

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LANA MARKS LTD. OF NEW YORK	:	DETERMINATION
		DTA NO. 823164
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 March 1, 2002 through February 28, 2005.	:	

Petitioner, Lana Marks Ltd. of New York, 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 March 1, 2002 through February 28, 2005.

On December 11, 2009, the Division of Taxation, by its representative, 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, dated December 11, 2009, and annexed exhibits supporting the motion. Petitioner did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on January 11, 2010, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Lana Marks Ltd. of New York, at its Palm Beach, Florida, address, a Notice of Determination number L-031602600-9, dated March 6, 2009, which assessed sales and use taxes, for the period March 1, 2002 through February 28, 2005, in the amount of \$27,426.15 plus interest.

2. By letter dated June 5, 2009, petitioner protested the Notice of Determination. Copies of this letter were sent via facsimile transmission and Federal Express "Standard Overnight" service on June 5, 2009 to Jenny Denick, an auditor in the Division's Buffalo District Office. Subsequently, the Buffalo District Office forwarded two copies of this letter to the Division's Bureau of Conciliation and Mediation Services (BCMS), which received same on June 11, 2009.

3. On June 26, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

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 March 6, 2009, but the request was not mailed until June 5, 2009, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the notice dated March 6, 2009, the Division provided the following: (i) an affidavit, dated November 1, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated December 1, 2009, of Patricia Finn Sears, the supervisor of the control unit of the

Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 6, 2009; and (iv) a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (ST-100) for the period September 1, 2008 through November 30, 2008 filed on December 22, 2008, which was the last sales and use tax return filed by petitioner prior to the issuance of the Notice of Determination.

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, each page of the 36-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 "3/6/09," to reflect the actual mailing date. Each notice is assigned a certified control number. 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 taxpayer assistance information on the back. The certified control number, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The 35th page of the CMR contains information on the subject notice and establishes that on March 6, 2009 a notice with the control number 7104 1002 9730 1263 5142 was sent to petitioner at its Palm Beach, Florida, address.

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. As the mail and supply supervisor, he supervises the Center's staff. The Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is

preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces 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 information contained on the CMR. A member of the Mail Processing 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 final page, corresponding to "Total Pieces and Amounts," is the preprinted number 386. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date March 6, 2009, confirming that the notices were mailed on that date.

7. Petitioner's Palm Beach, Florida, address on the CMR and the Mailing Cover Sheet matches the address listed on its sales and use tax return for the quarter ending November 30, 2008. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

8. The protest letter, the telefax transmittal, and the Federal Express "Standard Overnight" service shipping label each bore petitioner's address in Palm Beach, Florida.

CONCLUSIONS OF LAW

A. 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 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. In the instant matter, petitioner did not respond to the Division's motion and, therefore, has 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 v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged by the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons set forth below.

C. Where the timeliness of a petition or a request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

Additionally, Tax Law § 1138(a)(1) requires that the 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."

D. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., March 6, 2009, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's quarterly sales and use tax return for the period September 1, 2008 through November 30, 2008 which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). It is concluded that the notice was properly mailed, 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 March 6, 2009 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. The documents show that the notice was mailed on March 6, 2009, but petitioner's request for conciliation conference was not mailed until June 5, 2009, which is one day beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

F. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the claim for refund is disallowed, petitioner 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][a]; § 1139).

G. The Division of Taxation's motion for summary determination is granted, and the petition of Lana Marks Ltd. of New York is dismissed.

DATED: Troy, New York
April 1, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE