

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EDWIN B. STIMPSON COMPANY, INC.</b>	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 822616
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Years 2003 through 2005.	:	

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Petitioner, Edwin B. Stimpson Company, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2003 through 2005.

The Division of Taxation, by its representative Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 19, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Accompanying the motion was the affidavit of John E. Matthews, dated March 19, 2009, and attached exhibits supporting the motion. Petitioner, appearing by Robert J. Bogardt, CPA, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for the issuance of this order commenced on April 20, 2009, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. 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 petitioner filed a timely protest challenging a Notice of Deficiency issued by the Division of Taxation.

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued a Notice of Deficiency number L-029766306-1, dated March 10, 2008, asserting additional corporation franchise tax due in the amount of \$14,859.00, plus penalty and interest, for the years 2003 through 2005. The notice is addressed to petitioner, Edwin B. Stimpson, Inc., 1515 SW 13<sup>th</sup> Court, Pompano Beach, FL 33069-4710. A copy of this notice was also issued to petitioner's representative, Robert J. Bogardt/Patricia Ann Blum, Bogardt & Company, LLP, 490 Wheeler Road, Suite 270, Hauppauge, NY 11788.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) hand-dated as signed September 29, 2008.<sup>1</sup> Robert J. Bogardt, CPA, petitioner's representative, signed this request which protested notice numbers K-822208091-9 and L-029766306-1, dated September 8, 2008. The request lists petitioner's address as 1515 SW 13<sup>th</sup> Court, Pompano Beach, Florida 33069, and its representative's address as Robert J. Bogardt, CPA, Bogardt & Company, LLP, 140 Fell Court, Suite 300, Hauppauge, NY 11788.

3. By a Conciliation Order Dismissing Request (CMS No. 226294) dated October 17, 2008, BCMS dismissed petitioner's request as late filed. On November 7, 2008, the Division of

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<sup>1</sup> There is no evidence in the file indicating how the request was filed (e.g., by mail, delivery service, etc.) However, the Division has not challenged that the request was filed on the date set forth on its face (i.e., September 29, 2008). Since this is the earliest date on which the request could be claimed to have been filed, such September 29, 2008 date is accepted as the date of filing.

Tax Appeals received a petition seeking a redetermination of the deficiency issued in this matter. The envelope in which the petition was sent by first class mail bears a machine metered postmark dated October 29, 2008. The envelope bears the address of petitioner's representative, Bogardt & Company, LLP, 140 Fell Court, Suite 300, Hauppauge, NY 11788. The assertions in the petition address the merits of the case, not the timeliness of the request for conciliation conference.

4. In support of its motion for summary determination, the Division submitted copies of the petition and the envelope in which it was sent by first class mail; copies of the Request for Conciliation Conference and an attachment; a copy of the Conciliation Order Dismissing Request; a copy of petitioner's CT-400 Estimated Tax for Corporations payment document for form CT-3 for tax year ending December 31, 2007, which was the last return filed prior to the issuance of the Notice of Deficiency; a copy of the certified mail record containing a list of notices allegedly issued by the Division on March 10, 2008; copies of the Notice of Deficiency; copies of the mailing cover sheets; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of James Steven VanDerZee, Patricia Finn Sears and Heidi Corina, employees of the Division.

5. Patricia Finn Sears is employed as a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit. Her duties include supervising the processing of notices of deficiency such as the one at issue herein. Ms. Sears's affidavit describes the general or regular process involved in the computer generation of notices and the subsequent mailing of such notices. More specifically, Ms. Sears's affidavit describes the computer preparation of notices of deficiency to include the simultaneous preparation of a mailing cover sheet with mailing and return addresses and a bar code for each notice, as well as the preparation of a

certified mailing record (CMR). The CMR is a computer-generated document entitled “CERTIFIED RECORD FOR NON-PRESORT MANUAL MAIL - ASSESSMENTS RECEIVABLE” consisting, in this case, of one page. The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number.

6. Each computer-generated notice of deficiency is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading “Certified No.” Ms. Sears’s affidavit describes the CMR as carrying an initial date (the date of its printing) in its upper left corner which is approximately 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 initial date on the certified mailing record is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. All notices selected for manual review are printed in one run. The notice at issue was selected for manual review by the Audit Division - Income/Franchise Desk-AG13 so that the certified mail could be pulled for manual review prior to mailing. However, a manual review did not occur.

7. Attached as an exhibit to Ms. Sears’s affidavit is the one-page CMR listing the notice at issue herein. The CMR lists two certified control numbers, which were each assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR is manually dated March 10, 2008.

8. On the one-page CMR, corresponding to certified control number 7104 1002 9730 0623 3989, is notice number L-029766306, followed by petitioner’s name and address, which is

identical to that listed on the subject notice of deficiency, on petitioner's CT-400 Estimated Tax for Corporations payment document for form CT-3 for tax year ending December 31, 2007 (i.e., the last return filed prior to the issuance of the subject notice of deficiency), as well as on the request and on the petition. Also on this CMR, corresponding to certified control number 7104 1002 9730 0623 3996, is notice number L-029766306, followed by "ROBERT J.

BOGARDT/PATRICIA ANN BLUM, 490 WHEELER ROAD, SUITE 270, HAUPPAUGE, NY 11788."

9. The Division also submitted the affidavit of James Steven VanDerZee, who is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. VanDerZee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the United States Postal Service. The VanDerZee affidavit states that after a notice of deficiency is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member weighs and seals each envelope and affixes "postage" and "fee" amounts thereon. A mail processing clerk then checks the pieces of certified mail listed on the CMR 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 United States Postal service (USPS) located in the Albany, New York, area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his or her signature or initials to the CMR. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. 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 originating office (CARTS Control) within the Division.

10. The one-page CMR contains the preprinted entry of “2” corresponding to the heading “TOTAL PIECES AND AMOUNTS.” Appearing beneath this preprinted entry and corresponding to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten number “2,” which was circled. The CMR also bears a USPS stamp dated March 10, 2008, and the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmark, the initials of the Postal service employee, and the circled “2” and the handwriting of “2” indicate that the pieces listed on the CMR were received at the post office.

11. On September 8, 2008, the Division’s Audit Division - Income/Franchise Desk-AG 13 (Audit Division) sent a Response to Taxpayer Inquiry and an attachment to petitioner. This response, referencing Protest ID K-82208091-9 and Assessment ID L-0297663061 and replying to petitioner’s “recent inquiry about the above assessment(s),” stated that “the adjustment(s) made previously was appropriate and [the Division’s ] position remains the same. Therefore, the assessment(s) is once again being sustained.” The attachment to the response contained a computation summary section for assessment number L-029766306-1, which indicated payments totaling \$14,638.00, and a current balance due of \$4,570.61. Petitioner’s correspondence with the Audit Division is not part of the record.

12. In further proof of mailing and delivery of the subject notice to petitioner, the Division submitted the affidavit of Heidi Corina, a Legal Assistant in the Division’s Office of Counsel. Ms. Corina’s affidavit explained the steps she took to request delivery information from the USPS regarding an unrelated corporate taxpayer.

### ***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.*, 22NY2d 439, 293 NYS2d 93, 94 [1968]; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

“To obtain summary determination 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 (*Alford & 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]; *Whalen 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. If upon review of a taxpayer's return, the Commissioner of Taxation and Finance determines that there is a deficiency of tax, he is authorized to mail a Notice of Deficiency to the taxpayer by certified or registered mail at the taxpayer's last known address (Tax Law § 1081[a]). Such a notice becomes an assessment of tax unless a petition is filed with the Division of Tax Appeals within 90 days from the date of mailing (Tax Law § 1081[b]). Except for a limited exception, not pertinent here, the Division of Tax Appeals may entertain only those petitions which are filed within the 90-day period (Tax Law § 1089[b]). As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. The time period for filing such request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required is two-fold: 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

The affidavits of two Division employees, Patricia Finn Sears and James Steven VanDerZee, provide adequate proof of the Division's standard mailing procedure for the mailing, by certified mail, of notices of deficiency. The affidavits generally describe the various stages of

producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the Notice of Deficiency and the CMR submitted as evidence of actual mailing. It is clear from the evidence submitted that the Division issued the notice on March 10, 2008, mailing petitioner the Notice of Deficiency at the address listed on petitioner's CT-400 Estimated Tax for Corporations payment document for form CT-3 for tax year ending December 31, 2007, the last return filed prior to the issuance of the subject notice of deficiency, as well as on the request for a conciliation conference and on the petition. Tax Law § 1081(a) requires the Division to send the notice by certified or registered mail when it determines that there is a corporation franchise tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793 [1972]; *affd* 43 AD2d 815, 350 NYS2d 1017 [1973], *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028 [1974]; *cf. Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

F. Although I have concluded that the Division has established that it properly mailed the Notice of Deficiency to petitioner on March 10, 2008, my analysis does not end there. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v.*

*Frank*, 43 NY2d 168, 401 NYS2d 29 [1977]). Documents in the record indicate that a copy of the Notice of Deficiency was issued to petitioner's representative at a Wheeler Road, Hauppauge, New York, address. However, a Fell Court, Hauppauge, New York, address was listed for petitioner's representative on both the Request for Conciliation Conference and the petition. The difference in the addresses has not been explained. There is no evidence of actual delivery or a specific date of receipt of the Notice of Deficiency by petitioner's representative. As such, it is impossible to determine whether the Notice of Deficiency was served on the representative. Accordingly, the Division's motion is denied.

G. The Division of Taxation's motion for summary determination or dismissal is denied.

A hearing will be scheduled in due course.

DATED: Troy, New York  
July 16, 2009

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE