

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LIAQUAT ALI, INC. : DETERMINATION
 : 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. :
:

Petitioner, Liaquat Ali, Inc., filed a petition for revision of a determination or for refund of sales and use taxes Articles 28 and 29 of the Tax Law for the period June 1, 2007 through November 30, 2009.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion on July 9, 2013, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1) and (b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Sangeeta Sarraf, CPA, did not respond to the motion of the Division of Taxation within 30 days thereafter (20 NYCRR 3000.5[b]). Accordingly, the 90-day period for issuance of this determination commenced on August 8, 2013, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the motion papers and pleadings filed in this matter, Thomas C. Sacca, Administrative Law Judge, issues the following determination.

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

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 though 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 in response thereto.

4. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Processing Services Unit prepared and forwarded the conciliation orders, together with the accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward 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 included 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 would then be 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 would deliver 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 would be 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.

CONCLUSIONS OF LAW

A. 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 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. There is a 90-day statutory time limit, measured from the issuance of a conciliation order, for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond such 90-day statutory time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Where the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). "To meet its burden of proof, the Division is required to show proof of a standard procedure used by it, and must further show proof that the standard procedure was followed in this instance" (*Matter of New York City*

Billionaires Construction Corp., Tax Appeals Tribunal, October 20, 2011, *citing id.*; *see also Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011).

C. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, the CMR has 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). "A conciliation order is mailed when it is delivered into the custody of the USPS for mailing" (*Matter of Western Aries Construction* [citations omitted]). The Division has thus met its burden of proof and established that the protested Conciliation Order was mailed, as addressed, to petitioner on June 15, 2012.

D. When an order is found to have been properly mailed by the Division, a presumption arises that it was delivered to the intended recipient (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). That is, "[o]nce the Division has introduced adequate proof to establish a presumption of receipt by the taxpayer, the burden is on petitioner to rebut that presumption by introducing evidence of non-receipt" (*Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011). In this case, however, petitioner did not introduce evidence of non-receipt.

In fact, petitioner did not respond to the Division's motion and, therefore, has 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 Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged in the affidavit by John E. Matthews, Esq., as filed with the subject motion and supported by the documents supplied therewith. Consequently,

those facts may be deemed admitted and, accordingly, summary determination in favor of the Division may be granted in this matter.

E. The notice was properly mailed, as above, when it was delivered into the custody of the USPS on June 15, 2012, and it is this date that triggered the 90-day period within which a protest had to have been filed. In turn, 90 days after the June 15, 2012 date of mailing of the notice was September 13, 2012, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until it was sent to the Division of Tax Appeals by USPS mail on September 14, 2012, or one day beyond the statutory period within which a timely protest had to have been filed, and thus was not timely filed. Unfortunately, even *one* day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (*see Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Therefore, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*), and the petition is properly subject to dismissal (*Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

F. The petition of Liaquat Ali, Inc., is hereby dismissed.

DATED: Albany, New York
October 24, 2013

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE