

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**VAHAN A. KARIAN** : ORDER  
for Revision of a Determination or for Refund of : DTA NO. 823156  
Sales and Use Taxes Under Articles 28 and 29 of the :  
Tax Law for the Period June 1, 2005 through :  
November 30, 2007. :  
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Petitioner, Vahan A. Karian, 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, 2005 through November 30, 2007.

On July 28, 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, Semanoff Ormsby Greenberg and Torchia, LLC (Howard N. Greenberg, Esq.), filed a response to the Notice of Intent of Dismiss Petition on August 4, 2009. The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having requested a 30-day extension, submitted its response by the due date of September 28, 2009, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Catherine M. Bennett, 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-030368722-3, dated July 3, 2008, was issued to petitioner, Vahan A. Karian, by the Division of Taxation (Division) and asserted additional sales and use taxes in the sum of \$60,575.41, plus penalty and interest, for the period June 1, 2005 through November 30, 2007.

2. Petitioner filed a petition with the Division of Tax Appeals postmarked July 7, 2009, which was received on July 13, 2009.

3. On July 28, 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 § 1138(a)(1) of the Tax Law, a petition must be filed within ninety days from the date a Notice of Determination is issued.

It appears the Notice of Determination was issued on July 3, 2008, and it appears the petition was not filed until July 7, 2009 or more than three hundred sixty nine 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; and Patricia Finn Sears, Tax Processing Specialist 2 and Supervisor of the CARTS (Case and Resource Tracking System) Control Unit. In addition, the Division submitted various pertinent documents including copies of the petition filed with the Division of Tax Appeals on July 7, 2009; a copy of the Notice of Determination, dated July 3, 2008; copies of the certified mail record (CMR) containing a list of the statutory notices mailed by the Division on July 3, 2008 and the Nonresident and Part-Year Resident Income Tax Return, Form IT-203, filed by petitioner for tax year 2006, as well as the CARTS information pertaining to such filing date.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Howard N. Greenberg, Esq., submitted a letter, dated August 4, 2009, which stated that petitioner was the director and officer of Pure Weight Loss, Inc., a company which filed for bankruptcy on January 11, 2008, and that the lack of timeliness of the petition was caused by the bankruptcy trustee's omission in failing to address the deadlines imposed by the notice or provide petitioner with the records and information necessary to respond to the Division's claims.

6. 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 seven of the eight-page CMR contains the information on the notice in issue. Following general practices, this original date was manually changed to the actual mailing date of July 3, 2008, and appears on page one of the CMR. The taxpayer's address, certified control number, and reference number assigned to the 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 seven of the CMR establishes that a notice with the control number 7104 1002 9730 0763 9896 and reference number L-030368722 was sent to petitioner, Vahan A. Karian, in Lower Gwynedd, Pennsylvania. A United States postmark on seven of the eight pages of the CMR, including the one containing the name of petitioner, on page seven, confirms that the Notice of Determination in issue was sent to petitioner on July 3, 2008. Additionally, Ms. Sears specifically states that the procedures described and followed were the normal and regular procedures in effect as of July 3, 2008.

7. The affidavit of James Steven VanDerZee 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 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 seven and eight of the CMR confirmed that a USPS employee marked said pages of the CMR with the USPS postmark and his initials, and on page eight, wrote the number "77" and circled it, indicating the number of pieces of certified mail received. Page seven contained the mailing to petitioner, with an assigned certified number of 7104 1002 9730 0763 9896 and the notice number L 030368722. The USPS postmark is from the "Colonie Center USPS" and bears the date July 3, 2008, confirming that the notices were mailed on that date.

8. The Nonresident and Part-Year Resident Income Tax Return, Form IT-203, filed by petitioner for tax year 2006 bears a date near the signature line of January 23, 2008 and lists the same Lower Gwynedd, Pennsylvania address. The Division's CARTS records confirm that the return was actually filed with the Division on February 6, 2008. This was last return filed with the Division before the Notice of Determination dated July 3, 2008 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.” 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.

D. 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 Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. 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 Conditioner 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 July 3, 2008. Specifically, this document lists a certified control number the with corresponding name and address, and bears a U.S. Postal Service postmark dated July 3, 2008. Additionally, a postal employee wrote "77" 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).

F. Petitioner did not dispute that the notice was mailed as addressed on July 3, 2008. Rather, petitioner explained that he was the director and officer of Pure Weight Loss, Inc., a company which filed for bankruptcy on January 11, 2008, and contended that the lack of timeliness of the petition was caused by the bankruptcy trustee's omission in failing to address the deadlines imposed by the notice, or provide petitioner with the appropriate records to do so. 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.*). If petitioner believed that another person should have been responsible for addressing such notice, it was incumbent upon petitioner to be sure that person was properly notified by providing the Division with a different mailing address.

G. Here, the record shows that petitioner's address as listed on his Nonresident and Part-Year Resident Income Tax Return, Form IT-203, filed by petitioner for tax year 2006, bears a date near the signature line of January 23, 2008 and lists the same Lower Gwynedd, Pennsylvania, address. This was the last return filed before the Notice of Determination was issued on July 3, 2008 and constitutes his last known address.

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

H. In light of the conclusion reached above, the Division of Taxation has established that it properly mailed the Notice of Determination to petitioner on July 3, 2008 and the petition, filed on July 7, 2009, was not timely. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this matter (*Matter of Sak Smoke Shop*).

I. The petition of Vahan A. Karian is hereby dismissed.

DATED: Troy, New York  
December 23, 2009

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE