

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**PRABHAT CORPORATION** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 825707  
Sales and Use Taxes under Articles 28 and 29 of :  
the Tax Law for the Period June 1, 2008 :  
through May 31, 2012. :  
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Petitioner, Prabhat Corporation, 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 June 1, 2008 through May 31, 2012.

On November 25, 2013, the Division of Taxation, by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of Michelle M. Helm, dated November 20, 2013, and annexed exhibits. Petitioner, appearing pro se, did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference or petition 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 December 28, 2012 and bearing assessment identification number L-038953148-6. The notice is addressed to petitioner, Prabhat Corporation, at "115 05 Beach Channel Drive, Rockaway Park, NY 11694."

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination. The request was dated April 23, 2013 and stamped as received by BCMS on May 1, 2013.

3. Petitioner also filed a petition with the Division of Tax Appeals dated April 23, 2013 that was stamped as received on April 29, 2013.<sup>1</sup>

4. On May 10, 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 December 28, 2012, but the request was not mailed until April 29, 2013 or in excess of 90 days, the request is late filed.

5. To show proof of proper mailing of the December 28, 2012 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated November 15, 2013, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and

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<sup>1</sup> The petition also lists Roy Partha, Prabhat Corporation's president, as an additional petitioner, and notice number L-039112994-4, as being at issue. Mr. Partha has filed a separate petition challenging notice number L-039112994-4, which concerns his potential responsible officer liability for Prabhat Corporation for the same period as the instant case. That petition has been given DTA number 825637 and is proceeding in due course as a separate case. Meanwhile, the instant motion solely deals with the timeliness of Prabhat Corporation's request for conciliation conference or petition challenging Notice of Determination number L-038953148-6.

Control Units, which include its Case and Resource Tracking System (CARTS); (ii) a 31-page “Certified Record for Presort Mail - Assessments Receivable” (CMR), each page of which is legibly postmarked December 28, 2012; (iii) an affidavit, dated November 15, 2013, of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center; (iv) a copy of the December 28, 2012 Notice of Determination with the associated mailing cover sheet; and (v) a copy of petitioner’s New York State and Local Sales and Use Tax Return (Form ST-809) for the period September 1, 2012 through September 30, 2012, dated October 19, 2012, which lists the same address for petitioner as that listed on the subject notice.<sup>2</sup> This document was the last one filed by petitioner with the Division before the statutory notice was issued.

6. The affidavit of Daniel A. Maney 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. Each page of 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 page of the CMR in the present case to the actual mailing date of “12/28/12.” In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of

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<sup>2</sup> The same address for petitioner is also listed on its aforementioned Request for Conciliation Conference.

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 P.O. Address."

8. According to the Maney affidavit, the CMR in the present matter consists of 31 pages. Mr. Maney notes that the entire CMR is attached to his affidavit, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR, and initialed or signed page 31. He adds that the total number of statutory notices mailed pursuant to the CMR was 334.

9. Attached to the Maney affidavit, as exhibit "A," is a copy of all 31 pages of the CMR.

10. Page 20 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1440 7877 and assessment ID number L-038953148 was mailed to petitioner at the Rockaway Park, 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.

11. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) 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. Each page of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of December 28, 2012. On page 31, corresponding to "Total Pieces and Amounts," is the preprinted number 334, which is surrounded by a circle that extends into the space next to the line reading "Total Pieces Received At Post Office." There is a set of initials or a signature in this area on page 31.

12. According to the Maney affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that 334 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on December 28, 2012.

13. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on December 28, 2012, as claimed.

### ***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. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination to a

taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient. . . .” This section further provides that such a notice “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 in or out of this state.”

C. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170[3-a][b]; § 1138[a][1]). If a taxpayer fails to do so, or file a timely petition protesting a statutory notice (*see* Tax Law § 2006[4]), 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 or petition is at issue, the Division must carry 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. In the instant case, the Maney and Peltier affidavits establish the Division’s standard mailing procedure. Additionally, the production of the CMR by the Division, along with the aforementioned affidavits, constitutes sufficient documentary evidence to establish the subject Notice of Determination was mailed as addressed to petitioner on December 28, 2012. The

CMR listed: (1) the correct name and address, (2) a corresponding certified control number, (3) USPS postmarks dated December 28, 2012, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. Consequently, the CMR was properly completed, therefore, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Petitioner's address on the notice, corresponding mail cover sheet, and CMR all conform with the address reported on petitioner's New York State and Local Sales and Use Tax Return (Form ST-809) for the period September 1, 2012 through September 30, 2012, dated October 19, 2012, which was the last document filed before the notice was issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1). Additionally, petitioner's request for conciliation conference lists the same address (*see* Finding of Fact 5, footnote 2), further confirming its accuracy.

G. Finally, as noted above, petitioner failed to file a response to the instant motion; therefore 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 Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Maney, Peltier, and Helm affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

H. Petitioner had 90 days from the issuance of the Notice of Determination to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. Both the request for conciliation conference and petition were dated April 23, 2013, or more than

90 days from the December 28, 2012 issuance of the subject notice. Thus, based on the evidence in this record, both are untimely.

I. The petition of Prabhat Corporation is dismissed.

DATED: Albany, New York  
March 20, 2014

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE