

.STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LIVIU SEGAL	:	ORDER
	:	DTA NO. 822053
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 September 1, 2004 through May 31, 2006.	:	

Petitioner, Liviu Segal, 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 September 1, 2004 through May 31, 2006.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated July 16, 2008 seeking dismissal of the petition, or in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(a)(i) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated July 16, 2008, and attached exhibits supporting the motion. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on August 15, 2008, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion for dismissal of the petition or for summary determination should be granted.

FINDINGS OF FACT

1. On January 10, 2008, the Division of Tax Appeals received a petition in this matter, which was signed by petitioner, Liviu Segal, and was dated January 7, 2008. This petition was sent UPS "Next Day Air" service on January 8, 2008. The petition listed petitioner's address as 505B East Pine Street, Long Beach, New York 11561.

2. In support of its motion for summary determination, the Division of Taxation (Division) submitted: copies of the petition and the envelope in which it was sent by UPS Next Day Air Service; a copy of the Conciliation Order Dismissing Request; a copy of the certified mail record (CMR) containing a list of the conciliation orders allegedly issued by the Division on August 31, 2007; a copy of petitioner's request for conciliation conference and the envelope in which it was sent by United States Postal Service (USPS) First Class mail; and the affidavit of John E. Matthews, Esq., the Division's representative, as well as affidavits of James Steven VanDerZee and Robert Farrelly, employees of the Division.

3. In conjunction with the affidavit of Mr. Farrelly, the Division offered the CMR and the Conciliation Order Dismissing Request. On its face, the information on the CMR corresponds with the description set forth in the affidavit. Among other things, the CMR shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER." The upper right corners of the pages are consecutively numbered page 1 to page 4. On each page, a handwritten date of "8/31/07" is written in the upper right corner. 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 three shows an article of certified mail, certified control number 7104 1002 9730 0276 6276, reference/CMS number 000220557, addressed to petitioner, "LIVIU SEGAL, 505 B PINE ST., LONG BEACH, NY 11561-2430." A postal worker wrote his or her initials and manually circled the number "40" after the printed statement "TOTAL PIECES AND AMOUNTS" on page 4 of the CMR. A date stamp appears on each page of the CMR which accompanied the affidavit of Robert Farrelly. The stamp on page one is sufficiently legible to determine that it bears the date of August 31, 2007 and was from the Colonie Center Branch of the United States Postal Service. However, the date portion of the stamp is illegible on pages 2 and 3 of the certified mail record, and the stamp on page 4 of the CMR is totally illegible because it is so faint.

4. The Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner, Liviu Segal, bearing a date of August 31, 2007 and CMS No. 220557.

5. Petitioner made his request for a conciliation conference on a payment document (form DTF- 968.1) generated by the Division. Assessment number L-028316880-3, petitioner's name and a 505 B Pine St, Long Beach, NY 11561-2430 address appear in the upper left corner of this payment document. The envelope in which petitioner sent his request for conciliation conference bears a handwritten "505B E Pine Street, Long Beach, NY 11561" return address.

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). 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 affidavits 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.*, 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]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Cato; Matter of DeWeese*),

E. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue, in this case the conciliation order dismissing request, was properly mailed and when it was mailed (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

F. In this case, the Division introduced adequate proof of its general mailing procedures through the affidavits of Messrs. Farrelly and VanDerZee, employees of the Division who are

involved in and possess knowledge of the general procedure for producing and mailing conciliation orders. However, the evidence submitted by the Division to establish that the general mailing procedures were followed in this case raises a material and triable issue of fact. Mr. Matthews, in his affidavit, asserts that the conciliation order dismissing request was mailed to petitioner at his alleged address of record, 505 B Pine Street, Long Beach, New York 11561, which address was allegedly petitioner's last known address at the time the order was issued. The address listed on the request for conciliation conference and the CMR does not match the address utilized by petitioner on the envelope containing the request for conciliation conference or the petition which was 505 B East Pine Street, Long Beach, New York 11561. As such, it is impossible to determine whether the order was addressed to petitioner's last known address (Tax Law § 1147[a][1]; *Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). Accordingly, the Division's motion is denied.

G. The Division of Taxation's motion for summary determination or dismissal is denied. A hearing on the issue of whether the Division mailed the conciliation order dismissing request to petitioner's last known address will be scheduled in due course.

DATED: Troy, New York
November 6, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE