

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JASWINDER MULTANI</b>	:	DETERMINATION
	:	DTA NO. 822805
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	:	
February 28, 2007.	:	

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Petitioner, Jaswinder Multani, 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 February 28, 2007.

On May 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 May 1, 2009, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by June 1, 2009, which date commenced the 90-day period for issuance of this determination.<sup>1</sup> After due consideration of the affidavits and documents presented by the Division of Taxation, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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<sup>1</sup>Petitioner did not file a response to the motion.

***ISSUE***

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Jaswinder Multani, at his Middletown, New York, address, a Notice of Determination, dated June 23, 2008, which assessed sales and use taxes, for the period March 1, 2005 through February 28, 2007, in the amount of \$48,617.09 plus penalty and interest for a balance due of \$85,104.17. By his Request for Conciliation Conference, dated October 20, 2008, petitioner protested the notice, numbered L-030272727.

2. On December 12, 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 was issued on June 23, 2008, but the request was not mailed until October 24, 2008, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notice dated June 23, 2008, the Division provided the following: (i) an affidavit, dated April 27, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated April 23, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 23, 2008; and (iv) and a transcript of petitioner's electronically filed personal income

tax return for the year 2007, which was the last filing from petitioner prior to the issuance of the 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, the first and last pages of the eight-page CMR list an initial date of June 13, 2008. Following the Division's general practice, this date was manually changed to "6/23/08," 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." The second page of the CMR contains information on the subject notice and establishes that on July 23, 2008 a notice with the control number 7104 1002 9730 0760 2838 was sent to petitioner at his Middletown, New York, address.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. 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 member then weighs, seals and places postage on each envelope. The

first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center 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 of mail 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 affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 77. This number is circled and initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 23, 2008, confirming that the notices were mailed on that date.

6. Petitioner's Middletown, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2007. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

7. The envelope used to mail the request was sent via United States mail and bore a return address in Middletown, New York. However, the stamp on the envelope was not cancelled and does not bear a date placed by the Postal Service.<sup>2</sup> A stamp shows that the request was received by BCMS on November 28, 2008.

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<sup>2</sup> BCMS apparently relied upon a code printed on the side of the envelope to discern the date of mailing. Since there is no evidence in the record as to the meaning of the code, the same finding as to the date of the mailing will not be made here.

### **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 notices on the same date that they were dated, i.e., June 23, 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 listed on his personal income tax return for 2007 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 June 23, 2008 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. When one sends a document utilizing the United States Postal Service, the sender assumes the risk that the envelope containing the document will bear a postmark within the prescribed period or on or before the prescribed date (20 NYCRR 3000.22[2], [3]). Here, the envelope bearing petitioner’s Request for Conciliation Conference did not bear a postmark. Under these circumstances, the document must have been received by BCMS not later than the time when an envelope which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the required period of time (20 NYCRR 3000.22[a][3]; [b][2]). Petitioner has not offered any evidence to meet the burden of showing when such a document would ordinarily be received. Rather, the documents show

that the notice was mailed on June 23, 2008 but the Request was not received until November 28, 2008 which is well beyond the 90-day period. 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, he 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 Jaswinder Multani is dismissed.

DATED: Troy, New York  
August 27, 2009

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE