).

B. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

> The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; ***see also*** Tax Law § 2006[6]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is "subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR." (20 NYCRR 3000.9[c]; ***see also Matter of Service Merchandise Co.***, Tax Appeals Tribunal, January 14, 1999). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; ***see Daliendo v. Johnson***, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the "procedural equivalent of a trial" (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of a "day in court," summary determination must be used sparingly (***Wanger v. Zeh***, 45 Misc 2d 93, 256 NYS2d 227, 229 [1965], ***affd*** 26 AD2d 729 [1966]). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such facts exist" (***Daliendo v. Johnson,*** 543 NYS2d at 990, ***supra***). If any material facts are in dispute, if the existence of a triable issue of fact is "arguable," or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22

NY2d 439, 293 NYS2d 93, 94 [1968]; ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 1067 416 NYS2d 790, 791-792 [1979]; ***see also*** 20 NYCRR 3000.9[b]). Generally, with exceptions not relevant here, 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 (***see*** CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***Alvord & Swift v. Muller Constr. Co.***, 46 NY2d 276, 281, 413 NYS2d 309, 312 [1979]).

C. Petitioner did not respond to the Division's motion for summary determination. Therefore, petitioner is deemed to have conceded that the facts as presented in the affirmation submitted by the Division are correct (***see Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; ***Whelan v. GTE Sylvania*****,** 182 AD2d 446, 582 NYS2d 170, 173 [1992]). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (***Museums at Stony Brook v. Village of Patchogue Fire Dept., supra***, 536 NYS2d at 179; ***see also Weiss v. Garfield***, 21 AD2d 156, 249 NYS2d 458, 461 [1964]).

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 a 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 the particular instance (***see Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

G. The Division's proof in this case consists of the affidavits of Patricia Finn Sears and James Steven VanDerzee, which were offered to establish the general procedure for generating and issuing (mailing) notices of determination pursuant to Tax Law § 1138(a)(1), and Exhibit A of the Sears affidavit, a 16-page computer-generated CMR, which was offered to establish that the procedure was followed in this instance. The Division has introduced adequate proof of its

standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerzee, employees of the Division who are involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. However, I find the Division's proof that the standard procedure was followed in this instance to be deficient.

The CMR submitted by the Division contains a flaw. The date of the Postal Service postmark is not legible on 15 pages of the certified mail record, including page 12, the page on which petitioner's name appears, and page 16, the last page of the certified mail record (***see*** Finding of Fact "9"). Therefore, the Division has not established the date on which the Notice of Determination was mailed to petitioner, and the 90-day filing period was never triggered. (***Matter of Auto Parts Center, Inc.***, Tax Appeals Tribunal, February 9, 1995.) Accordingly, summary determination is not warranted in favor of the Division.

H. The Division of Taxation's Motion for Summary Determination is denied, and the matter will be scheduled for hearing in due course.

DATED: Troy, New York
January 31, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE