

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**LIAQUAT ALI, INC.** : DECISION  
DTA NO. 825237  
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, 2007 through :  
November 30, 2009. :

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Petitioner, Liaquat Ali, Inc., filed an exception to the determination of the Administrative Law Judge issued on October 24, 2013. Petitioner appeared by Sangeeta Sarraf, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich, of counsel).

Neither party filed a brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on July 29, 2014, the due date for the Division of Taxation's brief in opposition.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a conciliation order.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The Division of Taxation (Division) issued to petitioner, Liaquat Ali, Inc., at its Rochester, New York address, a notice of determination, numbered L-036256745 and dated June 10, 2011, assessing additional sales and use taxes due in the amount of \$22,775.37, plus penalty and interest, for the period June 1, 2007 through November 30, 2009. By its request for a conciliation conference, dated June 28, 2011, petitioner protested the notice.

2. The Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a conciliation order (CMS No. 246671), dated June 15, 2012, denying petitioner's request and sustaining the notice of determination. Petitioner challenged this order by filing a petition with the Division of Tax Appeals. The petition is dated as signed on September 13, 2012. The envelope in which the petition was mailed bears a United States Postal Service (USPS) stamp, dated September 14, 2012, and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on September 17, 2012.

3. To show proof of proper mailing of the Conciliation Order on June 15, 2012, the Division provided the following: (i) an affidavit, dated June 25, 2013, of John E. Matthews, Esq.; (ii) an affidavit, dated June 18, 2013, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's Registry Unit; (iii) an affidavit, dated June 18, 2013, of Robert Farrelly, the assistant supervisor of the BCMS; (iv) the "Certified Record for Presort Manual Mail - BCMS Cert. Letter" (CMR); and (v) a copy of petitioner's request for conciliation conference and the conciliation order issued in response thereto.

4. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, start when the BCMS Data Processing Services Unit prepares and forwards the conciliation orders, together with the accompanying cover letters, to the particular

conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and cover letter to the BCMS clerk assigned to process conciliation orders.

5. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing (AFP) Unit, which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

6. The BCMS clerk's regular duties include associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The "Total Pieces and Amounts" is indicated on the last page of the CMR. The BCMS clerk is to stamp the bottom left corner of the last page "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT," and to stamp the bottom right corner of the last page "POST OFFICE

Hand write total # of pieces and initial/ Do Not stamp over written areas.” The clerk then inserts on the top of each page of the CMR the date that the conciliation orders were mailed.

7. In this instance, certified control number 7104 1002 9730 1141 1075 was assigned to the conciliation order to be mailed to petitioner, Liaquat Ali, Inc., and certified control number 7104 1002 9730 1141 1099 was assigned to the conciliation order to be mailed to petitioner’s representative, Sangeeta Sarraf, CPA. The CMS reference number is, in each instance, 000246671. This information appears on page seven of the eight-page CMR pertaining to these mailings. The address Culverpak Gas Station & Conven, 645 Culver Road, Rochester, NY 14609 appears with respect to petitioner, and the address 1649 Jefferson Road, Rochester, NY 14623 appears with respect to Ms. Sarraf. The date “6-15-12” is handwritten in the upper right corner of each of the first seven pages of the CMR.

8. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

9. Under the Division’s standard mailing procedures, the conciliation orders and accompanying CMR is then picked up in BCMS by an employee of the Division’s Mail Processing Center (Center) and deposited in the “Outgoing Certified Mail” basket in the Center. A member of the staff, in turn, weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then counts the envelopes and verifies the names and

certified control numbers against the information contained on the CMR. In turn, a member of the Center staff delivers the sealed, stamped envelopes to a branch of the USPS in Albany, New York for mailing. A postal employee then affixes a postmark and his or her initials or signature to the CMR to indicate receipt by the post office. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Center, each CMR is picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

10. Review of the CMR in this case reveals that two pieces of mail were pulled, and a line is drawn through the information for those pieces of mail as appearing on page four of the CMR. There is no such line on or near the listing information for the pieces of mail relating to petitioner and petitioner's representative. The preprinted total pieces of mail listed on page 8 of the CMR is 82. This number has been crossed out and the handwritten number 80 has been inserted after the listing for "total pieces received at post office." The handwritten "80" is circled. Each page of the CMR reflects the postmark of the Stuyvesant Plaza branch office of the USPS, dated June 15, 2012, and the initials "EB."

11. The facts set forth above in Findings of Fact 4 through 9 were established through the affidavits of Robert Farrelly and Bruce Peltier. Mr. Farrelly was employed as the Assistant Supervisor of Tax Conferences for BCMS, his duties included supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. Peltier was employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, his duties included supervising Mail Processing Center staff

in delivering outgoing mail to branch offices of the USPS, and he is fully familiar with such procedures.

12. The record of this motion includes a copy of the conciliation order, bearing CMS No. 246671, allegedly mailed by certified mail to petitioner, Liaquat Ali, Inc., as well as to petitioner's representative, on June 15, 2012. The record also includes a copy of petitioner's request for conciliation conference, dated June 28, 2011, which lists the same address for petitioner and for petitioner's representative as are set forth above.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the conciliation order by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards and established that copies of the subject conciliation order were properly mailed to petitioner and petitioner's representative on June 15, 2012. The Administrative Law Judge also concluded that the period for the filing of a petition with the Division of Tax Appeals to protest the conciliation order expired 90 days from the date of such mailing, or on September 13, 2012. The Administrative Law Judge found that the subject petition was filed with the Division of Tax Appeals on September 14, 2012, the date of the USPS postmark on the envelope in which it was mailed and, accordingly, that such petition was untimely filed. Consequently, the Administrative Law Judge determined that the Division of Tax Appeals lacked jurisdiction to consider the merits

of petitioner's protest. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition.

### ***ARGUMENTS ON EXCEPTION***

Petitioner complains that the Administrative Law Judge's determination addresses only the timeliness of the petition and not the underlying merits of its case. According to petitioner, "We need an avenue to have that [i.e., the merits] considered." Petitioner does not dispute that its petition was one day late, but requests that consideration be given for its asserted filing of "paperwork" with an office of the Division in Binghamton, New York, a purported filing to which petitioner claims that it received no response.

### ***OPINION***

With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]). Pursuant to Tax Law § 170 (3-a) (e), the conciliation order in this matter is binding upon petitioner unless petitioner files a timely petition with the Division of Tax Appeals. 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).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City*

*Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). We agree with the Administrative Law Judge that the Division has met this burden through the properly completed CMR and the affidavits of Mr. Farrelly and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders. Additionally, we note that the addresses for petitioner and its representative, to which copies of the conciliation order were mailed, correspond to the addresses for petitioner and its representative as listed on petitioner's request for conciliation conference. We thus concur in the Administrative Law Judge's conclusion that the conciliation order at issue was properly mailed to petitioner and petitioner's representative on June 15, 2012, as claimed.

In reaching this conclusion, we note, as did the Administrative Law Judge, that petitioner did not respond to the Division's motion and thus has presented no evidence to contest the facts as alleged in the affidavits submitted therewith. We further agree with the Administrative Law Judge's conclusion that, accordingly, such facts may be deemed admitted.

As noted, Tax Law § 170 (3-a) (e) provides that a conciliation order is binding unless a petition is filed "within ninety days after the conciliation order is *issued* (emphasis added)." Issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Accordingly, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, June 15, 2012. There is no question that the petition in this matter was filed on September 14, 2012, i.e., the date of the USPS postmark stamped on the envelope in which it was mailed (*see* 20 NYCRR 3000.22 [a] [1]). Unfortunately for petitioner, September 14, 2012 fell 91 days after the date of issuance of the conciliation order. The petition was therefore late-filed. We note that the deadlines for filing petitions are strictly enforced and petitions even one day late are properly dismissed (*see Matter*

*of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006).

Finally, we note that petitioner's request for "consideration" for its filing of certain unspecified "paperwork" with the Division's Binghamton office is without merit. A taxpayer may protest a conciliation order only by filing a petition with the Division of Tax Appeals in accordance with the Rules of Practice and Procedure (*see* Tax Law § 170 [3-a] [e]; 20 NYCRR 3000.3).

While we agree with the Administrative Law Judge's conclusion that the subject petition was late-filed and therefore properly dismissed, we note that the Administrative Law Judge made a procedural error in his determination, which has no bearing on the ultimate outcome, and which we hereby correct.

The present matter came before the Administrative Law Judge as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). The Administrative Law Judge treated the matter as a motion for summary determination and, in dismissing the petition, granted such motion. As discussed above, however, the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition. The Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (*see* 20 NYCRR 3000.9 [a] [ii]). Accordingly, the Division's motion to dismiss should have been granted (*cf.*, *Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013 [where the presence of subject matter jurisdiction on the issue of whether petitioners timely filed their request for a conciliation conference required the denial of a motion to dismiss and the granting of the alternative summary determination motion]. Having

granted the motion to dismiss, the motion for summary determination is rendered moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Liaquat Ali, Inc. is denied;
2. The determination of the Administrative Law Judge is modified to the extent that the Division's motion to dismiss the petition is granted, but the determination is otherwise affirmed;  
and
3. The petition of Liaquat Ali, Inc. is dismissed, with prejudice.

DATED: Albany, New York  
January 22, 2015

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner