

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ADIRONDACK DIAGNOSTIC IMAGING OF ALBANY, INC. | : | DETERMINATION DTA NO. 822645 |
| 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 November 30, 2006. | : | |

Petitioner, Adirondack Diagnostic Imaging of Albany, 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 June 1, 2000 through November 30, 2006.

On March 16, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination 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 March 13, 2009, and annexed exhibits supporting the motion. Petitioner did not file a response to the motion. Thus, April 16, 2009, 30 days from the date the motion was filed, commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation, and the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination, notice number L 029842538, dated April 18, 2008, to petitioner, Adirondack Diagnostic Imaging of Albany, Inc. (Adirondack), at 100 Sitterly Road, Clifton Park, NY 12065-5671. The notice assessed sales and use taxes for the period June 1, 2000 through November 30, 2006 in the amount of \$130,119.23 plus interest.

2. Petitioner requested a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS) by letter, dated July 31, 2008 and signed by its controller, Francis Pipczynski. The letter was sent on petitioner's stationery which listed an address of 100 Sitterly Road, Clifton Park, NY 12065. A form DTF-996.30, Request for Conciliation Conference, dated July 31, 2008, was also filed by petitioner, also listing the same address. A BCMS order was issued, dated August 22, 2008, which dismissed the request on the basis that it was not timely filed within 90 days of the mailing of the statutory notice.

3. On November 20, 2008, petitioner filed a petition with the Division of Tax Appeals contesting the BCMS order on the grounds that the Division of Taxation did not provide the notice to petitioner more than 90 days prior to petitioner's filing its request for conference and that the Division sent the Notice of Determination to the wrong address.

4. To show proof of proper mailing of the April 18, 2008 notice, the Division provided the following with its motion papers: (i) an affidavit, dated March 11, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System

(CARTS); (ii) an affidavit, dated March 12, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (iii) the "Certified Record for Presort Mail" (CMR) postmarked April 18, 2008; and (iv) a copy of petitioner's 2006 New York S Corporation Franchise Tax Return, form CT-3-S, dated September 7, 2007, and a copy of petitioner's request for six-month extension of time to file its 2007 New York S Corporation Franchise Tax Return, dated March 3, 2008.

5. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 8 of the 10-page CMR contains information on the particular notice in issue and lists an initial date, which signifies the date and time the CMR was produced. Following general practices, this date was manually changed to the actual mailing date of April 18, 2008. Taxpayer addresses, certified control numbers, and notice numbers assigned to each notice may be found under their respective columns on the CMR. The certified number and notice number appear on the corresponding notices and accompanying cover sheet, respectively, while the address appears on both. Page 8 of the CMR establishes that a notice with certified number P 7104 1002 9730 0691 0491 and notice number L 029842538 was sent to petitioner at 100 Sitterly Road, Clifton Park, NY 12065-5671.

6. The affidavit of James Steven VanDerZee, the mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A Mailing Cover Sheet precedes each notice. A staff member operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on

each envelope. 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 and also performs a random review of up to 30 pieces of certified mail by checking the letters against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee affixed a postmark and initialed each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the circled number 109, confirming that 109 notices were received by the USPS. The USPS postmark on each page of the CMR is from the Colonie Center branch and bears the date April 18, 2008, confirming that the 109 notices were mailed on that date.

7. Petitioner's Clifton Park, New York, address on the CMR and on the notice match the address listed on its 2006 New York S Corporation Franchise Tax Return, form CT-3-S, dated September 7, 2007, and petitioner's request for six-month extension of time to file its 2007 New York S Corporation Franchise Tax Return, dated March 3, 2008. The address on the latter was the last return filed before the Notice of Determination was issued on April 18, 2008.

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. Petitioner did not respond to the Division's motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Petitioner has thus 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*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. Where the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice at issue on April 18, 2008 to petitioner's last known address. The submitted affidavits establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the notice, the corresponding mail cover sheets and the CMR conforms with the address listed on the last New York franchise tax return filed by petitioner (the 2006 New York S Corporation Franchise Tax Return, form CT-3-S, dated September 7, 2007) and the extension to file the 2007 return (the request for six-month extension of time to file its 2007 New York S

Corporation Franchise Tax Return, dated March 3, 2008) prior to the issuance of the subject statutory notice, thereby satisfying the “last known address” requirement in Tax Law § 1138(a)(1) and Tax Law § 1147(a)(1). It is concluded, therefore, that the Division properly mailed the notice on April 18, 2008 and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner’s Requests for Conciliation Conference, embodied in a letter, dated July 31, 2008, and on a form DTF-996.30, dated July 31, 2008, were filed more than 90 days from the date the Notice of Determination was issued. Petitioner’s request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]) and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner’s protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005).

F. Petitioner’s explanation for its failure to timely file a protest to the notice, i.e., the notice was mailed to the incorrect address and the notice was not provided to petitioner in time for it to apply for a conference, are without merit. The address was confirmed by the last franchise tax return, dated September 7, 2007, and the extension to file its 2007 franchise tax return, dated March 3, 2008, immediately prior to the issuance of the notice herein. It is further observed that the Notice of Determination clearly advised petitioner of the requirement to timely file a petition or request a conciliation conference, which should have caused it to inquire about the proper procedure to follow given the ample warnings and instructions set forth on the statutory notice.

G. The Division of Taxation's motion for summary determination is granted, and the petition of Adirondack Diagnostic Imaging of Albany, Inc. is dismissed with prejudice.

DATED: Troy, New York
June 25, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE