

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**NEW YORK CITY BILLIONAIRES  
CONSTRUCTION CORP.** :

DETERMINATION  
DTA NO. 823684

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, 2002 through August 31, 2008.

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Petitioner, New York City Billionaires Construction Corp., 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, 2002 through August 31, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion on November 8, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on December 8, 2010, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy Alston, 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 October 26, 2009 and bearing assessment identification number L-032810857. The notice is addressed to petitioner, New York City Billionaires Construction Corp., at a Rosedale, New York, address.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the October 26, 2009 Notice of Determination. The request is dated March 21, 2010 and was received by BCMS on March 24, 2010.

3. On April 9, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination 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 October 26, 2009, but the request was not mailed until March 22, 2010, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the October 26, 2009 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated November 3, 2010, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated November 4, 2010, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail -

Assessments Receivable" (CMR) postmarked October 26, 2009; (iv) an affidavit, dated November 4, 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; (v) two Postal Service forms 3811-A (Request for Delivery Information/Return Receipt after Mailing) and United States Postal Service responses to such requests dated September 13, 2010; and (vi) petitioner's quarterly sales tax return for the period ended August 31, 2009, dated September 9, 2009, which lists the same address for petitioner as that listed on the subject notice.<sup>1</sup>

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. Each page of the CMR lists an initial date that 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 the actual mailing date of "10/26/09."

6. All notices are assigned a certified control number. The certified control 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 is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address." The CMR in the present matter consists of 8 pages and

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<sup>1</sup> The same address for petitioner is also listed on its Request for Conciliation Conference dated March 21, 2010 and on its petition, dated June 9, 2010.

lists 84 certified control numbers along with corresponding assessment numbers, names and addresses. There are no deletions from the list.

7. Here, page 5 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1640 8544 and assessment ID number L-032810857 was mailed to petitioner at the Rosedale, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. Page 4 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1640 8407 and assessment ID number L-032810857 was mailed to petitioner's representative in this matter, Ludwig Sheppard, at a Brooklyn, New York, address. The corresponding mailing cover sheet bears this certified control number and lists Mr. Sheppard's name and address as noted.

9. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces 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 postmarked and initialed pages 1 through 8 of the CMR. The postmarks are dated October 26, 2009. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 84, which has not been circled. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," which is blank.

10. According to the Sears affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 84 articles of mail listed on the CMR, including the articles addressed to petitioner and its representative, were received by the USPS on October 26, 2009.

11. According to both the Sears and Peltier affidavits, a copy of the subject notice was mailed to petitioner and to its representative on October 26, 2009, as claimed.

12. The affidavit of Heidi Corina describes the Division's requests to the Postal Service for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A the Division requested delivery information with respect to articles of mail bearing certified control numbers 7104 1002 9730 1640 8544 and 7104 1002 9730 1640 8407. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1640 8544 and addressed to petitioner was returned to the Division on November 20, 2009. A copy of the envelope indicates that this article of mail was unclaimed by the addressee. The USPS response to the Division's request for information also indicates that the article of mail bearing certified control number 7104 1002 9730 1640 8407 and addressed to petitioner's representative was delivered as addressed on October 28, 2009.

13. The power of attorney form attached to petitioner's petition lists the same Brooklyn address for petitioner's representative as that listed on the CMR.

14. Attached to petitioner's petition is a letter addressed to petitioner, dated January 14, 2010, from the Division section head involved in the audit. The letter indicates that an audit of petitioner's records was completed and that, based on the audit findings, petitioner owes additional tax, plus interest and penalties. Also attached to the petition is a February 18, 2010 Notice and Demand issued to petitioner seeking payment of the subject assessment. The petition asserts that petitioner's Request for Conciliation Conference was timely relative to these documents.

### **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]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv denied* 62NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears, Peltier 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. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." This section further provides that such a

notice "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. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170(3-a)(a); § 1138[a][1]).<sup>2</sup> If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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

F. Here, the Sears and Peltier affidavits and the CMR establish the Division's standard mailing procedures. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, the CMR, although otherwise properly

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<sup>2</sup> Accordingly, neither the January 14, 2010 letter nor the February 18, 2010 Notice and Demand (*see* Finding of Fact 14) is subject to protest by a Request for Conciliation Conference or a petition.

prepared, is flawed because the entry "Total Number of Pieces Received at Post Office" was left blank (*see Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998). Such a flaw may be overcome by other evidence of mailing in the record, including evidence that other notices listed in the certified mail record were delivered (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). Other evidence of mailing is present in the record in this matter. Specifically, the USPS delivery information shows that a copy of the notice at issue addressed to petitioner's representative, which was also listed on the CMR, was delivered as addressed on October 28, 2009. The USPS delivery information also shows that the notice addressed to petitioner was returned to the Division as unclaimed on November 20, 2009. This fact, of course, requires an inference that the notice was mailed to petitioner in the first place. This other evidence of mailing is sufficient to overcome the flaw in the CMR and, along with the CMR, establishes the fact of mailing of the subject notice as claimed on October 26, 2009.

G. Petitioner's address on the notice, the corresponding mail cover sheet and the CMR conforms with the address reported on petitioner's New York sales tax return for the quarter ended August 31, 2009, as well as its request for conciliation conference and petition (*see* Finding of Fact 4, footnote 1). This satisfies the "last known address" requirement in Tax Law § 1138(a)(1).

H. Pursuant to the foregoing conclusions, the Division has established that it properly mailed the subject Notice of Determination to petitioner on October 26, 2009. Such proper mailing gives rise to a rebuttable presumption of receipt (*see* Tax Law § 1147(a)(1); *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). Under the instant facts and circumstances, this presumption is not rebutted by the fact that the notice addressed to petitioner was returned to the Division as unclaimed. Specifically, there is no indication in the record that the USPS did



not follow appropriate procedures (*cf. Matter of Ruggerite, Inc. v. State Tax Commission* (97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984])). Furthermore, considering that petitioner continued to use the address on the statutory notice (*see* footnote 1), it is reasonable, absent any evidence to the contrary, to equate petitioner's unclaimed notice with a refusal to accept delivery and thus deem the notice as constructively received (*see Matter of American Cars "R" Us, Inc. v. Chu*, 147 AD2d 797, 537 NYS2d 672 [1989])).

I. Petitioner's Request for Conciliation Conference was filed on March 22, 2010. 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]). 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).

J. The Division of Taxation's motion for summary determination is granted, and the petition of New York City Billionaires Construction Corp. is dismissed.

DATED: Troy, New York

FEB 17 2011



ADMINISTRATIVE LAW JUDGE