

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
CLINTON DELI, INC.	:	DETERMINATION
	:	DTA NO. 822745
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 December 1, 2004 through May	:	
31, 2007.	:	

Petitioner, Clinton Deli, Inc., 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 December 1, 2004 through May 31, 2007.

On June 1, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated June 1, 2009, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by July 1, 2009 which date commenced the 90-day period for issuance of this determination.¹ After due consideration of the affidavits and documents presented by the Division of Taxation, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

¹ Petitioner did not file a response to the motion.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because petitioner failed to file a petition or request within 90 days of the issuance of the Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Clinton Deli, Inc., at its 207 Clinton Street, #8, New York, New York, address, the following Notice of Determination with the corresponding date, period and amount of sales and use taxes due:

Notice #	Issue Date	Period	Deficiency
L-030368720	07/03/08	12/01/04 - 05/31/07	\$131,257.56

By its Request for Conciliation Conference, filed October 29, 2008, petitioner protested the notice numbered L-030368720 and dated July 3, 2008.

2. On November 14, 2008, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice 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 July 3, 2008, but the request was not mailed until October 29, 2008, or in excess of 90 days, the request is late filed.

3. With its motion papers, the Division, to show proof of proper mailing of the notice dated July 3, 2008, provided the following: (i) an affidavit, dated May 29, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated May 27, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) a "Certified Record for

Presort Mail - Assessments Receivable” (CMR) postmarked July 3, 2008; (iv) an affidavit, dated May 29, 2009, of Heidi Corina, a Legal Assistant in the Office of Counsel of the Department of Taxation and Finance; (v) United States Postal Service (USPS) Form 3811-A, Request for Delivery Information; (vi) the USPS response to the request for delivery information; and (vii) the Division of Taxation’s field audit report relating to petitioner.

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. Following the Division’s general practice, this date is manually changed to reflect the actual mailing date. Each notice is assigned a certified control number. The certified 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 entitled “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street and PO Address.”²

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. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff

² The affidavit mentions a mailing to a representative. This appears to be a typographic error because no representative by that name appeared in the case on audit.

member then weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service 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 of mail received or indicate the total number of pieces received by writing the number on the CMR.

6. Here, with respect to the mailing on July 3, 2008, page 1 of the 8-page CMR establishes that the notice with certified number 7104 1002 9730 0763 9230 and notice number L 030368720 was sent to Clinton Deli, Inc., at 207 Clinton St #8, New York, NY. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each of the eight pages of the CMR. On the final page, corresponding to “Total Pieces and Amounts,” is the printed number 77. Below this number is a handwritten and circled number 77. Below the number is a stamp which directed the post office to write the total number of pieces and initial confirming that all notices were received. Handwritten initials and a dated postmark appear below the stamp. The USPS postmark is from the Colonie Center branch and bears the date of July 3, 2008, confirming that the notice was mailed on that date.

7. Clinton Deli, Inc.’s Clinton Street address on the CMR, Mailing Cover Sheets, notice, request for conciliation conference and petition matches the address listed on the Division’s field audit report.

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. Here, petitioner did not respond to the Division's motion and, therefore, has 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 v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Moreover, petitioner has submitted no evidence to contest the facts alleged by the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons discussed below.

C. Where the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

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 of Determination "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. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that they were dated, i.e., July 3, 2008, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheets and CMR conforms with the address on the request for conciliation conference, petition and the Division's field audit report, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). It is concluded that the notice was properly mailed 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 3, 2008 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner's Request for Conciliation Conference was mailed on October 29, 2008, a date beyond the 90-day period for protesting the notice. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006) and must grant summary determination in favor of the Division of Taxation.

F. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, it may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

G. The Division's motion for summary determination is granted, and the petition of Clinton Deli, Inc. is dismissed.

DATED: Troy, New York
August 13, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE