

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>VICTOR SPERBER</b>	:	DETERMINATION
	:	DTA NO. 822198
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 2006 through May 31, 2007.	:	

---

Petitioner, Victor Sperber, 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 December 1, 2006 through May 31, 2007.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 8, 2008, 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 thereto in support of the motion. Petitioner, appearing by Silverman Acampora LLP (Jay S. Hellman, Esq., of counsel), had 30 days, or until September 8, 2008, to respond to the motion but did not do so. Thus, September 8, 2008 began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services following the issuance of two notices of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's Request for Conciliation Conference filed in response to two notices of determination addressed to petitioner, Victor Sperber, at 1 Piper Lane, St James, New York 11780-1123.

2. The first Notice of Determination, dated July 27, 2007, assessed additional sales and use taxes in the amount of \$377,427.49, plus interest and penalties, for a total amount due of \$449,830.28 for the period December 1, 2006 through February 28, 2007. The notice bears assessment identification number L-028968733-6 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0205 3758.

The second Notice of Determination, dated October 4, 2007, assessed additional sales and use taxes in the amount of \$435,633.40, plus interest and penalties, for a total amount due of \$523,680.10 for the period March 1, 2007 through May 31, 2007. The notice bears assessment identification number L-029190288-7 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0326 3194.

3. Petitioner filed a Request for Conciliation Conference which he dated January 31, 2008 concerning Assessment L-028968733-6. The mailing envelope containing the request bore a

metered postmark of January 31, 2008, and the request was received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on February 5, 2008, as evidenced by the in-date stamp of BCMS.

Petitioner also filed a Request for Conciliation Conference which he dated October 12, 2007 concerning Assessment L-028968733-6.<sup>1</sup> The priority overnight mailing label accompanying the request bore a ship date of February 28, 2008, and the request was received by the BCMS on February 29, 2008, as evidenced by the in-date stamp.

4. As to Assessment L028968733, on February 22, 2008, BCMS issued a Conciliation Order Dismissing Request (CMS No. 217362), which denied petitioner's request for a conciliation conference, stating:

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 27, 2007, but the request was not mailed until January 31, 2008, or in excess of 90 days, the request is late filed.

As to Assessment L029190288, on February 22, 2008, BCMS issued a Conciliation Order Dismissing Request (CMS No. 217362), which denied petitioner's request for a conciliation conference, stating:

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 4, 2007, but the request was not mailed until February 28, 2008, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review of both assessments described above, signed and dated by petitioner's representative, Jay S. Hellman, Esq., on March 27, 2008, was received

---

<sup>1</sup> Although the request listed L-028968733-6 as the subject notice, the Division treated the request as though it pertained to L-029190288-7. There is no supporting evidence in the record to establish that a Request for Conciliation Conference was made regarding Assessment L-029190288-7.

by the Division of Tax Appeals on March 31, 2008. It sought review of the conciliation orders dismissing requests for a conference.

6. In response to the petition, the Division filed an answer dated June 4, 2008. The Division subsequently brought this motion, dated August 8, 2008, 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 notices was filed more than 90 days from the date of issuance of the statutory notices.

In support of its motion for summary determination, the Division submitted: the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of the notices of determination allegedly sent to petitioner; a copy of the certified mail records (CMRs) containing a list of statutory notices allegedly issued by the Division on July 27, 2007 and October 4, 2007; a copy of two requests for conciliation conference filed by petitioner (one dated October 12, 2007 and the second dated January 31, 2008) both of which protest Assessment L028968733; a copy of the envelope in which the request dated January 31, 2008 was mailed; a copy of the Priority Overnight shipping label dated February 28, 2008; the conciliation orders dismissing request concerning notice numbers L028968733 and L029190288; a copy of petitioner's 2005 Resident Income Tax Return, Form IT-201 dated October 17, 2006; a record from the Division stating that the postmark date of the 2005 Form IT-201 was 10/17/06; and the affidavits 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.

7. Petitioner did not respond to the Division's motion.

8. The CMR for the block of statutory notices issued on July 27, 2007, included the Notice of Determination (L-028968733-6) issued to petitioner. With respect to the CMR prepared for

the 111 statutory notices mailed by certified mail on July 27, 2007, each of the pages consists of 11 entries with the exception of the last page (page 11), which contains 1 entry.

The CMR for the block of statutory notices issued on October 4, 2007, included the Notice of Determination (L-029190288-7) issued to petitioner. With respect to the CMR prepared for the 147 statutory notices mailed by certified mail on October 4, 2007, each of the pages consists of 11 entries with the exception of the last page (page 14), which contains 4 entries.

9. When the statutory notices are delivered into the possession of a USPS representative, the USPS employee affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR, and lists the number of notices or circles the number printed, to indicate the total number of pieces received. In this case, the postal representative affixed a postmark to each page of the CMR and beside each postmark initialed each of the 11 and 14 pages of the respective CMRs, and circled the number of pieces received to indicate the total number of pieces received at the post office for mailing, on the final page of both CMRs.

10. The copy of the corresponding Notice of Determination L-028968733-6 bears the certified control number of “7104 1002 9730 0205 3758,” which is identical to that which appears on the corresponding CMR.

The copy of the corresponding Notice of Determination L-029190288-7 bears the certified control number of “7104 1002 9730 0326 3194,” which is identical to that which appears on the corresponding CMR.

11. The facts set forth above in Findings of Fact 8 through 10 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.

12. The fact that the Postal Service employee initialed the pages of the CMR and circled the total number of pieces received on 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.

13. Petitioner's 2005 Resident Income Tax Return (Form IT-201), signed by petitioner on about October 17, 2006, was the last return filed by petitioner prior to the issuance of the notices of determination dated July 27, 2007 and October 4, 2007, according to the Division's records. This return indicated that petitioner's address was 1 Piper Lane, St. James, New York 11780, the same address on both notices at issue herein.

#### ***SUMMARY OF PETITIONER'S POSITION***

14. Petitioner asserts that the Division could not locate the Request for Conciliation Conference dated October 12, 2007, concerning Assessment L-028968733, and having heard nothing from the Division, he made a second request dated January 31, 2008 regarding the same notice.

As to Assessment L-029190288, petitioner maintains he received no information or any form permitting him to request a conciliation conference. By correspondence dated February 28, 2008, petitioner requested a conciliation conference for this assessment.

### **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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 852, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch 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 if the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village 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,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions

are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992], *citing Zuckerman v. City of New York*).

C. In the instant matter, petitioner presented no evidence to contest the facts alleged in the Sears and VanDerZee 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*).

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

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 (mailing) notices of determination.

G. The two CMRs provide sufficient documentary proof to establish that the notices of determination dated July 27, 2007 and October 4, 2007, were mailed as addressed on July 27, 2007 and October 4, 2007, respectively. Each page of both CMRs bore U.S. Postal Service postmarks with the dates that they were asserted to have been mailed, and the initials of a Postal Service employee. A postal employee circled the number “111” and “147” beside the “total pieces received,” thereby indicating that all 111 and 147 pieces listed on the respective CMRs were received at the post office. The notices addressed to petitioner were among the 111 and 147 pieces so listed. 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).

H. Tax Law § 1138(a)(1) provides 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.” Tax Law § 1147(a)(1) further 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.*)

I. Here, petitioner’s personal income tax return for the tax year 2005, filed on or about October 17, 2006, listed petitioner’s address as 1 Piper Lane, St. James, New York 11780. Petitioner did not assert that he filed any personal income or sales tax return after this date and before the issuance of the subject notices of determination. Accordingly, the procedures for mailing such notices have been set forth and the Division has shown that the subject notices of determination were, in fact, properly mailed to petitioner at his last known address on July 27, 2007 and October 4, 2007, respectively.

J. One of petitioner’s requests for a conciliation conference concerning Assessment L-028968733-6, although dated October 12, 2007 (which would have been timely if properly mailed), was not received by BCMS until February 29, 2008, and was introduced associated with an overnight mailing label bearing a ship date of February 28, 2008. The other request for a conciliation conference also concerned Assessment L-028968733-6 and was dated January 31, 2008, attached to which was the mailing envelope in which it was sent to the Division, in-dated February 5, 2008 by BCMS. Both February 28, 2008 and January 31, 2008 fall well beyond the 90-day period of limitations for the filing of such a request for a Notice of Determination dated October 4, 2007. Petitioner’s request as to that notice was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]).

As to Notice of Determination L-029190288-7, dated July 27, 2007, petitioner does not offer any proof that the assessment was the subject of a Request for Conciliation Conference, and clearly, if the first protest of that notice was the petition filed with the Division of Tax Appeals on March 28, 2008, it too was untimely filed (*see* Tax Law § 1138[a][1]).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Victor Sperber is dismissed with prejudice.

DATED: Troy, New York  
November 26, 2008

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE