

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FRANK RICCARDI</b>	:	DETERMINATION
	:	DTA NO. 821976
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period June 1, 2005 through	:	
November 30, 2005.	:	

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Petitioner, Frank Riccardi, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2005 through November 30, 2005.

On April 24, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated April 24, 2008, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by May 23, 2008, which date commenced the 90-day period for issuance of this determination.<sup>1</sup> After due consideration of the affidavits and documents presented by the Division of Taxation, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

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<sup>1</sup>Petitioner did not file a response to the motion.

**ISSUE**

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, the facts mandate a determination in its favor.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued to petitioner, Frank Riccardi, at his Glen Head, New York, address, the following notices of determination with the corresponding dates, periods and amounts of sales and use taxes due:

<b>Notice #</b>	<b>Issue Date</b>	<b>Period Ended</b>	<b>Deficiency</b>
L-027368456	07/10/2006	11/30/2005	\$13,948.34
L-027368457	07/10/2006	08/31/2005	\$14,728.99

By his Request for Conciliation Conference, filed August 6, 2007, petitioner protested notices numbered L-027368456 and L-027368457, dated July 10, 2006.

2. On August 24, 2007, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices was untimely and stated, 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 July 10, 2006, but the request was not mailed until August 9, 2007, or in excess of 90 days, the request is late filed.

3. With its motion papers, the Division, to show proof of proper mailing of the notices dated July 10, 2006, provided the following: (i) an affidavit, dated April 22, 2008, of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing

center; (ii) an affidavit, dated April 21, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 29, 2006; and (iv) petitioner's 2003 form IT-372, Application for Additional Extension of Time to File for Individuals, dated August 11, 2004, which was the last filing from petitioner prior to the issuance of the notices.

4. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, pages 25 and 26 of the 39-page CMR contain information on the subject notices and list an initial date of June 22, 2006 ("20061791700," referring to 5:00 P.M. on day 179 of 2006). Following the Division's general practice, this date was manually changed to "7/10/06," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 25 of the CMR issued by the Division on July 10, 2007 establishes that a notice with the control number 7104 1002 9730 1308 5427 and assessment number L-027368456 was sent to petitioner at his Glen Head, New York, address. Page 26 of the same CMR establishes that a notice with the control number 7104 1002 9730

1308 5434 and assessment number L-027368457 was sent to petitioner at the same Glen Head, New York, address.

5. The affidavit of James Steven VanDerzee, the mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. 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 CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on pages 1 through 39 of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 425. To the upper right of this number is a handwritten number 425 with initials over it, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 10, 2006, confirming that the notices were mailed on that date.

6. Petitioner's Glen Head, New York, address on the CMR and Mailing Cover Sheets matches the address listed on his form IT-372, which was filed on August 11, 2004. This is the

last item that petitioner filed with the Division before the issuance of the subject notices of determination.

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

A. A motion for summary determination shall be granted:

if, upon all 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 and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Moreover, petitioner has submitted no evidence to contest the facts alleged by the VanDerzee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons discussed below.

C. Where the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the

particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*)

Additionally, Tax Law § 1138(a)(1) requires that the Notice of Determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

D. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices on the same date that they were dated, i.e., July 10, 2006, to petitioner’s last known address. 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). Further, the address on the Mailing Cover Sheets and CMR conforms with the form IT-372 extension application filed by petitioner on August 11, 2006, which satisfies the “last known address” requirement in Tax Law § 1138(a)(1). It is concluded that the notices were properly mailed and thus, the statutory 90-day time limit to file a either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on July 10, 2006 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner’s Request for Conciliation Conference was mailed on August 6, 2007, a date far beyond the 90-day period for protesting the notices. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006) and must grant summary determination in favor of the Division of Taxation.

F. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, he may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

G. The Division's motion for summary determination is granted, and the petition of Frank Riccardi is dismissed.

DATED: Troy, New York  
July 10, 2008

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE