STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHENG JIAN LIN	:	ORDER DTA NO. 822137
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, 2000 through May 31, 2003.	:	

Petitioner, Cheng Jian Lin, 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, 2000 through May 31, 2003.

On March 4, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(4) and 20 NYCRR 3000.9(a)(4). The notice advised that the parties had 30 days to submit written comments on the proposed dismissal. On March 7, 2008 and April 3, 2008, petitioner, appearing by Louis Miu, CPA, filed written comments and documents in opposition to dismissal. On March 26, 2008, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this Order commenced April 3, 2008. After due consideration of the documents and arguments submitted, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the instant Notice of Intent to Dismiss is the timeliness of petitioner's petition of a Notice of Determination dated February 24, 2006 and addressed to petitioner, Cheng Jian Lin, at 25-34 76th Street, East Elmhurst, New York 11370-1426.

2. The subject Notice of Determination assesses sales tax of $305,876.40, plus penalty and interest, for a total amount due of $651,708.22 for the period June 1, 2000 through May 31, 2003. The notice bears assessment identification number L-026641260-7 and the corresponding "Mailing Cover Sheet" bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 1152 1798.

3. Petitioner filed a petition with the Division of Tax Appeals protesting the subject Notice of Determination on February 20, 2008.

4. On March 4, 2008, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent states that "[t]he Notice of Determination appears to have been issued on February 24, 2006 and it appears the petition was not filed until February 20, 2008 or more than seven hundred days later."

5. Notices of determination, such as the one at issue, are computer-generated by the Computerized Case and Resource Tracking System (CARTS) Control Unit of the Division of Taxation (Division). The computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

6. Each computer-generated Notice of Determination is predated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each notice of determination. The CMR lists a "run" or printing date and time in its upper left corner which is generally about 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage and mailing. The printing date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, the CMR lists a run date of "20060451700" (meaning February 14, 2006, 5:00 P.M.), which has been manually changed to "2/24/06."

7. After notices of determination, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail." A staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or the employee's initials (or signature) or both to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

9. The CMR relevant to this case is a 16-page, computer-generated document entitled "Certified Record for Presort Mail - Assessments Receivable." This CMR lists 170 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice number (under the heading "Reference No."), the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

10. Information regarding the subject Notice of Determination is contained on page 9 of the CMR. Specifically, corresponding to the certified control number 7104 1002 9730 1152 1798 is reference (notice) number L026641260, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination and on the related Mail Cover Sheet.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated February 24, 2006 and the initials of a Postal Service employee.

12. On page 16 of the CMR there is a preprinted entry of "170" corresponding to the heading "Total Pieces and Amounts." Below the total pieces entry, and below the heading "Total Pieces Received at Post Office," the number "170" has been manually written and circled. The initials of a postal service employee appear next to the handwritten "170."

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten "170" on page 16 as described indicate that all 170 pieces of mail listed on the CMR were received at the post office.

14. The facts set forth above in Findings of Fact 5 through 13 were established through affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a supervisor in the Division's CARTS Control Unit. Ms. Sears's duties include supervising the processing of notices of determination. Mr. VanDerzee is employed as a mail and supply supervisor in the Division's Registry Unit. Mr. VanDerzee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The fact that the Postal Service employee wrote and circled "170 "on the last page of the CMR to indicate that this was the number of pieces received at the post office was established through the affidavit of Mr. VanDerzee. Mr. VanDerzee's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

16. The Division generally does not request, demand or retain return receipts from certified or registered mail.

17. Petitioner's 2004 New York State Resident Income Tax Return (Form IT-201) was filed on June 28, 2005. This was the last return filed by petitioner prior to February 24, 2006, the date of the Notice of Determination at issue. This return lists as petitioner's address 25-34 76th Street, East Elmhurst, NY 11370.

18. In response to the Notice of Intent to Dismiss, petitioner's representative, by letter dated March 7, 2008, asserted that "the Notice of Determination issued on February 24, 2006 was not sent to the correct address and the taxpayer never received it." In support of this contention petitioner submitted a copy of a social security statement dated November 7, 2007; an auto insurance bill with a due date of August 7, 2005; and bank statements covering the periods

November 24, 2005 through December 22, 2005 and July 26, 2006 through August 22, 2006. Each of the submitted documents show petitioner's address as 4 Queens Street, Syosset, NY 11791.

19. A Collection Notice and Consolidated Statement of Tax Liabilities, both issued by the Division to petitioner and both dated June 4, 2007, were attached to petitioner's petition. The Collection Notice was addressed to petitioner at 4 Queens Street, Syosset, NY 11791. The Consolidated Statement of Tax Liabilities, which was enclosed with the Collection Notice, lists as a liability subject to collection assessment L-026641260-7, and further lists the tax assessed of $305,876.40, plus accrued interest and penalty.

20. As the Collection Notice and Consolidated Statement of Tax Liabilities were attached to petitioner's petition, it is clear that petitioner actually received such notice and was, therefore, made aware of the existence of the assessment at issue herein. There is no evidence in the record, however, as to the date on which petitioner received the Collection Notice and Consolidated Statement of Tax Liabilities.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional sales and use taxes due. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination within 90 days of the mailing of the notice of determination (***see*** Tax Law § 1138[a][1]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment (***id***.). 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). In this case, it appeared upon receipt of the subject petition by the Division of Tax Appeals that it was filed late.

Accordingly, a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination.

C. As provided in section 3000.9(b)(1) of the Rules, a motion for summary determination "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."

D. Section 3000.9(c) of the Rules of Practice and Procedure 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, 853, 487 NYS2d 316, 317 [1985], ***citing Zuckerman v. City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). 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 where the material issue of fact is "arguable" (***Glick & Dolleck v. Tri-Pac Export Corp.***, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; ***Museums at Stony Brook v. Vil. of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177 [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 [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'" (***Whelan v. GTE Sylvania***, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] ***citing Zuckerman***). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where, as here, the timeliness of a taxpayer's petition of a Notice of Determination is in question, the Division bears the initial burden of demonstrating proper mailing of the notice (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). 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" (***Matter of United Water New York,*** Tax Appeals Tribunal, April 4***,*** 2004***; see Matter of Katz***; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerzee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

H. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on February 24, 2006. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated February 24, 2006 on each page. Additionally, a postal employee wrote and circled "170" below the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (***see Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001).

I. Petitioner did not dispute that the notice was mailed as addressed on February 24, 2006. Rather, petitioner contended that the notice was not mailed to the correct address and that in fact he never received it. As noted petitioner submitted evidence showing certain articles of mail addressed to him at 4 Queens Street, Syosset, NY 11791.

J. Tax Law § 1138(a)(1) requires that a 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." On the same point, 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 the provisions of [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." The mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (***Id***.)

K. Here, the record shows that petitioner's address as listed on his 2004 New York State personal income tax return filed June 27, 2005 was 25-34 76th Street, East Elmhurst, New York 11370, the address to which the subject notice was mailed on February 24, 2006. The record also shows that the 2004 income tax return was the last return filed by petitioner prior to the February 24, 2006 date of mailing of the Notice of Determination at issue. While petitioner has introduced several articles of mail addressed to him by third parties at the 4 Queens Street, Syosset, NY address, petitioner has offered no proof to show that he ever advised the Division of any address change at any point prior to February 24, 2006. Accordingly, the Division has shown that it mailed the subject Notice of Determination to petitioner at his "last known address" consistent with Tax Law § 1138(a)(1) and at "such address as may be obtainable" under Tax Law § 1147(a)(1).

L. In light of Conclusions of Law G, H and K, the Division has established that it properly mailed the subject Notice of Determination to petitioner on February 24, 2006 as claimed. Such proper mailing gives rise to a rebuttable presumption of receipt (***see Matter of Sugranes***, Tax Appeals Tribunal, October 3, 2002).[1]

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[1] The applicable statute in ***Sugranes*** was Tax Law § 1138(a)(1) (as amended by L 1996, ch 267). Such amendment, which became effective for tax years beginning January 1, 1997, provides for the "mailing," rather than the former "giving" of notice of determinations of tax due to persons responsible for the collection or payment thereof (***see*** Tax Law former § 1138[a][1]). The language of this amendment and its legislative history indicate an intent to bring the notice provisions of the sales tax into conformity with those of the personal income tax where receipt of a notice of deficiency is not a part of the service requirement (***compare*** Tax Law § 681; ***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990; ***see*** June 26, 1996 letter to Governor Pataki in support from Owen Johnson, Vice President Pro Tempore ["The legislation conforms the service requirements for sales tax to those required for income tax."]; ***see also*** Senate Memorandum in Support ["The bill provides that service by proper mailing is sufficient to assess tax."]). Significantly, however, the legislation did not amend Tax Law § 1147(a)(1), which, as noted above, provides that the mailing of a notice of determination shall be "presumptive evidence of receipt." The Division of Budget's Budget Report on the bill dated June 25, 1996, noted the changes to Tax Law

M. As noted, in support of his denial of receipt of the Notice of Determination petitioner submitted articles of mail addressed to him at 4 Queens Street, Syosset, NY 11791. The dates of these articles of mail, except for the social security statement, fall reasonably close to the February 24, 2006 mailing date of the subject Notice of Determination (***see*** Finding of Fact 18). This evidence is more than a mere denial of receipt (***see Matter of T.J. Gulf, Inc. v. New York State Tax Commn.***, 124 AD2d 314, 315, 508 NYS2d 97, 98 [1986]) and is sufficient to raise a material and triable issue of fact as to whether petitioner did or did not receive the subject Notice of Determination (***see*** 20 NYCRR 3000.9[b][1]). If resolved in petitioner's favor, this factual issue would rebut the statutory presumption of receipt of the February 24, 2006 Notice of Determination.

N. While it is clear that petitioner actually received notice of the assessment from the Collection Notice (***see*** Findings of Fact 19 and 20), the record does not contain any evidence as to the date on which petitioner received such notice. Dismissal of a petition as untimely filed requires proof of a date certain when petitioner received actual or presumptive notice of the determination of tax due (***see Matter of Astoria Leasing Corp.***, Tax Appeals Tribunal, May 27, 1999).

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§1138 and the lack of any amendment to Tax Law §1147 and commented "if this bill were to become law it would be unclear as to which rules apply." In ***Matter of Ruggerite v. State Tax Commn.*** (64 NY2d 688, 485 NYS2d 517 [1984]), a case decided under Tax Law former § 1138[a][1], the Court of Appeals found that the language of Tax Law § 1147(a)(1) "makes 'receipt' part of the procedural equation and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption" (***id.*** at 690, 485 NYS2d at 518). Given this holding, the Tribunal properly found a rebuttable presumption of receipt in ***Sugranes***, notwithstanding the amendments to Tax Law § 1138(a)(1) enacted by Laws of 1996 (ch 267).

O. In accordance with Conclusion of Law M, the Notice of Intent to Dismiss Petition is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner's petition.

DATED: Troy, New York
June 19, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE