

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ZW DELI &amp; GROCERY CORP.</b>	:	DETERMINATION DTA NO. 823643
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for		
the Periods March 1, 2003 through November 30, 2005,	:	
and February 1, 2006.		

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Petitioner, ZW Deli & Grocery Corp., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 2003 through November 30, 2005, and February 1, 2006.

On November 5, 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, dated November 5, 2010, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on December 6, 2010,<sup>1</sup> the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of

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<sup>1</sup> December 5, 2010 is the 30<sup>th</sup> day from November 5, 2010. However, as December 5, 2010 fell on a Sunday, petitioner's response to the Division of Taxation's motion was required to be filed by Monday, December 6, 2010 (*see* General Construction Law §§ 20, 25-a).

the affidavits and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, ZW Deli & Grocery Corp., a Notice of Determination (Audit Case ID) number X-960664610-5, dated April 27, 2009, asserting sales and use taxes due in the amount of \$227,512.40, less assessment payments/credits of \$1,454.33, for the period March 1, 2003 through November 30, 2005. The notice asserted that petitioner, as a bulk sale purchaser, was liable for taxes determined to be due from the seller, Abdo A. Nagi, in accordance with Tax Law § 1141(c) and § 1138(a)(3). Petitioner's Assessment ID number, L-031851010-6, was listed in the Computation Summary Section of this notice. The mailing cover sheet of this Notice of Determination contains the certified control number 7104 1002 9730 1317 5401.

2. The Division issued to petitioner, a Notice of Determination number L-032063457-1, dated June 12, 2009, asserting sales and use taxes due in the amount of \$1,166.49, plus penalty and interest, for the period ended February 1, 2006. The notice asserted that petitioner owed tax on the transfer of tangible personal property in accordance with Tax Law § 1133, § 1138 and § 1141(c). The mailing cover sheet of this second Notice of Determination contains the certified control number 7104 1002 9730 1350 3761.

3. The notices of determination described above were addressed to petitioner, ZW Deli & Grocery Corp., at 2240 2<sup>nd</sup> Avenue, New York, New York. This same address is listed on the

Division's mailing records, as described hereinafter, as the address to which the notices were mailed.

4. Petitioner protested the two notices of determination by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a Request for Conciliation Conference. The request was signed and dated by Aubrey F. Abrahams, as petitioner's representative, on March 26, 2010. Mr. Abrahams faxed the request, as well as some attached documents, to the Division's Transaction Desk Audit Bureau on March 26, 2010. BCMS received the request on March 29, 2010. The request lists petitioner's address as the New York, New York, address, and Mr. Abrahams's address as Bronx, New York.

5. On April 16, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices 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(s) was issued on April 27, 2009 and June 12, 2009, but the request was not received until March 26, 2010, or in excess of 90 days, the request is late filed.

6. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The petition lists petitioner's address in New York, New York. The Division subsequently brought this motion, dated November 5, 2010, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notices was filed more than 90 days from their date of the issuance.

7. In support of its motion for summary determination, the Division submitted: copies of the petition and the envelope in which it was sent by certified mail; copies of the Request for

Conciliation Conference dated March 26, 2010 and the fax cover sheet by which Mr. Abrahams faxed the request on March 26, 2010; a copy of the Conciliation Order Dismissing Request; copies of petitioner's New York State and Local quarterly sales and use tax returns for a single jurisdiction (ST-102) for the quarters ended February 28, 2009 and May 31, 2009 filed on or about March 11, 2009 and June 4, 2009, respectively, which were the last sales tax returns filed by petitioner prior to the issuance of the notices of determination; a copy of the "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked April 27, 2009; a copy of the "Certified Record for Presort Mail - Assessments Receivable" (CMR) for statutory notices allegedly issued on June 12, 2009; copies of the notices of determination and the accompanying mailing cover sheets; a copy of the Division's Request for Delivery Information/Return Receipt After Mailing Form (USPS Form 3811-A); a copy of the Response to Request for Delivery Information from the U.S. Postal Service (USPS); the affidavit of John E. Matthews, Esq., the Division's representative; the affidavit of Patricia Finn Sears with attached exhibits; the affidavit of Bruce Peltier; a second affidavit of Patricia Finn Sears with attached exhibits; a second affidavit of Bruce Peltier and the affidavit of Heidi Corina with attached exhibits.

8. As noted, the Division submitted five affidavits pertaining to the mailing of the notices. The first affidavit was that of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit, attached to which was a copy of the certified mail record dated April 27, 2009 and the Notice of Determination dated April 27, 2009. Ms. Sears's duties include supervising the processing of notices of determination prior to their mailing. Ms. Sears's affidavit describes the general or regular process involved in the computer generation of notices and the subsequent mailing of such notices. More specifically, Ms. Sears's

affidavit describes the computer preparation of notices of determination to include the simultaneous preparation of a mailing cover sheet with mailing and return addresses and a bar code for each notice, as well as the preparation of a certified mailing record (CMR). The CMR is a computer-generated document, entitled "CERTIFIED RECORD FOR NON-PRESORT MANUAL MAIL - ASSESSMENTS RECEIVABLE" consisting, in this case, of one page. The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

9. Each computer-generated notice of determination is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." Ms. Sears's affidavit describes the CMR as carrying an initial date (the date of its printing) in its upper left corner that is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the certified mailing record is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. All notices selected 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. The notice at issue was selected for manual review by the Audit Division - Sales Tax - Desk Audit - AG2 so that the certified mail could be pulled for manual review prior to mailing. However, a manual review did not occur.

10. Attached as an exhibit to Ms. Sears's affidavit is the one-page CMR that was printed on page 3 of the run, as indicated by the listing "page: 3" in the upper right corner of the CMR. The CMR lists one certified control number, which was assigned to the item of mail listed on the

CMR. Specifically, corresponding to the listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR is manually dated April 27, 2009.

11. On page three of the CMR, corresponding to certified control number 7104 1002 9730 1317 5401, is reference number X 960664610, followed by petitioner's name and address, which is identical to that listed on the subject notice of determination, on petitioner's New York State and Local Quarterly Sales and Use Tax Return for a Single Jurisdiction (ST-102) for the period December 1, 2008 through February 28, 2009 (i.e., the last return filed prior to the issuance of the subject notice of determination), as well as on the request and on the petition.

12. The Division submitted the affidavit of Bruce Peltier, who is employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. Mr. Peltier's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS. The Peltier affidavit states that after a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member retrieves the notices and operates a machine that puts each statutory notice and associated documents into a windowed envelope. The staff member then weighs and seals each envelope and affixes "postage" and "fee" amounts thereon. A mail processing clerk then checks the pieces of certified mail listed on the CMR against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his or her signature or initials to the CMR. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces of mail

received or indicate the total number of pieces received by writing the number on the CMR. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

13. The page of the CMR contains the preprinted entry of “1” corresponding to the heading “TOTAL PIECES AND AMOUNTS.” Appearing beneath this preprinted entry and corresponding to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten number “1,” which was circled. The CMR also bears the postmark of the Colonie Center Branch of the USPS, dated April 27, 2009, and the initials of the Postal Service employee accepting receipt of the item. The affixation of the Postal Service postmark, the initials of the Postal Service employee, and the handwriting and circling of “1” indicate that the piece listed on the CMR was received at the post office on April 27, 2009.

14. The Division offered a second set of affidavits from Patricia Finn Sears and Bruce Peltier with respect to the mailing of the Notice of Determination dated June 12, 2009. Each of the additional affidavits sets forth the same introductory paragraphs regarding the respective affiant’s title and job duties and the standard mailing procedures of the Division. With respect to the Notice dated June 12, 2009, Ms. Sears averred that the CMR entitled “Certified Record for Presort Mail - Assessments Receivable” consisted of 22 cut sheets pages, which pages were banded when the documents were delivered into the possession of the USPS. The pages remain banded when the postmarked documents are returned to Ms. Sears’s office after mailing and stay banded unless she orders otherwise. Each page of the 22-page CMR lists an initial date that 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 page to “6-12-09.” This CMR lists

certified control numbers for each statutory notice in the order that the notice was generated in the batch. Page three of the CMR reflects that a notice with the certified control number 7104 1002 9730 1350 3761 and reference number L-032063457 was to be sent to petitioner at its New York, New York, address. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

15. The second affidavit of Bruce Peltier attests to the regular procedures followed by the Mail Processing Center staff in processing outgoing presort certified mail and delivering it to branches of the USPS. The Mail Processing Center receives the notice 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 and associated documents into a window envelope. A staff member then weighs, seals and places postage on each envelope. The first and last pieces 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 information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the USPS 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 Mail Processing 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 22-page CMR, pertaining to the second Notice of Determination, indicates that the USPS employee initialed or signed each page of the CMR. The CMR also bears the postmark of the Colonie Center Branch of the USPS, dated June 12, 2009, on page 1 of the CMR. However, the postmarks on the remaining 21 pages of the CMR are faint

and unreadable. On the final page of the 22-page CMR, corresponding to “TOTAL PIECES AND AMOUNTS,” is the preprinted number “233,” which was not circled. Below the total pieces entry there is a heading “TOTAL PIECES RECEIVED AT POST OFFICE,” which is blank.

16. According to the second Peltier affidavit, the affixation of the postmarks and the Postal Service employee’s initials indicate that all 233 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on June 12, 2009.

17. The Division also offered the affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, with attached exhibits, in support of its mailing of a Notice of Determination to petitioner on June 12, 2009. As part of her duties, Ms. Corina prepared USPS Form 3811-A. Form 3811-A was used by the mailer to request return receipts after mailing. A Form 3811-A was sent to the post office for mail delivered on or after July 24, 2000. The Postal Service provided whatever information it had concerning delivery when delivery could be confirmed.

18. Attached to Ms. Corina’s affidavit was a copy of the Form 3811-A that was requested for petitioner. This form requested information regarding a piece of mail bearing certified control number 7104 1002 9730 1350 3761 and addressed to ZW Deli & Grocery Corp., at its New York, New York, address. Also attached to Ms. Corina’s affidavit was the Postal Service’s response to the Form 3811-A request, a letter on USPS letterhead dated August 6, 2010. The letter stated in part: “The delivery record shows that this item was delivered on 06/15/2009 at 12:40 PM in NEW YORK, NY 10029.” The letter also contained a scanned image of the recipient’s signature as what appears to be the barely legible signature of “Wadhah” above an illegible handwritten name. The address of the recipient/petitioner, 2240 2<sup>nd</sup> Avenue, was shown

below. This address was the same as that shown on petitioner's last tax return filed by it before the issuance of the Notice of Determination, i.e., a New York State and Local Quarterly Sales and Use Tax Return for a Single Jurisdiction for the quarter March 1, 2009 through May 31, 2009. The return listed petitioner's address as 2240 2<sup>nd</sup> Avenue, New York, New York.

19. Petitioner, in its petition, claims that the notices were not timely protested because the corporation's president lacks both an understanding of the English language (speaking and reading) and the knowledge of the importance of responding to correspondence from the government or its agencies.

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

A. A motion for summary determination may 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 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. Petitioner did not respond to the Division's motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears, Peltier and Corina affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whalen v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1992]).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a

petition with the Division of Tax Appeals seeking a revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the Notice of Determination (*see* Tax Law § 1138[a][1]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Where, as here, the Division claims that a taxpayer's protest against notices was not timely filed, the initial inquiry must focus on the issuance of the notices. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. With respect to the first Notice of Determination, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier,

Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that this Notice of Determination was mailed as addressed to petitioner on April 27, 2009. This one-page document bears a U.S. Postal Service postmark dated April 27, 2009. A postal service employee handwrote and circled the number “1” near the “Total Pieces Received at Post Office” heading and initialed the page near the circled number, thereby indicating that the one piece listed on the CMR was received at the post office. The notice addressed to petitioner was the piece so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. Tax Law § 1138(a)(1) provides 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. . . .” Tax Law § 1147(a)(1) further 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.”

H. Here, petitioner’s quarterly sales and use tax return for the period December 1, 2008 through February 28, 2009, filed on or about March 11, 2009, listed petitioner’s address in New York, New York. Petitioner did not file any return after this date and before the issuance of the first Notice of Determination. Accordingly, the Division has shown that the first Notice of Determination was properly mailed to petitioner at its last known address on April 27, 2009.

I. Petitioner's Request for Conciliation Conference was filed on March 26, 2010. This date falls well beyond the 90-day period of limitations for the filing of such request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a result, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the first Notice of Determination (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

J. As noted above, to prove the fact and date of mailing of the second Notice of Determination, the Division submitted second affidavits of Ms. Sears and Mr. Peltier and a copy of a 22-page CMR. While the Sears and Peltier second affidavits set forth the Division's standard mailing procedures, I find that this 22-page CMR contains a number of flaws. First, the postmark is only legible on page 1 of the CMR. Second, the CMR does not bear any entry made by the USPS to indicate the actual number of pieces received at the post office. Accordingly, this CMR does not give rise to a presumption of regularity inasmuch as the document is not complete. The CMR therefore fails to establish that the item addressed to petitioner was actually mailed to it on June 12, 2009 (*see Matter of Rakusin; Matter of Cal-Al Burrito*, Tax Appeals Tribunal, July 30, 1998).

K. Notwithstanding the foregoing failures of proof, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS form 3811-A, that the second Notice of Determination (number L-03206345) was mailed by certified mail (certified control number 7104 1002 9730 1350 3761) and was in fact delivered to petitioner at its last known address on June 15, 2009. As a result, the period in which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., June 15, 2009, 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 New York*, 68 NY2d 891, 508 NYS2d 934 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). In turn, 90 days after the June 15, 2009 date of actual receipt of the notice was September 13, 2009. As this date fell on a Sunday, the request for conciliation conference was due on Monday, September 14, 2009 (*see* General Construction Law §§ 20, 25-a). However, petitioner's protest of the second Notice of Determination was not filed until March 26, 2010, a date that falls beyond the statutory period within which a timely protest had to have been filed. Unfortunately, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the second Notice of Determination (*see Matter of Rotondi Industries*).

L. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessments and file claims for refund (Tax Law § 1139[c]). If the claims for refund are disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowances (Tax Law § 170[3-a][a]; § 1139).

M. The Division of Taxation's motion for summary determination is granted, and the petition of ZW Deli & Grocery Corp. is dismissed.

DATED: Troy, New York  
March 3, 2011

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE