

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LOEHMANN'S HOLDINGS, INC.</b>	:	<b>DETERMINATION</b>
for Redetermination of a Deficiency or for Refund	:	<b>DTA NO. 823145</b>
of Corporation Franchise Tax under Article 9-A	:	
of the Tax Law for the Period February 3, 2002	:	
through October 12, 2004.	:	

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Petitioner, Loehmann's Holdings, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period February 3, 2002 through October 12, 2004.

On January 20, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (Robert J. Tompkins, 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 Robert Tompkins, Esq., dated January 15, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by its Assistant Controller, Michael A. Phelan, did not submit documents or argument in opposition to the motion within 30 days after its filing, i.e., by February 19, 2010, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavit and documents submitted, and all pleadings filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

**ISSUE**

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

**FINDINGS OF FACT**

1. The Division of Taxation (Division) issued to petitioner, Loehmann's Holdings, Inc., at its Bronx, New York, address, a Notice of Deficiency, numbered L-031170855-3 and dated December 8, 2008, which asserted additional corporation franchise tax due in the amount of \$128,105.76 for the period February 3, 2002 through October 12, 2004, plus penalty and interest. By its request for a conciliation conference, dated March 30, 2009, petitioner protested the notice.

2. On April 17, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a Conciliation Order Dismissing Request (CMS No. 231143). 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 December 8, 2008, but the request was not mailed until March 31, 2009, or in excess of 90 days, the request is late filed.

3. Petitioner timely challenged this order by filing a petition with the Division of Tax Appeals, by certified mail, on July 8, 2009.

4. To show proof of proper mailing of the notice of determination dated December 8, 2008, the Division provided the following: (i) an affidavit, dated December 1, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated November 24, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) an affidavit,

dated December 1, 2009, of Heidi Corina, a legal assistant in the Division's Office of Counsel; (iv) the "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR); and (v) a copy of petitioner's Report of a Corporation Included in a Combined Franchise Tax Return (Form CT-3-A/C) for the period ended February 3, 2007.

5. 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. In its upper left corner, the CMR bears the date and time the CMR was produced, in this case November 26, 2008 at 5:00 P.M. The notices are predated with the anticipated date of mailing, in this case December 8, 2008.

6. 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."

7. All notices targeted for manual review are printed in one printing run, and each unit that has notices selected for manual review receives a separate and complete CMR for their notices. In this instance, the notice selected for manual review by Audit Division-Metropolitan-Income/Franchise unit was the notice pertaining to petitioner. This one-page CMR was printed on page 5 of the run, as indicated by the listing "page 5" in the upper right corner of the CMR. The CMR indicates manual mail so that the certified mail item could be pulled for manual

review by the issuing unit prior to mailing. Page five of the CMR reflects that a notice with the control number 7104 1002 9730 1088 1763 and reference number L-031170855 was to be sent to petitioner at its Bronx, New York, address.

8 According to Ms. Sears's affidavit, following the Division's general practice the printed date on which the CMR was produced (here November 26, 2008) is manually changed, by personnel in the Division's Mail Processing Center, by handwriting in the upper right corner of the CMR the actual mailing date of the notices (here allegedly December 8, 2008). Further, Ms. Sears states that the statutory notice is placed in an envelope by Division personnel and is delivered into the possession of a U.S. Postal Service (USPS) representative, where the USPS representative affixes his or her initials or signature and a USPS postmark to the CMR to confirm the number of items being mailed, here one item as set forth on the lower center portion of the CMR, as well as the actual mailing of such items.

9. Review of the mailing cover sheet noted above and of the Notice of Deficiency in this case reveals the same certified control number (7104 1002 9730 1088 1763), reference/assessment number (L-031170855), name and Bronx, New York, address for petitioner as set forth on the CMR. However, contrary to the statements in Ms. Sears's affidavit, review of the one-page CMR in this case reveals no handwritten date in the upper right corner of the CMR to show the actual date of mailing, nor is there any affixation of initials, signature or USPS postmark (or any other postmark) anywhere on the CMR to confirm the number of items being mailed or the actual mailing of such items (*see* Finding of Fact 8).

10. 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 pieces of mail listed on the CMR are checked against the information listed on the CMR, and the clerk then performs a review 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 USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or 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.

11. Notwithstanding the foregoing noted absence of affixation of any information by a USPS representative (*see* Finding of Fact 9), Mr. VanDerZee states that his review of the CMR and copies of the notice at issue and its related mailing cover sheet submitted by the Division herein, in conjunction with his review of Ms. Sears's affidavit, confirms that the foregoing standard procedures were followed in this instance and that the notice in question was mailed in accordance with such procedures on December 8, 2008.

12. Petitioner's Bronx, New York, address set forth on the CMR and Mailing Cover Sheet matches the address listed on its Form CT-3-A/C for the period ended February 3, 2007, received by the Division on January 17, 2008 as part of the last return filed by petitioner prior to the date on the Notice of Deficiency. The same Bronx, New York, address is also listed on the

Notice of Deficiency, on petitioner's request for conciliation conference, on the petition, and on petitioner's Form CT-3-A/C filed for each of the surrounding tax periods (i.e., the [immediately preceding] period ended January 28, 2006 and the [immediately subsequent] period ended February 2, 2008).

13. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her September 21, 2009 filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for an item mailed by the Division under certified number 7104 1002 9730 1088 1763 on December 8, 2008 from the Colonie Center branch office of the USPS to petitioner at its Bronx, New York, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 1088 1763 to petitioner's Bronx, New York, address on December 10, 2008 at 2:43 P.M.

14. Petitioner refers, in its petition, to correspondence it sent to the Division in November 2008, i.e., prior to the date of the Notice of Deficiency, concerning each of the substantive issues raised on audit. Petitioner states that its request for a conciliation conference was filed late because petitioner was awaiting a response to its November 2008 correspondence. Petitioner did not respond to the Division's motion for dismissal or for summary determination.

#### ***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. There is a 90-day statutory time limit within which a taxpayer may challenge a statutory notice by filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; § 1085[a][1]). Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138[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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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*).

C. While the Sears and VanDerZee affidavits in this case establish that the Division has a standard procedure by which statutory notices are issued, the balance of the evidence fails to establish that the Division adhered to that procedure in this instance. Specifically, despite affirmative statements in such affidavits that the date of mailing was handwritten by Division personnel in the upper right corner of the CMR, and that a USPS employee in turn affixed a USPS postmark, and wrote his or her signature or initials and circled or wrote the number of

items being accepted into the custody of the USPS for mailing on the face of the CMR, there are in fact no such handwritten markings or postal service stamps or signatures on the CMR (*see* Findings of Fact 9 and 11). Accordingly, this portion of the Division's submission fails to establish that the notice was issued by certified mail, as claimed, on December 8, 2008.

D. Notwithstanding the foregoing failures of proof, the Division has nonetheless established, via the Corina affidavit and accompanying USPS form 3811-A, that the notice was mailed by certified mail (Cert. No. 7104 1002 9730 1088 1763) and was in fact delivered to petitioner at its last known address on December 10, 2008 (*see* Finding of Fact 13). As a result, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., December 10, 2008, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). In turn, 90 days after the December 10, 2008 date of actual receipt of the notice was March 10, 2009, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. However, petitioners' protest was not filed until March 31, 2009, a date which falls beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest, including reconsideration based upon the stated reason for the admitted late filing of the petition (*Matter of Sak Smoke Shop*).

E. The Division's motion for summary determination is granted, and the petition of Loehmann's Holdings, Inc. is hereby dismissed.

DATED: Troy, New York  
April 8, 2010

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE