

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MEJREMA CECUNJANIN** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NO. 822633  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period September 1, 2006 through November 30, :  
2007.

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Petitioner, Mejrema Cecunjanin, 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 September 1, 2006 through November 30, 2007.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 5, 2009, 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 Boushie & Associates (R. Scott Boushie, CPA), had 30 days, or until April 6, 2009, to respond to the motion but did not do so. Thus, April 6, 2009 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 four 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 four notices of determination addressed to petitioner, Mejrema Cecunjanin, at 68-07 150 ST, APT B, Flushing, New York 11367-1425.

2. The first Notice of Determination, dated April 7, 2008, assessed additional sales and use taxes in the amount of \$3,738.44, plus interest and penalties, less payments and credits of \$3,815.66, for a total amount due of \$1,413.12 for the period September 1, 2006 through November 30, 2006. The notice bears assessment identification number L-029808286-8 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 0686 2882.

The second Notice of Determination, dated April 7, 2008, assessed additional sales and use taxes in the amount of \$2,746.72, plus interest and penalties, for a total amount due of \$3,785.47 for the period December 1, 2007 through February 28, 2007. The notice bears assessment identification number L-029808285-9 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 0686 2875.

The third Notice of Determination, dated April 7, 2008, assessed additional sales and use taxes in the amount of \$7,387.44, plus interest and penalties, for a total amount due of \$9,155.24

for the period June 1, 2007 through August 31, 2007. The notice bears assessment identification number L-029808284-1 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 0686 2868.

The fourth Notice of Determination, dated April 7, 2008, assessed additional sales and use taxes in the amount of \$3,470.62, plus interest and penalties, for a total amount due of \$4,068.54 for the period September 1, 2007 through November 30, 2007. The notice bears assessment identification number L-029808283-2 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 0686 2851.

3. Petitioner filed a Request for Conciliation Conference dated October 16, 2008, concerning the four assessments described in Finding of Fact 2. The mailing envelope containing the request bore a metered postmark of October 17, 2008, and the request was received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on October 20, 2008, as evidenced by the in-date stamp of BCMS.

4. On November 7, 2008, BCMS issued a Conciliation Order Dismissing Request (CMS No. 226691), 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(s) was issued on April 7, 2008, but the request was not mailed until October 17, 2008, or in excess of 90 days, the request is late filed.

The Conciliation Order referenced all four assessment numbers previously described.

5. A petition seeking administrative review of all four assessments described above, signed and dated by petitioner on November 11, 2008, was received by the Division of Tax

Appeals on November 17, 2008. It sought review of the conciliation order dismissing requests for conference, and the merits of petitioner's underlying claim.

6. In response to the petition, the Division filed an answer dated January 14, 2009. The Division subsequently brought this motion, dated March 5, 2009, 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 record (CMR) containing a list of statutory notices allegedly issued by the Division on April 7, 2008; a copy of the request for conciliation conference filed by petitioner; a copy of the envelope in which the request was mailed; the conciliation order dismissing request concerning the four assessment notice numbers; the electronic return transcript of petitioner's 2006 Resident Income Tax Return, Form IT-201, postmarked March 9, 2007; 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 April 7, 2008, included the notices of determination (L-029808283, L-029808284, L-029808285, L-029808286) issued to petitioner. With respect to the CMR prepared for the 365 statutory notices mailed by certified mail on April 7, 2008, each of the first 33 pages consists of 11 entries and the last page (page 34), contains 2 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 34 pages of the CMR, 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 the CMR

10. The copy of the corresponding Notice of Determination L-029808286-8 bears the certified control number of “7104 1002 9730 0686 2882,” which is identical to that which appears on the corresponding CMR.

The copy of the corresponding Notice of Determination L-029808285-9 bears the certified control number of “7104 1002 9730 0686 2875,” which is identical to that which appears on the corresponding CMR.

The copy of the corresponding Notice of Determination L-029808284-1 bears the certified control number of “7104 1002 9730 0686 2868,” which is identical to that which appears on the corresponding CMR.

The copy of the corresponding Notice of Determination L-029808283-2 bears the certified control number of “7104 1002 9730 0686 2851,” 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. The electronic return transcript indicating the filing of petitioner's 2006 Resident Income Tax Return (Form IT-201), postmarked by petitioner on March 7, 2007, was the last return filed by petitioner prior to the issuance of the notices of determination dated April 7, 2008, according to the Division's records. This return listed petitioner's address as 68-07 150<sup>th</sup> Street, Apt. B, Flushing, New York, the same address on the four notices at issue herein.

### ***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 CMR provides sufficient documentary proof to establish that the four notices of determination dated April 7, 2008, were mailed as addressed on April 7, 2008. Each page of the CMR bore U.S. Postal Service postmarks with the date that they were asserted to have been



mailed, and the initials of a Postal Service employee. A postal employee circled the number “365” beside the “total pieces received,” thereby indicating that all 365 pieces listed on the CMR was received at the post office. The notices addressed to petitioner were among the 365 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, the electronic transcript for petitioner’s personal income tax return for the tax year 2006, filed on or about March 9, 2007, listed petitioner’s address as 68-07 150<sup>th</sup> Street, Apt. B, Flushing, New York. Petitioner did not assert that he filed any personal income or other 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 April 7, 2008.

J. Petitioner's request for a conciliation conference concerning the assessments at issue was postmarked October 17, 2008 and stamped as received by BCMS on October 20, 2008. The mailing date of October 17, 2008 fell well beyond the 90-day period of limitations for the filing of such a request for notices of determination dated April 7, 2008. Petitioner's request as to such notices was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]).

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

DATED: Troy, New York  
July 2, 2009

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE