

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS SMARIO	:	DETERMINATION
		DTA NO. 822236
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, 2005 through November 30, 2005.	:	

Petitioner, Thomas Smario, 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, 2005 through November 30, 2005.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 13, 2008 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. 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 September 12, 2008, 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 J. 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 three notices 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 three notices of determination each dated May 22, 2006 and addressed to petitioner, Thomas Smario, at 1369 King St., Greenwich, CT 06831-2517.

2. The subject notices of determination assess, in total, tax of \$156,411.00, plus penalty and interest, for the three sales tax quarters comprising the period March 1, 2005 through November 30, 2005. In explanation, each notice indicates that it is being issued because petitioner is liable as a corporate officer or a person responsible for the collection and payment of sales and use taxes due from New Road One, LLC. The notices further indicate that the tax deficiency results from a failure to remit tax as reported on returns.

3. Each notice bears an assessment identification number as indicated below. Additionally, the mail cover sheet corresponding to each of the subject notices bears petitioner's name and address as listed above and a certified mail control number as indicated below.

Period	Assessment ID	Certified No.
3/1/05-5/31/05	L-026959823-5	71041002973012206601
6/1/05-8/31/05	L-026959822-6	71041002973012206595
9/1/05-11/30/05	L-026959821-7	71041002973012206588

4. On March 28, 2008, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the three notices of determination at issue.

5. On April 11, 2008, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices 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 May 22, 2006, but the request was not received until March 28, 2008, or in excess of 90 days, the request is late filed.

6. To show proof of proper mailing of the three May 22, 2006 notices, the Division provided the following with its motion papers: (i) an affidavit, dated August 12, 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 August 12, 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 May 22, 2006; and (iv) petitioner's 2001 New York nonresident income tax return filed June 7, 2004, which was the last New York return filed by petitioner prior to the issuance of the subject statutory notices and which lists the same address for petitioner as that listed on the subject notices.

7. 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 1 of the 33-page CMR contains information on the three notices in issue and indicates an initial date of May 11, 2006.¹ Following general practices, this date was manually changed to the actual mailing date of "5/22/06." 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 1 of the CMR establishes that three notices with certified control numbers and corresponding

¹ The CMR specifically states "20061311700" or year 2006, day 131 at 5:00 P.M.

assessment ID numbers as listed in Finding of Fact 3 were mailed to petitioner at the address listed on the notices of determination and mail cover sheets.

8. 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 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 postmarked and initialed pages 1 through 33 of the CMR. The postmarks are dated May 22, 2006. On the final page, corresponding to "Total Pieces and Amounts," is the number 358. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," next to which the number "358" has been manually written. The affixation of the postmarks and the postal service employee's initials confirm that the notices were received by the USPS on May 22, 2006.

9. In a letter to the Division dated March 2, 2008 and attached to his petition, petitioner's representative states: "In March 2007 Mr. Smario was notified by mail that he had been assessed

as a responsible person. Although your office issued the assessment in March of 2006 it was the first time that Mr. Smario became aware of the liability.”

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; he 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]; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears and VanDerZee 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. 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).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notices at issue on May 22, 2006 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 notices, the corresponding mail cover sheets and the CMR conforms with the address listed on the last New York tax return filed by petitioner prior to the issuance of the subject statutory notices, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). It is concluded, therefore, that the Division properly mailed the May 22, 2006 notices 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 that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner's representative's claim that petitioner was unaware of the notices of determination until March 2007 (*see* Finding of Fact 9), is plainly insufficient to rebut the statutory presumption of receipt arising from the proper mailing of the notices (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Petitioner's Request for Conciliation Conference was filed on March 28, 2008. 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, 2005).

G. It is noted that petitioner may not be without some remedy, for he may pay the taxes and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, petitioner 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).

H. The Division of Taxation's motion for summary determination is granted, and the petition of Thomas Smario is dismissed with prejudice.

DATED: Troy, New York
November 26, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE