

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>STEVEN GANIN</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 823542</b>
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, 2006	:	
through November 30, 2008.	:	

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Petitioner, Steven Ganin, 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, 2006 through November 30, 2008.

On August 4, 2010, 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, Esq., dated August 3, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by Allan D. Povol, CPA, submitted an affidavit in opposition to the Division's Motion to Dismiss with annexed exhibits. After due consideration of the affidavit and documents submitted, and all pleadings filed in this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner timely protested the Notice of Determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Steven Ganin, at his Jericho, New York, address a Notice of Determination, dated June 8, 2009, which assessed sales and use taxes for the period March 1, 2006 through November 8, 2009 (Notice, L-032028651-7). The notice assessed tax in the amount of \$782,680.70, plus penalty and interest, for a balance due of \$1,332,346.48.

2. On November 25, 2009, petitioner mailed a request for conciliation conference. It was received by the Bureau of Conciliation and Mediation Services (BCMS) on November 27, 2009. BCMS issued to petitioner, on December 18, 2009, a Conciliation Order Dismissing Request that stated that as the request was filed in excess of 90 days from the date of the issuance of the statutory notice, the request was late filed and was therefore denied.

3. To show proof of proper mailing of the notice, dated June 8, 2009, the Division provided the following: (i) an affidavit, dated August 2, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated July 26, 2010, 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 8, 2009; and (iv) a copy of petitioner's New York State Resident Income Tax Return for the year 2005, dated October 30, 2006.

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, each page of the 16-page CMR lists an initial date, which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page to "6-8-09," 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 numbers, the assessment numbers and the names and addresses of the recipients are listed on the CMR. The ninth page of the CMR contains information on the subject notice and establishes that on June 8, 2009 a notice with control number 7104 1002 9730 1349 5424 and assessment number L 032028651 was sent to petitioner at his Jericho, 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 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. 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 174. The number 174 is handwritten and circled and the page is initialed, confirming that 174 notices were received. The USPS postmark is from the Colonie Center branch and bears the date June 8, 2009, confirming that the notices were mailed on that date.

6. Petitioner’s Jericho, New York, address on the CMR and Mailing Cover Sheet matches the address listed on petitioner’s New York State income tax return for 2005. This is also the address on the request for conference and petition.

### ***SUMMARY OF PETITIONER’S POSITION***

7. In response to the motion to dismiss, petitioner’s representative submitted an affidavit stating that the Notice of Determination at issue herein overlaps and duplicates a prior notice of determination currently pending in BCMS. The representative requests that the Notice of Determination in this matter be remanded to BCMS to be consolidated and processed with the other notice of determination, or, in the alternative, suspended pending the outcome of the BCMS process regarding the earlier notice of 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. 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."

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., June 8, 2009, 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 Sheet and CMR conforms with the address listed on the return filed by petitioner prior to the issuance of the notice, as well as the address listed on the request for conference and petition. 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 the BCMS or a petition with the Division of Tax Appeals commenced on June 8, 2009 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. The documents show that the notice was mailed on June 8, 2009, but the petition was not mailed until November 25, 2009, which is well beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

E. It is recognized that the affidavit alleges that there exists another notice of determination in BCMS that may contain overlapping periods and the process therein may have an impact on the tax due in this matter. Unfortunately, these assertions by petitioner have no bearing upon the timeliness of this petition and will not be addressed.

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 Steven Ganin is dismissed.

DATED: Troy, New York  
November 24, 2010

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE