

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LORD OF KINGS INC. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 828791
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 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, 2011 through August 30, 2013.

On October 17, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). Due to a mailing error, the Division of Tax Appeals reissued the notice of intent to dismiss petition on December 4, 2018. The parties were given until January 3, 2019 to respond. On November 29, 2018 and December 13, 2018, petitioner, appearing by its president, Ahmed Faisal, submitted a letter and documentation opposing the dismissal. On December 6, 2018, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jessica DiFiore, Esq., of counsel), submitted an affidavit and documentation in support of the dismissal. The 90-day period for issuance of this determination commenced on January 3, 2019. Based upon the affidavits and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

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, 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, 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 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 Departmental 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 of 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 indicates 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.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. 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

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.

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]).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be 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). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on June 24, 2015. 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 establishes 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 sheets and CMR conforms with the address listed on petitioner's last ST-810 New York State and Local Sales and Use Tax Return for Quarterly Recap for Monthly Filers, which satisfies the "last known address" requirement (*see* Tax Law § 1138 [a] [1]). It is thus concluded that the Division properly mailed the notice on June 24, 2015, 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 (*see* Tax Law § 1138 [a] [1]).

G. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]). Here the evidence demonstrated that the notice was sent by certified mail to Howard Sobel, petitioner's then-representative, at his last known address on June 24, 2015, thus fulfilling the case law requirement for doing so.

H. In sum, the Division has established that notice of determination L-043236627 was properly mailed as addressed to petitioner at its last known address on June 24, 2015. Having established that the notice of determination was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until July 6, 2018, a date that falls beyond 90 days after the date of issuance of the notice of determination. Petitioner's president, Ahmed Faisal claimed that the matter was resolved at a conciliation conference; however, the letter from the conciliation conferee included in his response to the notice of intent, pertains to an assessment that was not protested in this case. Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Lord of Kings Inc., is dismissed.

DATED: Albany, New York
March 28, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE