

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>WAEIL QUDSI D/B/A</b>	:	<b>DETERMINATION</b>
<b>KANZ CONVENIENCE STORE</b>	:	<b>DTA NO. 823398</b>
	:	
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 September 1, 2006	:	
through May 31, 2008.	:	

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Petitioner, Waeil Qudsi d/b/a Kanz Convenience Store, 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 September 1, 2006 through May 31, 2008.

On May 6, 2010, the Division of Taxation filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3009.(b). Accompanying the motion to dismiss, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 6, 2010. After due consideration of the documents submitted, Daniel J. Ranalli, 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 notice of determination.

***FINDINGS OF FACT***

1. Petitioner, Waeil Qudsi d/b/a Kanz Convenience Store, was issued Notice of Determination L-031642154 dated March 19, 2009.

2. In protest of the notice of determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). Although dated June 1, 2009, the request was mailed on August 26, 2009 and stamped received by BCMS on August 28, 2009.

3. Following this request, BCMS issued Conciliation Order Dismissing Request, CMS number 234756, on September 11, 2009 denying petitioner's request for a conciliation conference because, having filed for conciliation conference on August 26, 2009, petitioner had allowed 160 days to elapse between the issuance of the notice of determination and subsequent request.

4. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of determination at issue. The petition was date stamped received on December 14, 2009.

5. To support its motion for summary determination, the Division submitted, among other documents, the affidavit of John E. Matthews, an attorney employed in the Office of Counsel of the Division.

6. Mr. Matthews attests that petitioner's last known address was 3056 Burnet Ave., #11, Syracuse, NY 13206 for purposes of issuing the notice of determination at issue on March 19, 2009. The Division provided a copy of the petitioner's last tax return, which confirmed the address attested to by Mr. Matthews.

7. The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of determination is placed in the "Outgoing Certified Mail" area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

8. Following this review, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

9. A review of the CMR confirms that a USPS employee initialed or signed page 32 of the CMR, affixed a postmark to each page of the CMR and wrote and circled the total number of pieces of certified mail received. Page 32 of the CMR originally listed 342 pieces of mail; however, the number of pieces received at the post office shows 341, reflecting the fact that one piece of certified mail had been "pulled" from the mailing record. The one piece that was pulled from the CMR did not concern either the listing for petitioner or petitioner's representative.

10. Mr. VanDerZee attested that, on March 19, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 3056 Burnet Ave., #11, Syracuse, NY 13206 and one piece to petitioner's representative, Andre Johnson, at 214 Chaffee Ave., Syracuse, NY 13207, to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.

11. The Division also provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the Division. CARTS refers to the Division's computer system for generating documents, including notices of determination issued to taxpayers. The computer generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

12. Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was generated, and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

13. The CMR for the notices issued on March 19, 2009 to petitioner and his representative consisted of 32 pages. Furthermore, the postal service representative affixed a postmark to each page of the CMR and stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on page 32. Specifically, the representative wrote and circled 341 on page 32 and initialed or signed each page of the CMR.

14. On page 26 of the CMR, Notice of Determination L-031642154 is indicated as being sent to Waeil Qudsi, 3056 Burnet Ave. #11, Syracuse, NY 13206 by certified mail using control number 7104 1002 9730 1268 0739, and a postmark of March 19, 2009 is present.

15. On page 27 of the CMR, Notice of Determination L-031642154 is indicated as being sent to Andre Johnson, 214 Chaffee Ave. #11, Syracuse, NY 13207 by certified mail using control number 7104 1002 9730 1268 0746, and a postmark of March 19, 2009 is present.

16. Ms. Sears attested to the truth and accuracy of the copy of the 32-page CMR relevant to this matter containing the certified control numbers for the notices sent to petitioner and his representative on March 19, 2009.

17. Neither petitioner nor his representative responded within the 30-day period following the Division's filing of the motion to dismiss pursuant to 20 NYCRR 3000.5(b).

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

A. Tax Law § 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due. As an alternative to petitioning for a hearing, the taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" (20 NYCRR 4000.3[a]).

B. Tax Law § 170(3-a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

The filing of a written request, and one conformed copy, with BCMS “suspends the running of the period of limitations for the filing of a petition for a hearing” (20 NYCRR 4000.3[c]).

Pursuant to these provisions, petitioner had 90 days from the date the assessment was issued (March 19, 2009) to either request a conciliation conference or file a petition for a hearing, but failed to do either within the allowable time requirement.

C. 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, Inc.*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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 Katz*). 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).

E. 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).

F. In this case, the Division has introduced adequate evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and James VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

G. The production of the CMR by the Division constitutes sufficient documentary evidence to establish that the subject notice of determination was mailed as addressed to petitioner and his representative on March 19, 2009. The CMR listed: (1) names and addresses, (2) corresponding certified control numbers, (3) U.S. Postal Service postmarks dated March 19, 2009, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. The CMR has thus been properly completed, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. Here, pursuant to 20 NYCRR 3000.5(b), petitioner or his representative had 30 days to respond to the filing of the motion to dismiss, yet neither exercised this right.

I. Therefore, based upon the facts of this case and the provisions cited, petitioner had 90 days from the issuance of the notice of determination (March 19, 2009) to either file with BCMS for conciliation conference or file a petition with the Division of Tax Appeals, yet both he and his representative failed to do either.

J. The petition of Waeil Qudsi d/b/a Kanz Convenience Store is hereby dismissed.

DATED: Troy, New York  
July 22, 2010

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE