

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**C.M.E.M. INC.** :  
**D/B/A GOLDEN DOVE DINER** : **ORDER**  
: **DTA No. 823019**  
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, 2004 through :  
November 30, 2006. :

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Petitioner, C.M.E.M., Inc., d/b/a Golden Dove Diner, 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, 2004 through November 30, 2006.

On May 12, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner, by its representative, S. Buxbaum & Co. Sales Tax Consulting, LLC (Stewart Buxbaum, CPA), and the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted responses to the Notice of Intent of Dismiss Petition by June 9, 2009, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). The Division of Taxation submitted affidavits and other documents in support of dismissal while petitioner submitted a letter with its legal argument. After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

***FINDINGS OF FACT***

1. The notice in issue, notice number L-029743412-3, dated February 25, 2008, was issued to petitioner, C.M.E.M. Inc., by the Division of Taxation (Division) which asserted additional sales and use taxes in the sum of \$208,104.59, plus penalty and interest, for the period June 1, 2004 through November 30, 2006.

2. Petitioner filed a petition with the Division of Tax Appeals on April 29, 2009.

3. On May 12, 2009, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety days from the date a statutory notice is issued.

It appears the Notice of Determination was issued on February 25, 2008, and it appears the petition was not filed until April 29, 2009 or more than four hundred days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the following: affidavits of Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel; James Steven VanDerZee, the Principal Mail and Supply Supervisor in the Division's Registry Unit; Patricia Finn Sears, Tax Processing Specialist 2 and Supervisor of

the CARTS (Case and Resource Tracking System) Control Unit; and Heidi Corina, Legal Assistant 2. In addition, the Division submitted various pertinent documents including copies of the petition filed with the Division of Tax Appeals on April 29, 2009; a copy of the Notice of Determination, dated February 25, 2008; copies of the certified mail record (CMR) containing a list of the statutory notices mailed by the Division on February 25, 2008; and the part-quarterly sales and use tax return filed by petitioner for the period January 1, 2008 through January 31, 2008 on February 18, 2008.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Stewart Buxbaum, CPA, submitted a letter, dated May 29, 2009, which stated that neither petitioner nor its representative (the "power of attorney on file") Mr. Rick Scheck ever received the Notice of Determination and that, due to these failures, the notice was not properly served on petitioner and a hearing on the merits should be granted. Petitioner also submitted a document that it alleged was garnered from a Freedom of Information Law request which indicated that the Division's records reflected that there was a power of attorney on file for Mr. Rick Scheck, of Manalapan, New Jersey.

6. The affidavit of Patricia Finn Sears, sworn to June 4, 2009, 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, pages 36 and 245 of the 1,214-page CMR contain information on the notice in issue and list an initial date of February 14, 2008. Following general practices, this date was manually changed to the actual mailing date of "2/25/08," or February 25, 2008, and appears on page 1 of the CMR. 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 245 of the CMR establishes that a notice with the control number 7104 1002 9730 0601 4052 and reference number L-029743412 was sent to petitioner, C.M.E.M. Inc., in Staten Island, New York. Page 36 of the CMR establishes that a notice with the control number 7104 1002 9730 0599 1095 and reference number L 029743412 was sent to petitioner's representative, Frederick P. Scheck, in Manalapan, New Jersey.<sup>1</sup> A United States postmark on each of the 1,214<sup>2</sup> pages of the CMR, including those containing the names of petitioner and its representative, pages 36 and 245, confirms that the Notice of Determination in issue was sent to petitioner and its representative on February 25, 2008.

Ms. Sears specifically states that the procedures described and followed were the normal and regular procedures in effect as of February 25, 2008.

7. The affidavit of James Steven VanDerZee, sworn to June 5, 2009, describes the Mail Processing 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. A

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<sup>1</sup>The Sears affidavit referenced Mr. Scheck four times. However, in the last paragraph, Ms. Sears referenced a "Francis G. Marchese," who was never mentioned previously in the affidavit and was not listed on the CMR. This reference was an obvious clerical error given the overwhelming proof with regard to service on Mr. Scheck, including the listing for him on the CMR, the references to him in Mr. VanDerZee's affidavit and the references to him in the Corina affidavit. Given the absence of any evidence to show that petitioner's representative at the time the Notice of Determination was mailed did not actually receive the subject order it is concluded that the error in the Sears affidavit was inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

<sup>2</sup>Due to volume, only the pertinent pages were submitted, to wit: pages 1, 36, 245 and 1,214. However, Ms. Sears swore to the fact that each page of the CMR had a postmark affixed and that a postal employee initialed or signed page 1,214 and wrote the number of pieces of mail received, 13,346, thus acknowledging that all the notices and 1,214 pages had been received.

mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on 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 or initials 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 pages 1, 36, 245 and 1,214 of the CMR submitted by the Division confirmed that a USPS employee marked said pages of the CMR with the USPS postmark and placed his initials on the last page, page 1,214, and wrote the number 13,346, indicating the number of pieces of certified mail received. Page 245 contained the mailing to petitioner, C.M. E.M., Inc., in Staten Island, New York, with an assigned certified number of 7104 1002 9730 0601 4052 and the notice number L 029743412. Page 36 contained the mailing to petitioner's representative, Frederick P. Scheck, in Manalapan, New Jersey, with an assigned certified number of 7104 1002 9730 0599 1095 and the notice number L 029743412. On the final page, page 1,214, corresponding to "Total Pieces and Amounts," is the number 13,346, and a short distance below this number are the handwritten initials of the USPS employee and the handwritten number "13,346," confirming that all notices were received by the USPS. The USPS postmark is from the "Albany NY General Mail Facility" and bears the date February 25, 2008, confirming that the notices were mailed on that date.

8. Pursuant to requests filed by Heidi Corina, Legal Assistant 2 in the Office of Counsel of the Department of Taxation and Finance, the USPS provided a confirmation of delivery of the

certified mail item number 7104 1002 9730 0601 4052 to C.M.E.M., Inc., in Staten Island, New York, on February 27, 2008. In addition, also in response to a request by Ms. Corina, the USPS provided a confirmation of delivery of the certified mail item number 7104 1002 9730 0599 1095 to Frederick P. Scheck in Manalapan, New Jersey.

9. The part-quarterly sales and use tax return filed by petitioner for the period January 1, 2008 through January 31, 2008 on February 18, 2008 listed its address in Staten Island, New York. This was the last return filed before the Notice of Determination was issued.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional sales and use taxes due. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination within 90 days of the mailing of the notice of determination (*see* Tax Law § 1138[a][1]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment (*id.*). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a

party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]).

Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss.

Accordingly, the instant matter shall be treated as a motion for summary determination.

C. As provided in section 3000.9(b)(1) of the Rules, a motion for summary determination “shall 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.”

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879 [1960]). “To

defeat a motion for summary judgment the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer’s petition is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioning Sales & Serv.*). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. VanDerZee and Ms. Sears, Division employees involved in and possessing knowledge of the process.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice of determination was mailed as addressed to petitioner on February 25, 2008. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated February 25, 2008. Additionally, a

postal employee wrote “13,346” next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

Finally, the USPS confirmations of delivery of the items with the identifying numbers 7104 1002 9730 0601 4052 and 7104 1002 9730 0599 1095 demonstrated that they were delivered to petitioner’s address in Staten Island, New York, and petitioner’s representative’s address in Manalapan, New Jersey, respectively, further establishing that the notice was properly mailed to petitioner and its representative.

G. Petitioner did not dispute that the notice was mailed as addressed on February 25, 2008. Rather, petitioner contended that the notice was never received by it or its representative. Tax Law § 1138(a)(1) requires that a 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.” On the same point, Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

H. Here, the record shows that petitioner’s address as listed on its part-quarterly sales and use tax return for the period January 1, 2008 through January 31, 2008 and filed on February 18, 2008 was in Staten Island, New York. This was the last return filed before the Notice of Determination was issued on February 25, 2008 and constitutes its last known address.

Accordingly, the Division has shown that it mailed the subject Notice of Determination to petitioner at its “last known address” consistent with Tax Law § 1138(a)(1) and at “such address as may be obtainable” under Tax Law § 1147(a)(1).

I. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29 [1977]). Here the evidence demonstrated that the Notice of Determination was mailed by certified mail to Mr. Scheck, petitioner’s duly appointed representative, on February 25, 2008 and was received at his address, as confirmed by the United States Postal Service, thus fulfilling the case law requirement for doing so.

J. In light of the conclusions reached above, the Division of Taxation has established that it properly mailed the Notice of Determination to petitioner on February 25, 2008 and the petition, filed on April 29, 2009, was not timely. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this matter. (*Matter of Sak Smoke Shop*)

K. The petition of C.M.E.M. Inc. is hereby dismissed.

DATED:Troy, New York  
August 20, 2009

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE