STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN V. McCANN, JR.	:	ORDER DTA NO. 823093
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, 2004 through December 28, 2006.	:	

Petitioner, John V. McCann, Jr., 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, 2004 through December 28, 2006.

On July 10, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) upon the basis that the petition had not been filed with the Division of Tax Appeals within the applicable period of time prescribed by statute. On July 30, 2009, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and exhibits in support of the proposed dismissal of the petition. On August 10, 2009, the Division of Tax Appeals, in response to a letter of August 7, 2009 from petitioner's representative, Corrigan & Baker, LLC (John P. Corrigan, Esq., of counsel), requesting an extension for the filing of a response to the Notice of Intent to Dismiss Petition, granted petitioner until September 10, 2009 to file such response which was, in fact, filed on September 10, 2009. Therefore, pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on September 10,

2009. After due consideration of the documents and arguments presented, Brian L. Friedman, 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. On June 11, 2009, the Division of Tax Appeals received a petition from John V. McCann, Jr. (petitioner). The petition was signed by petitioner's representative, John P. Corrigan, Esq., and was dated June 9, 2009. The petition was mailed by certified mail on June 9, 2009. Attached to the petition was a copy of a Notice of Determination, dated July 2, 2007, which assessed sales and use tax in the amount of $72,266.49, plus penalty and interest, for a total amount due of $107,106.11 for the period June 1, 2004 through December 28, 2006.

2. Attached to the petition, among other things, were:

a. A Statement of Proposed Audit Change for Sales and Use Tax issued to CSJ of Putnam, Inc. (CSJ), dated March 23, 2007, asserting tax due in the amount of $109,774.28, plus penalty and interest, for a total amount due of $179,021.88 for the period June 1, 2003 through December 28, 2006.

b. A copy of a letter dated April 12, 2007 from petitioner to the New York State Department of Taxation and Finance's Westchester District Office, Sales Tax Section, stating that "CSJ, Inc. does not agree with your findings. There are many discrepancies in your estimates and we request a hearing to go correct these findings."

c. A Notice and Demand for Payment of Tax Due, dated October 25, 2007, issued to petitioner in the amount of $72,266.49, plus penalty and interest, for a total amount due of $112,765.51, for the period June 1, 2004 through December 28, 2006.[1]

d. A letter to the Department of Taxation and Finance's Westchester District Office, Sales Tax Section, from petitioner's representative, John P. Corrigan, dated November 15, 2007, which, in addition to asserting that petitioner had nothing to do with the finance, accounting and tax areas of CSJ, stated, in relevant part, as follows:

> For the reasons set forth below, I respectfully request that you withdraw the deficiency in full or in the alternative grant a hearing to ascertain the accuracy of the imposed deficiency.
>
> First of all, the Demand makes reference to an earlier letter dated July 2, 2007 which allegedly contains the detailed computations which form the basis for the Demand. My client never received this letter so I respectfully request you provide me a copy at your earliest convenience.

e. A New York State Department of Taxation and Finance (and New York City Department of Finance) Power of Attorney form, dated November 15, 2007, which appointed John P. Corrigan, Esq., the representative for petitioner.

f. A Collection Notice and a Consolidated Statement of Tax Liabilities issued to petitioner for tax in the amount of $72,266.49, plus penalty and interest, each of which was dated December 13, 2007.

g. A letter dated December 28, 2007 from petitioner's representative to New York State Assessment Receivables which stated, in part, as follows:

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[1] The Notice and Demand indicated that petitioner was liable as an officer or responsible person of CSJ of Putnam, Inc.

> For the reasons set forth below, I respectfully request that you withdraw the deficiency in full or in the alternative grant a hearing to ascertain the accuracy of the imposed deficiency. At a minimum, please refrain from issuing a tax warrant which would be premature at this juncture of the hearing process requested.
>
> Of greatest importance is the fact that the Demand fails to acknowledge an earlier response from my office dated November 15, 2007. As of today, I still have not yet received a response to my letter seeking abatement of the deficiency and/or a hearing to review the auditor's erroneous assessment.
>
> Thank you for your cooperation and please copy me on all further communications to Mr. McCann. I have enclosed . . . a copy of a previously executed Power of Attorney naming me as attorney in fact for the above-referenced deficiency in dispute.

h. A form DTF-991, Correspondence Acknowledgment Notice, dated January 22, 2008.

i. A Warrant issued to petitioner which was docketed June 30, 2008.

j. An Income Execution issued to petitioner dated May 5, 2009.

k. Copies of motion papers filed by petitioner's representative in Supreme Court, County of Putnam, filed on June 9, 2009, seeking a Protective Order against the income execution and warrant pursuant to section 5240 of the CPLR on behalf of petitioner against the Commissioner of Taxation and Finance.

3. On July 10, 2009, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. This notice advised that the Notice of Determination appeared to have been issued on July 2, 2007, but that the petition was not filed until June 9, 2009, or more than 600 days later. As a consequence, since the petition was required to be filed within 90 days from the date that the Notice of Determination was issued, the petition was not timely. The notice

further advised the parties that they had 30 days from the date of the notice to submit written comments on the proposed dismissal of the petition.

4. By letter dated July 30, 2009, the Division of Taxation (Division) took the position that since the petition was not filed within 90 days of the date the Notice of Determination was issued, the Division was in agreement with the proposed dismissal. In support of its position, the Division submitted: the affidavit of John E. Matthews, Esq., the Division's representative in this proceeding; a copy of the petition and the envelope in which it was sent to the Division of Tax Appeals on June 9, 2009; the six-page certified mailing record (CMR) containing the entry for the notice issued to petitioner; a copy of the Notice of Determination addressed to petitioner and dated July 2, 2007; a copy of petitioner's 2006 resident income tax return dated May 7, 2007, which was the last return filed by petitioner prior to the issuance of the Notice of Determination; and the affidavits of James Steven VanDerZee, the Division's Principal Mail and Supply Supervisor, who attested to the regular procedures followed by his staff in delivering outgoing mail to branches to the United States Postal Service (USPS) and Patricia Finn Sears, a Tax Processing Specialist 2, who supervises the processing of statutory notices issued by the Division.

5. The affidavit of Patricia Finn Sears, a Tax Processing Specialist 2 and Supervisor of the Refunds, Deposits, Overpayments and Control Units, which includes the CARTS (Case and Resource Tracking System) Control Unit of the Division, sets forth the Division's general practice and procedure for processing statutory notices. Notices of determination, such as the one at issue herein, are computer generated and are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. Here, each page of the six-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of

mailing. Following the Division's general practice, this date was manually changed on the first page to "7-2-07," to reflect the actual mailing date. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." The second page of the CMR contains information on the subject notice and establishes that on July 2, 2007, a notice with assessment number L028814677 and the control number 7104 1002 9730 0076 2645 was sent to petitioner at his Cold Spring, New York, address. Ms. Finn Sears's affidavit states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

6. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice in the batch is preceded by a Mailing Cover Sheet. A CMR is also received by the Center for each batch of statutory notices. A member of the staff operates a machine that puts each statutory notice and the associated documents into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and

the CMR to one of the various branch offices of the USPS located in the Albany, New York ,area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail 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 confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the last page, corresponding to "Total Pieces and Amounts," is the preprinted number 55. This number is circled and the page is initialed, confirming that all statutory notices set forth on the CMR were received by the USPS. The postmark is from the Colonie Center branch and bears the date July 2, 2007, confirming that the notices were mailed on that date.

7. Petitioner's Cold Spring, New York, address on the CMR and on the Notice of Determination matches the address listed on his New York State personal income tax return filed for the 2006 tax year in May 2007. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

8. As previously noted, the petition filed with the Division of Tax Appeals was signed and dated June 9, 2009, was mailed by certified mail on June 9, 2009 and was received by the Division of Tax Appeals on June 11, 2009.

9. Petitioner filed a response to the Notice of Intent to Dismiss which states, among other things, that despite the affidavits from two of its employees supporting the fact that a Notice of Determination was mailed properly to petitioner on July 2, 2007, the Division "still failed to provide sufficient evidence that it complied with existing precedent." Petitioner provides no further explanation of how the mailing of the statutory notice at issue in this matter failed to comply with existing precedent.

Petitioner's representative contends that despite a timely response to the Division's March 23, 2007 Statement of Proposed Audit Changes for Sales and Use Tax in which petitioner disagreed with the audit findings and requested a hearing, no hearing was ever provided. Later, upon petitioner's receipt of a Notice and Demand dated October 25, 2007, his representative wrote a letter on November 15, 2007, with a duly completed Power of Attorney, requesting a hearing.

Petitioner's response also states further states: "To summarize, it is clear that a taxpayer is entitled to a conciliation conference and the DOT [Department of Taxation] should not have denied McCann this right since he asked for it 3 months in advance of the issuance of the improper Notice of Determination."

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, or alternatively, a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) within 90 days of the mailing of the notice of determination (***see*** Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]). 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 a petition filed beyond the 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 petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

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 the timeliness of a taxpayer's petition is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered 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 (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

F. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of 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.***). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. VanDerZee and Ms. Sears, Division employees involved in and possessing knowledge of the process.

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 July 2, 2007. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated July 2, 2007. Additionally, a postal employee circled "55" next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (***see Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001).

G. Petitioner did not dispute that the notice was mailed as addressed on July 2, 2007. Rather, petitioner's representative generally denied that the notice was received by petitioner. 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***.)

H. Here, the record shows that petitioner's address as listed on his 2006 New York State personal income tax return filed in May 2007 was in Cold Spring, New York. This was the last return filed before the Notice of Determination was issued on July 2, 2007 and constitutes his last known address.

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).

I. Petitioner contends that his letter of April 12, 2007 to the Division's Westchester District Office, Sales Tax Section, constituted a timely request for a hearing. This contention is without merit.

First, it must be noted that petitioner's letter was in response to a Statement of Audit Change for Sales and Use Tax, dated March 23, 2007, which was issued not to petitioner, but to the corporation, CSJ.

Second, the letter was sent on April 12, 2007, a date which was more than one and one-half months prior to the issuance of the Notice of Determination issued to petitioner by the Division on July 2, 2007. Even if petitioner's letter could qualify as a request for a hearing for himself, it was premature (Tax Law § 170[3-a]; 20 NYCRR 4000.3[c]) and a subsequent request or petition would have been required for a timely protest within 90 days of the issuance of the Notice of Determination. It is well settled that a petition which is filed before the issuance of the notice of determination must be dismissed as premature (***Matter of West Mountain Corp. v. State Dept. of Taxation & Fin.***, 105 AD2d 989, 482 NYS2d 140 [1984], ***affd*** 64 NY2d 991, 489 NYS2d 62 [1985]). Where a petition has been filed before a notice of determination has been issued, the petition must be dismissed because "review by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation's assessment was only a proposed one, subject to change under the internal procedures within the Division of Taxation [citation omitted]." (***Matter of Yegnukian,*** Tax Appeals Tribunal, March 22, 1990.)

J. After the issuance by the Division of a Notice and Demand, dated October 25, 2007, petitioner's representative provided a Power of Attorney, dated November 15, 2007, to the Division and simultaneously sent a letter stating: " I respectfully request that you withdraw the deficiency in full or in the alternative grant a hearing to ascertain the accuracy of the imposed deficiency." By this time, however, the 90-day period for protesting the Notice of Determination had already expired.[2]

K. The Notice of Determination was mailed to petitioner on July 2, 2007. Accordingly, even if the letter of petitioner's representative dated November 15, 2007 is found to be a request for a hearing, it, too, was filed more than 90 days after the mailing of the Notice of Determination and, as such, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Notice of Determination.

L. Petitioner is not entirely without recourse. He may pay the tax assessment at issue herein and then file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, he may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a]; § 1139).

M. The petition of John V. McCann, Jr. is hereby dismissed.

DATED:Troy, New York
November 25, 2009

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE

[2] Since the Notice of Determination was issued on July 2, 2007, a petition for an administrative hearing or a request for a conciliation conference had to have been filed on or before September 30, 2007. Because September 30, 2007 fell on a Sunday, petitioner had until the following day, or until Monday, October 1, 2007, to file the petition.