

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ANTHONY CLAY REALTY CORPORATION</b>	:	DETERMINATION
	:	DTA NO. 823099
for Redetermination of a Deficiency or for Refund of	:	
Corporation Franchise Tax under Article 9-A of the Tax	:	
Law for the Period June 1, 2003 through May 31, 2004.	:	

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Petitioner, Anthony Clay Realty Corporation, 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 period June 1, 2003 through May 31, 2004.

On June 25, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4), in response to which petitioner's representative, Neil Hutchins, Esq., submitted a statement in opposition to dismissal and the Division of Taxation (Division), by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal.

On October 8, 2008, Administrative Law Judge Brian L. Friedman issued an order withdrawing the Notice of Intent to Dismiss Petition.

On January 26, 2010, the Division, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b).

Accompanying the motion was the affidavit of John E. Matthews, Esq., dated January 26, 2010, and annexed exhibits supporting the motion. Petitioner did not file a response to the Division's

motion. Accordingly, the 90-day period for issuance of this determination commenced on February 25, 2010 (20 NYRCC 3000.5[d]).

After due consideration of the entire record in this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

### ***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

### ***FINDINGS OF FACT***

Findings of Fact 1 through 21 in Judge Friedman's October 8, 2009 order are incorporated herein by reference. Additionally, this determination makes the following Findings of Fact.

1. At issue in this matter is the timeliness of petitioner's protest of a conciliation order dated December 19, 2008 and bearing CMS number 222329. Petitioner filed a petition with the Division of Tax Appeals in protest of the December 19, 2008 order on June 12, 2009.

2. Judge Friedman's October 8, 2009 order concluded that the Division properly mailed the subject conciliation order to petitioner on December 19, 2008. As a necessary prerequisite to this conclusion, Judge Friedman found that the Division established a standard procedure for the mailing of conciliation orders by persons with knowledge of such procedures. Specifically, the order noted affidavits of Robert Farrelly and James Stephen VanDerZee, Division employees involved in and possessing knowledge of the process of generating, reviewing and mailing conciliation orders. Judge Friedman's order also found that adequate proof was presented to show that the subject order was actually mailed to petitioner on December 19, 2008. The order found that a certified mailing record (CMR) documenting such mailing was properly completed and demonstrated mailing to petitioner on that date.

3. The October 8, 2009 order found that the Division's proof was deficient in that it did not show mailing of a copy of the conciliation order to petitioner's representative, Neil Hutchins, Esq. Judge Friedman noted that the copy of the CMR submitted in support of the Notice of Intent to Dismiss lacked any indication of mailing to Mr. Hutchins. Accordingly, Judge Friedman's order withdrew the Notice of Intent to Dismiss.

4. In support of the instant motion the Division has submitted affidavits of Mr. Farrelly and Mr. VanDerZee, which are substantially similar to the affidavits submitted in connection with the Notice of Intent to Dismiss.

5. The Division has also submitted a CMR which is similar to the CMR submitted in connection with the Notice of Intent to Dismiss in all respects except that it also contains information regarding the mailing of a copy of the subject conciliation order to petitioner's representative. Specifically, on page two of the CMR, corresponding to certified control number 7104 1002 9730 1098 2620 is reference/CMS number 000222329, along with petitioner's representative's name and address ("Neil Hutchins 1187 Clay Avenue, Apt. 3, So. Bronx, NY 10456").

6. A comparison of the copy of the CMR submitted in support of the Notice of Intent to Dismiss and the copy of the CMR submitted in the instant motion shows that the Division erroneously redacted the information indicating mailing to the representative in its supporting papers in respect of the Notice of Intent to Dismiss.

7. The address listed on the CMR for Mr. Hutchins is the same as that listed for Mr. Hutchins on petitioner's request for conciliation conference.

8. The Division also submitted an affidavit, dated January 25, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United

States Postal Service (USPS) for delivery information. Ms. Corina's affidavit describes the Division's request to the Postal Service using PS Form 3811-A for delivery information on the subject conciliation order. The PS Form 3811-A requests delivery information with respect to an article of mail bearing certified control number 7104 1002 9730 1098 2620. The USPS response indicates that such article was delivered as addressed to Mr. Hutchins on December 29, 2008 and also includes a copy of the mail recipient's signature which appears to be that of Mr. Hutchins.

### ***CONCLUSIONS OF LAW***

Conclusions of Law A through F in Judge Friedman's October 8, 2009, order are incorporated herein by reference. Additionally, this determination makes the following 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 Farrelly, VanDerZee and Corina 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. As noted, Judge Friedman's order determined that the Division established that it properly mailed the subject conciliation order to petitioner on December 19, 2008. As indicated

in Judge Friedman's order, the Division's proof was lacking in that the CMR did not show that a copy of the conciliation order was mailed to petitioner's representative. That flaw has been corrected in the copy of the CMR submitted in support of the instant motion. That is, the CMR shows that a copy of the order was mailed to petitioner's representative on December 19, 2008 at the address indicated on the request for conciliation conference. The Division also submitted evidence establishing receipt of the conciliation order by petitioner's representative.

D. Pursuant to Judge Friedman's order dated October 8, 2009, the Division established that it properly mailed the subject conciliation order to petitioner on December 19, 2008. Pursuant to Conclusion of Law C herein, the Division has established that it properly mailed a copy of the subject conciliation order to petitioner's representative on December 19, 2008. The statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][e]).

E. The subject petition was filed on June 12, 2009. This date falls well after the 90-day period of limitations. Petitioner's petition was therefore untimely filed (*see* Tax Law § 170[3-a][e]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The Division of Taxation's motion for summary determination is granted, and the petition of Anthony Clay Realty Corporation is dismissed with prejudice.

DATED: Troy, New York  
May 13, 2010

/s/ Timothy Alston  
ADMINISTRATIVE LAW JUDGE