STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LIVING ROOM CAFÉ INC.	:	DETERMINATION DTA NO. 822104
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 March 1, 2004 through November 30, 2004.	:	

Petitioner, Living Room Café, Inc., 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 March 1, 2004 through November 30, 2004.

On July 2, 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 July 2, 2008, and annexed exhibits supporting the motion. Petitioner's response to the motion was filed on September 1, 2008, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented by the Division of Taxation, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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 Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) received from petitioner, Living Room Café, Inc., a request for conciliation conference (request). This request identifies petitioner by name, and lists its current address as 178 Avenue U, Brooklyn, New York, 11223-3740. A U.S. Postal Service Certified Mail Receipt shows a mailing date of October 24, 2007. The request also bears the same date.

2. The document challenged by the request is a Notice of Determination addressed to petitioner at "178 Ave U Brooklyn, NY 11223-3740." The notice was dated June 15, 2007 and asserted that New York State sales and use taxes were due from petitioner for the period March 1, 2004 through November 30, 2004 in the amount of $50,990.64 plus interest in the amount of $23,905.77 and penalty in the amount of $20,395.91 for a balance due of $95,292.32. An explanation in the notice stated that it may be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by September 13, 2007.

3. The last tax return filed by petitioner before the issuance of the Notice of Determination was a New York State and Local Quarterly Sales and Use Tax Return for the period September 1, 2006 through November 30, 2006. The return listed petitioner's address as 178 Avenue U, Brooklyn, New York, 11223-3740.

4. In a Conciliation Order Dismissing Request (CMS No. 221379) dated November 16, 2007, BCMS advised petitioner that its request for a conciliation conference was denied. Specifically, the order stated that the notice was issued on June 15, 2007 but the request was not received until October 29, 2007. Therefore, the request was untimely since it was filed more than 90 days after the issuance of the notice.

5. Petitioner challenged this denial by filing a petition with the Division of Tax Appeals. According to the petition, the tax assessment was arbitrary and without merit because petitioner's previous representative was unresponsive to inquires made by the Division. It was also averred that petitioner's previous representative was under indictment. The petition references a letter from petitioner's representative to the Division of Tax Appeals which argues that the contention that the request for a conciliation conference was due within 90 days from the date the notice was issued on June 15, 2007 is inconsistent with a letter from the Division dated January 11, 2008 which stated that the audit period was March 1, 2004 through November 30, 2006. Petitioner's representative further maintains that he has been and intends to be cooperative with the Division.

6. The Division offered the affidavits of Patricia Finn Sears, James Steven VanDerZee and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of petitioner's Request for Conciliation Conference, a copy of the certified mailing record (CMR) containing a list of the conciliation orders allegedly issued by the Division on October 5, 2006, including petitioner's, and a copy of the Conciliation Order Dismissing Request dated November 16, 2007.

7. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

8. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A which was requested for petitioner. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 0068 8457[1] and addressed to petitioner at 178 Ave. U, Brooklyn. NY 11223-3740. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated April 7, 2008. The letter states in part: "The delivery record shows that this item was delivered on 06/18/2007 at 01:06 PM in BROOKLYN, NY 11223." The letter also contains a scanned image of the recipient as "Harjrudin Reckovic" above the handwritten name "Harjrudin Reckovic." The address of the recipient is shown as "178 Ave. U."

9. In response to the Division's position, petitioner's current representative asserts that his petition was timely filed and that the Division of Tax Appeals has jurisdiction of this matter. Petitioner's representative posits that his client is committed to be cooperative and to have a fair and proper resolution of this matter. It is also maintained that petitioner failed to directly respond to the notice because he relied on his prior accountant to perform this task. Petitioner's representative also asserts that there is reasonable cause for the delay in filing because if there had been proper representation, there would not have been a need for a hearing. It is submitted that the assessment of tax is excessive and capricious. Petitioner's representative further contends that the correspondence from the Division which referred to an extended audit period of March 1, 2006 through November 30, 2006 and stated that the period in issue is still under consideration, is inconsistent with the position that petitioner did not submit a timely response.

[1] This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Determination to petitioner on June 15, 2007.

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 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***, 182 AD2d 446, 582 NY2d 170, 173 [1992]). 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 § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such notice "shall be an assessment of the amount of tax specified" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 90 days from the issuance of the subject notice of determination to file a request for a conciliation conference. 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).

D. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (***Id.***)

E. It is undisputed that at the time the Notice of Determination was issued, petitioner's sales and use tax return for the period ended November 30, 2006 was the last return filed by it before the notice was issued. The address on the notice is the same address reported on the sales tax return. Thus, the notice was sent to petitioner's last known address. Further, documentation from the USPS establishes that the notice was received at petitioner's last known address on June 18, 2007. It follows that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information and the USPS response that the notice was delivered to petitioner's last known address.

F. Based upon a receipt date of June 18, 2007, petitioner had 90 days or until September 17, 2007 to mail a request for a conciliation conference or mail a petition for a hearing. The envelope used to mail the request bore a U.S. Postal Service Certified Mail Receipt mailing date of October 24, 2007. It follows that the request was untimely.

G. It is unfortunate that petitioner relied upon a representative who did not file a timely request for a conciliation conference or a petition for a hearing. Further it is noteworthy that petitioner has not claimed that the correspondence from the Division misled petitioner into filing

an untimely request for a conference. Therefore, there is no basis for raising an estoppel. The outcome here is governed by the rule set forth above that the Division of Tax Appeals has no authority to consider an untimely protest to a notice (***Matter of Cato; Matter of DeWeese***).

H. 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, it 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).

I. The petition of is hereby dismissed.

DATED:Troy, New York
November 26, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE