

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
J AND S AMERICA CORP.	:	DETERMINATION DTA NO. 821928
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 June 1, 2002 through May 31, 2005.	:	

Petitioner, J and S America 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 June 1, 2002 through May 31, 2005.

On March 25, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion were the affidavit of John E. Matthews, dated March 25, 2008, and annexed exhibits supporting the motion. Petitioner, appearing by Chan-Yun Joo, Esq., had until June 24, 2008 to file a response but failed to do so. Thus, that date commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation and petitioner, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, such facts mandate a determination in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, J and S America Corp., at its Bronx, New York, address, a Notice of Determination dated July 21, 2005 and bearing the Audit Case ID X-569243872. The notice asserted a total sales tax deficiency of \$572,446.90 for the period June 1, 2002 through May 31, 2005. Petitioner protested this notice by its Request for Conciliation Conference, filed on June 2, 2007 with the Division's Bureau of Conciliation and Mediation Services (BCMS).

2. On June 15, 2007, BCMS issued a Conciliation Order Dismissing Request to petitioner. That order determined that petitioner's protest of the subject notice was untimely and stated, in relevant 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 July 21, 2005, but the request was not mailed until June 2, 2007, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

Petitioner filed a timely protest to the Conciliation Order on October 17, 2007.

3. To show proof of proper mailing of the July 21, 2005 notice, the Division provided the following with its motion papers: (i) an affidavit, dated March 20, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated March 21, 2008, of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 21, 2005; and (iv) petitioner's form AU-196.10, Notification of Sale, Transfer or Assignment in Bulk, dated April 28, 2005, which was petitioner's last filing prior to the issuance of the subject notice.

4. 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, page 32 of the 99-page CMR contains information on the particular notice in issue and lists an initial date of July 11, 2005.¹ Following general practices, this date was manually changed to the actual mailing date of "7-21," or July 21, 2005. Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Page 32 of the CMR establishes that a notice with the control number 7104 1002 9730 0742 2672 and reference number X-569243872-7 was sent to petitioner at its Bronx, New York, address.

5. The affidavit of James Steven VanDerzee, the 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 operates a machine that puts each notice 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 U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the

¹ The CMR specifically states "20051921906" or year 2005, day 192 at 7:06 P.M.

CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the 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 confirmed that a USPS employee marked pages 1 through 99 of the CMR. On the final page, corresponding to “Total Pieces and Amounts,” is the number 1,078. A short distance below this number is the handwritten number 1,078 with initials beneath it, confirming that all notices were received by the USPS. The USPS postmark is from the Colonie Center branch and bears the date July 21, 2005, confirming that the notices were mailed on that date.

6. Petitioner’s Bronx, New York, address on the CMR, the notice and its cover sheet matches the address listed on its form AU-196.10, which was filed on April 28, 2005. This was the last item petitioner filed with the Division before the issuance of the notice.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all 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 the timeliness of a Request for Conciliation Conference or petition is at issue, as here, 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 prove the fact and date of mailing the subject notice, the Division must show the following:

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 “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.”

C. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice on the day it was dated, July 21, 2005, to petitioner’s last known address. The submitted affidavits establish the Division’s standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the notice, its cover sheet and the CMR conforms with the address on the form AU-196.10 filed by petitioner on April 28, 2005, thereby satisfying the “last known address” requirement in Tax Law § 1138(a)(1). Petitioner offered neither argument nor proof either disputing the evidence introduced by the Division or alleging nonreceipt. Therefore, it is concluded that the Division properly mailed the notice to petitioner’s last known address, 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 July 21, 2005 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. Petitioner’s Request for Conciliation Conference was mailed on June 2, 2007, a date far beyond the 90-day period for protesting the notice and, therefore, is untimely. Consequently, the Division of Tax Appeals has no jurisdiction to hear this matter (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005) and must grant summary determination in favor of the Division of Taxation.

E. Finally, it is observed that petitioner may not be without some remedy. It may pay the taxes and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, it may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

F. The Division's motion for summary determination is granted, and the petition of J and S America Corp. is dismissed.

DATED: Troy, New York
August 21, 2008

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE