

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFF ZEGANS	:	DETERMINATION
		DTA NO. 823543
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, 2006 through November 30, 2008.	:	

Petitioner, Jeff Zegans, 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, 2006 through November 30, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 3, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated August 3, 2010, and annexed exhibits supporting the motion. In opposition to the Division's motion, petitioner's representative, Allan Povol, CPA, filed an affidavit, dated September 1, 2010, with attached exhibits. The 90-day period for the issuance of this determination began on September 7, 2010, the filing date of petitioner's response. After due consideration of the affidavits and exhibits submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated June 8, 2009. The notice is addressed to petitioner's Hewlett, New York, address and bears assessment identification number L-032028649-8.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated November 24, 2009 in protest of the Notice of Determination, that was received by BCMS on November 27, 2009.

3. BCMS issued a Conciliation Order Dismissing Request to petitioner dated December 18, 2009. The order, bearing CMS number 236208, determined that petitioner's protest of the Notice of Determination dated June 8, 2009 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 was issued on June 8, 2009, but the request was not mailed until November 25, 2009, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the Notice of Determination dated June 8, 2009, the Division provided the following: (i) an affidavit of John E. Matthews, Esq., representing the Division in this matter; (ii) the petition filed by petitioner on March 11, 2010; (iii) the Division's answer; (iv) an affidavit, dated August 2, 2010, of James Steven VanDerZee, the head mail and supply supervisor in the registry unit of the Division; (v) an affidavit, dated July 26, 2010, of Patricia Finn Sears, the supervisor of the refunds, deposits, overpayments and control units of the

Division, including the CARTS control unit; (vi) a Certified Mail Record (CMR) postmarked June 8, 2009; (vii) the Notice of Determination issued to petitioner dated June 8, 2009; (viii) the BCMS conciliation order (CMS No. 23608) dated December 18, 2009; (ix) petitioner's request for conciliation conference dated November 24, 2009; and (x) petitioner's Form IT-201, New York State Resident Income Tax Return for 2007, dated October 13, 2008.

5. The affidavit of Ms. Sears sets forth the Division's specific steps, as well as its general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center for mailing. She established that the procedures followed were the normal and regular procedures of the CARTS control unit. She explained that the CMR for statutory notices issued on June 8, 2009, shows that a Notice of Determination dated June 8, 2009, with reference to assessment number L-032028649, was sent to petitioner by certified mail using certified control number 7104 1002 9730 1349 5271, on June 8, 2009, as indicated by an affixed United States Postal Service postmark.

6. The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. VanDerZee's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service (USPS) in the Albany, New York, area. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here, the postal employee affixed a postmark to the certified mail record, initialed the CMR, and wrote in the total number of pieces of certified

mail received. This CMR indicates that a total of 174 pieces of mail were delivered to the USPS. Based upon Mr. VanDerZee's review of the affidavit of Ms. Sears, the CMR and the Notice of Determination, he concluded that one piece of certified mail addressed to petitioner at the same address listed on the Notice of Determination was delivered to the USPS in Albany, New York, on June 8, 2009.

7. Petitioner's Hewlett, New York, address on the CMR and the mailing cover sheet of the Notice of Determination matches the address listed on petitioner's 2007 resident income tax return, Form IT-201, dated October 13, 2008. According to the Division's records, this was petitioner's last known address when the notice under protest was issued.

8. Petitioner filed a timely Request for Conciliation Conference with BCMS in connection with a separate sales and use tax matter involving the period March 1, 2006 through May 31, 2008. BCMS assigned this matter CMS number 233314.

SUMMARY OF PETITIONER'S POSITION

9. In response to the Division's motion to dismiss, petitioner's representative submitted an affidavit stating that the Notice of Determination at issue herein overlaps and duplicates another notice of determination currently pending in BCMS. The representative requests that the Notice of Determination in this matter be remanded to BCMS to be consolidated and processed with the other notice, or in the alternative, suspended pending the outcome of the BCMS process concerning the other notice.

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. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of 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).

C. Here, the Division clearly established proper mailing of the subject Notice of Determination to petitioner's last known address on June 8, 2009 as claimed. The affidavits of James Steven VanDerZee and Patricia Finn Sears established the Division's mailing procedures for notices of determination. Additionally, the affidavits, together with the properly completed CMR, further established that such procedures were followed in the present matter. Specifically, the VanDerZee affidavit, as corroborated by the CMR, established that a member of the mail processing center inserted a copy of the subject notice into an envelope addressed as indicated on the CMR and delivered the sealed envelope to the USPS on June 8, 2009. Moreover, it is observed that the CMR in this matter is properly completed and as such constitutes highly probative documentary evidence of the mailing of the subject notice to the address listed and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that it mailed a copy of the subject notice to the address listed on the CMR on June 8, 2009. Additionally, petitioner's Hewlett, New York, street address as listed

on the CMR and on the notice itself conforms with the address reported on the last New York sales tax return filed by petitioner prior to the issuance of the subject statutory notice, thereby satisfying the “last known address” requirement in Tax Law § 1138(a)(1).

D. As the Division has established that it properly mailed the subject Notice of Determination on June 8, 2009, 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]). Petitioner’s Request for Conciliation Conference was filed on November 25, 2009. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner’s request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a result, 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).

E. Petitioner contends that the June 8, 2009 Notice of Determination, which is the subject of the present matter, overlaps and duplicates a prior notice of determination that is currently pending at BCMS (CMS 233314). Petitioner asserts that the subject notice should be remanded to BCMS to be consolidated with and processed with such other pending matter. Alternatively, petitioner proposes that the instant matter be suspended pending resolution of CMS 233314.

Absent a timely filed protest of the June 8, 2009 notice, however, as noted above, the Division of Tax Appeals is without jurisdiction over that notice and therefore lacks authority to remand or suspend the present matter as petitioner requests. Additionally, it is noted that the record is inconclusive as to whether the June 8, 2009 notice is duplicative as there is no copy of the other referenced notice of determination in the record.

F. The Division of Taxation's motion for summary determination is granted, and the petition of Jeff Zegans is dismissed.

DATED: Troy, New York
December 2, 2010

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE