

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition :  
of :  
**BITEFOOD, LTD.** : DETERMINATION  
 : DTA NO. 828008  
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, 2012 through February 28, :  
2015. :  
\_\_\_\_\_ :

Petitioner, Bitefood, Ltd., 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, 2012 through February 28, 2015.

On February 3, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner, appearing by Reed Smith, LLP (Aaron M. Young, Esq., of counsel) filed a response on March 22, 2017. On April 7, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), having been granted an extension of time to do so, submitted an affidavit and documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on April 20, 2017. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. On December 27, 2016, petitioner, Bitefood, Ltd., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Notice of Determination, assessment number L-045407606-4, which was attached to the petition.

2. The subject notice of determination, dated August 22, 2016, was addressed to petitioner at an Edgewater, New Jersey, address.

3. On February 3, 2017, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of a notice of determination issued to petitioner on August 22, 2016, and that the petition was not filed until December 27, 2016.

4. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of the notice of determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated March 22, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked August 22, 2016; (iii) an affidavit, dated March 29, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room; (iv) a copy of the August 22, 2016 notice with the associated mailing cover sheet addressed to petitioner; (v) a copy of the August 22, 2016 notice with the associated mailing cover sheet addressed to petitioner's representatives, Fred Slater and Ellen Minkow; (vi) a copy of petitioner's Part-Quarterly ST-809, New York State and Local

Sales and Use Tax Return for Part-Quarterly Filers, for the period July 1, 2016 through July 31, 2016, filed on August 15, 2016, which reports the same Edgewater, New Jersey, address for petitioner as that listed on the subject notice of determination, and was the last return filed by petitioner prior to the issuance of the subject notice.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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 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 and last page of the CMR in the present case to the actual mailing date of "8/22/16." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. 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.

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. The CMR in the present matter consists of 18 pages and lists 194 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 18, which contains 7 entries. Ms. Nagengast 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 USPS postmark dated August 22, 2016 to each page of the CMR, wrote his or her initials on each page thereof, and wrote the number "194" on page 18 next to the heading "Total Pieces Received at Post Office."

8. Page one of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0024 2574 and assessment number L-045407606, was mailed to petitioner at the Edgewater, New Jersey, address listed on the subject notice. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

Page three of the CMR also indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0024 2734 and assessment number L-045407606, was mailed to petitioner's representatives, Fred Slater and Ellen Minkow, at 309 West 57<sup>th</sup> Street, OFC 301, New York, New York. The corresponding mailing cover sheet bears this certified control number and the representatives' names and address as noted.

9. The affidavit of Melissa Kate Koslow describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A

staff member receives 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 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 contained 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated August 22, 2016 on and initialed each page of the CMR. The mailroom 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. Here, the USPS employee complied with this request by writing the number "194" on the last page next to the heading "Total Pieces Received at Post Office."

10. Based upon her review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Koslow stated that on August 22, 2016, an employee of the mail room delivered pieces of certified mail addressed to petitioner, "Bitefood Ltd., Scott Skey, 126 Undercliff Ave., Edgewater, NJ, 07020-1155" and petitioner's representatives, Fred Slater and Ellen Minkow, at 309 West 57<sup>th</sup> Street, OFC 301, New York, New York 10019, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these

procedures were followed in mailing the pieces of certified mail to petitioner and petitioner's representatives on August 22, 2016.

11. Attached to petitioner's response to the notice of intent to dismiss petition is a copy of a power of attorney dated February 25, 2015. The power of attorney names Fred Slater and Ellen Minkow as petitioner's representatives and lists their address as 309 West 57<sup>th</sup> Street, OFC 301, New York, New York 10019. Mr. Slater and Ms. Minkow were petitioner's representatives on the date the notice of determination was issued.

### ***CONCLUSIONS OF LAW***

A. 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services "if the time to petition for such a hearing has not elapsed" (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a request for conciliation conference or petition 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).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on August 22, 2016, as well as to petitioner's representatives. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's part-quarterly sales and use tax return filed for the period July 1, 2016 through July 31, 2016, which satisfies the "last known address" requirement. Additionally, petitioner's representatives' address appearing on the mailing cover sheet and CMR for the copy of the notice sent to the representatives is the same as that listed on the power of attorney submitted by petitioner. It is thus concluded that the Division properly mailed the notice on August 22, 2016 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]).

D. Petitioner's protest was not filed until December 27, 2016, or 127 days later. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*see Matter of Sak Smoke Shop*).

E. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion "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."

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Petitioner argues that neither he nor his representatives received the notice; however, petitioner does not dispute that the addresses listed on the notice for petitioner and his representatives are correct. Contrary to petitioner's argument of non-receipt, the proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Without a timely filed petition, the Division of Tax Appeals does not have the jurisdiction to entertain the substantive issues presented in the petition.

G. The petition of Bitefood, Ltd., is dismissed.

DATED: Albany, New York  
July 6, 2017

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE