

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LORD OF KINGS INC.	:	DECISION
	:	DTA NO. 828791
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, 2011 through August 30, 2013.	:	

Petitioner, Lord of Kings Inc., filed an exception to the determination of the Administrative Law Judge issued on March 28, 2019. Petitioner appeared by Ehsanul Habib, Esq. and its president, Ahmed Faisal. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on July 30, 2019, the date that petitioner's reply brief was received.

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

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

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

set forth below.

1. Petitioner, Lord of Kings Inc., filed a petition that was received by the Division of Tax Appeals on July 9, 2018. The envelope containing the petition bears a Federal Express label with a tracking number indicating that the petition was mailed on July 6, 2018.

2. The petition included a copy of a notice of determination bearing assessment number L-043236627, dated as issued to petitioner on June 24, 2015.

3. The petition challenges only the foregoing notice of determination.

4. On October 17, 2018, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notice of determination, the petition was not timely filed.

5. The October 17, 2018 notice of intent was reissued on December 4, 2018, following a mailing error. Both parties were given until January 3, 2019 to respond.

6. In response to the issuance of the notice of intent, the Division of Taxation's (Division's) representative provided the following: (i) an affidavit, dated December 5, 2018, of Jessica DiFiore, Esq., an attorney employed by the Office of Counsel of the Division; (ii) a copy of the petition; (iii) copies of the notice of intent, dated October 17, 2018 and December 4, 2018; (iv) copies of the June 24, 2015 notice of determination with the associated mailing cover sheets addressed to petitioner and petitioner's then-representative; (v) an affidavit, dated October 29, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (vi) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 24, 2015; (vii) an affidavit, dated November 1, 2018, of Fred Ramundo, a supervisor of the Division's mail room; and (viii) a copy

of petitioner's ST-810 New York State and Local Sales and Use Tax Return for Quarterly Recap for Monthly Filers for the tax period March 1, 2015 - May 31, 2015, filed on June 12, 2015.

This tax return lists the same address for petitioner as that listed on the notice of determination and the petition, and was the last tax return filed with Division before the notice of determination was issued.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs. She is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of their mailing. The 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 and last page of the CMR in the present case to the actual mailing date of "6/24/15." The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control 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 Division's return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No."

The names and addresses of the recipients are listed under “Name of Addressee, Street, and PO Address.”

9. The June 24, 2015 CMR consists of 26 pages and lists 279 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 26, which contains 4 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated June 24, 2015 to each page of the CMR, wrote the number “279” next to the heading “Total Pieces Received at Post Office” on page 26, and initialed or signed each page of the CMR.

10. Page 16 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0488 6149 and reference number L-043236627 was mailed to petitioner at the Brooklyn, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. Page 20 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0488 6583 and reference number L-043236627 was mailed to petitioner’s then-representative, Howard Sobel, at the Merrick, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s then-representative’s name and address as noted.

12. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The

notices are received in the mail room and placed in the “Outgoing Certified Mail” area. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope, so that the address and certified number from the mailing cover sheet shows through the window. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark dated June 24, 2015. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all 279 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on June 24, 2015.

13. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner and petitioner’s then-representative on June 24, 2015, as claimed.

14. In response to the notice of intent, petitioner’s president, Ahmed Faisal, provided two letters, dated November 28, 2018 and December 13, 2018. Mr. Faisal claims, in pertinent part, that upon receipt of the notice at issue (L-043236627), a conciliation conference took place with the Division’s Bureau of Conciliation and Mediation Services (BCMS). Mr. Faisal provided a letter, dated December 24, 2015, signed by Steven Saskin, a conciliation conferee

with BCMS. Mr. Saskin's letter details a proposed modification to notice of determination L-043246876.¹ Mr. Faisal states that he believed the purpose of the conciliation conference was to apportion petitioner's liability between him and the previous owners of Lord of Kings Inc. He assumed that the Division's pursuit of petitioner would cease once he entered into a settlement agreement to pay his portion of the liability. Mr. Faisal emphasizes that since he purchased Lord of Kings Inc., in March 2013, and since the Division issued a bulk sale release, petitioner should not be liable for sales taxes assessed for the period prior to the issuance of the bulk sale release.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the standard of review in the present matter is the same as that of a summary determination motion. The Administrative Law Judge pointed out that such a motion may be granted where no disputed material issue of fact exists. The Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition following the issuance of the notice of determination. The Administrative Law Judge also observed that where the timeliness of a protest of a notice is in question, it must first be determined if the notice of determination was properly mailed by the Division, because if so, there is a presumption that the notice was delivered. The Administrative Law Judge explained that to show proper mailing of the notice of determination, the Division must establish its standard mailing procedure and that such procedure was followed in this specific case.

¹ The petition filed protests assessment number L-043236627. Mr. Saskin's letter, dated December 24, 2015, details a proposed modification to notice of determination L-043246876, which appears to have been issued in the name of Ahmed Faisal. The letter from Mr. Saskin does not reference the notice at issue. A petition protesting assessment number L-043246876 has not been filed with the Division of Tax Appeals; therefore, Mr. Saskin's letter has no bearing on this determination.

The Administrative Law Judge concluded that the Division met its burden and established that the subject notice of determination, was properly mailed to petitioner on June 24, 2015. Specifically, the Administrative Law Judge found that the submitted affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed in the present case. The Administrative Law Judge also found that the address to which the notice of determination was mailed was petitioner's last known address.

The Administrative Law Judge noted that although there is no specific statutory requirement for the service of a notice on a taxpayer's representative, the decisions of this Tribunal have consistently held that where a taxpayer's representative is not served with a notice, the 90-day period for filing a petition or request for conciliation conference is tolled. The Administrative Law Judge concluded that in this case, the Division had demonstrated that the notice was properly mailed to petitioner's then-representative.

The Administrative Law Judge stated that it was incumbent upon petitioner to file a petition within 90 days after the proper mailing of the notice of determination on June 24, 2015. As the petition was not filed until July 6, 2018, the Administrative Law Judge concluded that the petition was untimely and that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition. Finally, the Administrative Law Judge noted that petitioner's assertion that this matter was resolved at a conciliation conference pertained instead to a case involving a different notice than the notice that was protested in this case.

ARGUMENTS ON EXCEPTION

Petitioner does not argue that its petition was timely filed with the Division of Tax Appeals, or that there was any issue with the proper mailing of the notice of determination.

Rather, petitioner continues to argue that a bulk sale release² was issued in this matter and that this matter was previously resolved with the Division as evidenced by a letter from a conciliation conferee proposing to modify notice number L-043246876. In its letter brief in reply, petitioner asserts that a timely request for conciliation conference was made in 2015. The remainder of petitioner's arguments on exception pertain to the merits of its case.

The Division notes that petitioner did not except to the findings and conclusions of the Administrative Law Judge that the notice of determination was properly issued or that the petition filed in this matter was untimely. The Division argues that it established that the notice of determination was properly mailed on June 24, 2015, and thus, the petition filed on July 6, 2018 was untimely. Finally, the Division asserts that petitioner's claim that it has a meritorious case is irrelevant where, as here, the Tax Appeals Tribunal lacks jurisdiction to review the merits where it has been found that the petition was untimely.

OPINION

The Administrative Law Judge's dismissal of the petition was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). That is, such a motion "shall be granted if, upon all the papers

² A copy of what appears to be a bulk sale release issued to FM Friendz Inc. was attached to petitioner's exception. However, as that document was not part of the record below, this Tribunal will not consider it (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

“The proponent of a summary judgment [or determination] 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 (citations omitted)” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opponent of such a motion “must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice, with certain exceptions not relevant here (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). Absent such a timely-filed protest, a notice of determination becomes an assessment subject to collection (Tax Law § 1138 [a] [1]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of Am. Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [protest filed one day late is untimely]). A petition or request for a conciliation conference must be timely filed for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see e.g. Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Papaye Rest., Inc.*, Tax Appeals Tribunal, May 12, 2016).

Where, as here, the timeliness of a taxpayer's petition is in question, we must first examine whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

The Division has met its burden. The affidavits of Ms. Picard and Mr. Ramundo establish the Division's standard mailing procedures. The CMR has been properly completed and thus shows that the Division's standard mailing procedure was followed in this instance (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Furthermore, the address on the notice of determination and the mailing cover sheet matches petitioner's address as reported on the last sales tax return filed by petitioner prior to the mailing of the notice. The notice was thus properly addressed (*see* Tax Law §§ 1138 [a] [1], 1147 [a] [1]). Accordingly, we agree with the Administrative Law Judge's conclusion that the Division's evidence proves that the notice of determination was properly mailed to petitioner on June 24, 2015, as claimed.

The fact that the petition in this matter was filed on July 6, 2018, more than the required 90 days from the June 24, 2015 mailing of the notice of determination, is not disputed. Thus, the petition was not timely filed, and we are without jurisdiction to address the merits of petitioner's case (*see e.g. Matter of Ahmed; Matter of Papaye Rest., Inc.*)

Petitioner makes several arguments regarding why this Tribunal should address the merits of its case. The first argument, that this matter was resolved during the conciliation process, ignores that the liability of a person responsible for the collection of sales tax under Tax Law § 1133 (a) is joint and several (*see Matter of Sacher*, Tax Appeals Tribunal, July 2, 2015). As relevant here, this means that the corporate taxpayer, and all persons found responsible for the collection of sales taxes on behalf of the corporate taxpayer, are subject to liability for the full amount of tax due. Thus, as pointed out by the Administrative Law Judge, the fact that a notice issued to Ahmed Faisal was modified during the conciliation process, even if issued to him as a person responsible for the collection of sales taxes for the petitioner, has no relevance to this matter where the subject notice was issued to the corporate taxpayer.

Additionally, petitioner argues that a bulk sale release was issued in this matter. However, petitioner does not even assert, much less offer to prove, that a bulk sale release was issued to petitioner (*see* footnote 2). Thus, petitioner's argument is again not relevant to the notice of determination before us.

Finally, petitioner asserts that a timely request for a conciliation conference was filed by petitioner in 2015. However, this is also not relevant, as the issue in the present matter is whether petitioner filed a timely petition with the Division of Tax Appeals, not a request for conciliation conference with BCMS. Even if we were to assume that petitioner meant there was a timely petition filed in 2015, there is no evidence in the record to support such an assertion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lord of Kings Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and,
3. The petition of Lord of Kings Inc. is dismissed.

DATED: Albany, New York
January 30, 2020

/s/ Roberta Moseley Nero

Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava

Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina

Anthony Giardina
Commissioner