

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**LLPD, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 825837  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period March 1, 2008 through May 31, 2012. :

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Petitioner, LLPD, Inc., 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, 2008 through May 31, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion on January 8, 2014 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Robert A. Maslyn, dated January 8, 2014, and annexed exhibits. Petitioner, appearing by PD CPA Firm, PC (Paul Deonarine, CPA), did not respond to the motion. The 90-day period for issuance of this order began on February 10, 2014, the date petitioner's response to the motion was due. After due consideration of the affidavit of Mr. Maslyn and exhibits annexed thereto, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, 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 a Notice of Determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated October 29, 2012 and bearing assessment numbers L-038781185, L-038781186, L-038781187, L-038781188, L-038781189 and L-038781190 and Audit case identification number X-279735052.<sup>1</sup> The notice is addressed to petitioner, "LLPD, Inc., Eliot's Chicken Place & Quick Serve Café, 6104 Fresh Pond Rd, Middle Village, NY 11379-1040."

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the October 29, 2012 Notice of Determination. The request was mailed to BCMS on May 3, 2013.

3. On May 17, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice of determination 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 October 29, 2012, but the request was not mailed until May 3, 2013, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the October 29, 2012 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated December 3, 2013,

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<sup>1</sup>The Notice of Determination bearing audit identification number X-279735052 was also assigned assessment numbers L-038781185, L-038781186, L-038781187, L-038781188, L-038781189 and L-038781190. These latter numbers appear in the computation sections of the subject notice.

of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) page numbered 2 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), legibly postmarked October 29, 2012; (iii) a copy of the Notice of Determination issued on October 29, 2012; (iv) an affidavit, dated December 4, 2013, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (v) a copy of the Request for Conciliation Conference dated May 3, 2013; and (vi) Form AU-196.10 Notification of Sale, Transfer, or Assignment in Bulk which lists the same address for petitioner as that listed on the subject notice.<sup>2</sup> This Form AU-196.10 was the last document filed with the Division by petitioner before the notice was issued.

5. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code, the taxpayer's mailing address and a Departmental return address on the front and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice. Each notice, with accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

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<sup>2</sup> The same address for petitioner is also listed on its petition, dated August 12, 2013.

6. 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 Departmental return address on the front, and 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."

7. According to the Maney affidavit, the CMR in the present matter consists of one page and lists one certified control number along with corresponding reference number, name and address of petitioner. He states that the USPS representative affixed a postmark to the one-page CMR and initialed the page. Mr. Maney notes the single page lists one item and postage for one item.

8. Attached to the Maney affidavit, as exhibit "A," is a copy of the CMR issued by the Division on October 29, 2012. The CMR has a handwritten entry referring to October 29, 2012 on the top.

9. The CMR indicates that a notice of determination with certified control number 7104 1002 9730 1403 2345 and reference number X-279735052 was mailed to petitioner at the Middle Village, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a supervisor in the mail room since March of 1999 and currently a Principal Mail and Supply Supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the

notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against 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 also places his or her signature on the CMR, indicating receipt by the post office. The Center 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.

11. The one-page CMR in exhibit “A” of the Maney affidavit contains a USPS postmark of October 29, 2012. On the CMR, corresponding to “Total Pieces and Amounts,” is the preprinted number 1, and next to “Total Pieces Received At Post Office” is the handwritten and circled entry “1” along with initials or a signature. According to Mr. Peltier, the affixation of the postmark and the Postal Service employee’s initials indicate that the article of mail listed on the CMR, addressed to petitioner, was received by the USPS on October 29, 2012.

12. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on October 29, 2012, as claimed.

### ***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. Accordingly, it is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Maney and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden, id.* at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

C. A taxpayer may file a Request for Conciliation Conference with BCMS seeking revision of the determination within 90 days of the mailing of a notice of determination (*see* Tax Law § 170(3-a)(a); § 1138[a][1]). If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice at issue to petitioner's last known address on the date claimed. The submitted affidavits and CMR establish the Division's standard mailing procedure and that, in this case, the

procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

Further, petitioner's address on the notice, the corresponding mailing cover sheet and the CMR conform to the address petitioner reported on its Notification of Bulk Sale form dated September 25, 2012, which was the last document filed before the Notice of Determination was issued, thereby satisfying the "last known address" requirement set forth in Tax Law § 1138(a)(1). Thus, it is concluded that the Division properly mailed the notice on October 29, 2012 and the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

F. Petitioner's Request for Conciliation Conference was filed on May 3, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). 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).

G. The Division of Taxation's motion for summary determination is granted, and the petition of LLPD, Inc. is dismissed.

DATED: Albany, New York  
May 1, 2014

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE