

21-998

TAX TYPE: SALES & USE TAX

TAX YEAR: 07/01/16-03/31/19

DATE SIGNED: 4/26/2022

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, J. FRESQUES

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT</p> <p>Appeal No. 21-998</p> <p>Account No: #####</p> <p>Tax Type: Sales & Use Tax</p> <p>Tax Year: 07/01/16-03/31/19</p> <p>Judge: Marshall</p>
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Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Assistant General Counsel
REPRESENTATIVE-2 FOR TAXPAYER, CFO
REPRESENTATIVE-3 FOR TAXPAYER, Sales and Use Tax Manager

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, Auditing Division
RESPONDENT-2, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on October 25, 2021 for a Hearing on Respondent's ("Division") Motion for Summary Judgment.¹ The Division based its Motion for Summary Judgment on the contention that Petitioner's ("Taxpayer") Petition for Redetermination was not timely filed.

¹ While a motion for lack of jurisdiction may be brought as a motion to dismiss, such a motion must be converted to a motion for summary judgment where matters outside the pleadings are presented and not excluded by the Court. Utah R. Civ. P. 12(b); *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983). The Division has presented matters outside the pleadings and has, therefore, filed this motion as one for summary judgment.

APPLICABLE LAW

Rule 56 of the Utah Rules of Civil Procedure allows for a Motion for Summary Judgment. Subsection (c) specifically provides, in part:

...The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

Utah Code Ann. §59-1-501 provides that a taxpayer must file a petition for a redetermination of a deficiency within thirty days of the issuance of a notice of deficiency, as follows in pertinent part:

- (2) A person may file a request for agency action, petitioning the commission for redetermination of a deficiency.
- (3) Subject to Subsections (4) through (6), a person shall file the request for agency action described in Subsection (2):
 - (a) within a 30-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405...

Filing within the thirty-day deadline is governed by Rule R861-1A-20 of the Utah Administrative Rules, as follows:

- (1) Except as provided in Subsection (2), a petition for adjudicative action must be received in the commission offices no later than 30 days from the date of the action that creates the right to appeal. The petition is deemed to be timely if:
 - (a) in the case of mailed or hand-delivered documents:
 - (i) the petition is received in the commission offices on or before the close of business of the last day of the 30-day period; or
 - (ii) the date of the postmark on the envelope or cover indicates that the petition was mailed on or before the last day of the 30-day period; or
 - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the 30-day period.
 - (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).
- (2) If a statute provides the period within which an appeal may be filed, a petition for adjudicative action is deemed to be timely if:
 - (a) in the case of mailed or hand-delivered documents:
 - (i) the petition is received in the commission offices on or before the close of business of the last day of the time frame provided by statute; or
 - (ii) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the time frame provided by statute; or
 - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the time frame provided by statute.

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- (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).
- (3) Any party adversely affected by an order of the commission may seek judicial review within the time frame provided by statute. Copies of the appeal shall be served upon the commission and upon the Office of the Attorney General.

Further guidance on the filing deadline is provided in Rule R861-1A-22 of the Utah Administrative Rules, as follows in relevant part:

- (1) Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

The burden of proof is on the Petitioner, in accordance with Utah Code Ann. §59-1-1417, below, in relevant part:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
 - (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
 - (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
 - (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
 - (i) required to be reported; and
 - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

MATERIAL FACTS

1. The Division issued a Statutory Notice - Sales and Use Tax to the Taxpayer on December 29, 2020. (RESPONDENT-1 Declaration, Ex. 1).
2. The Statutory Notice was mailed to ADDRESS-1, CITY-1, STATE-1 ZIPCODE. This was the Taxpayer's last-known address, as shown on the records of the Commission. (RESPONDENT-1 Declaration).
3. The Statutory Notice was mailed via Certified Mail. (Respondent's Reply Brief, Ex. 1).
4. The Statutory Notice was delivered to the "Front Desk/Reception/Mail Room" on January 4,

2021. (Respondent's Reply Brief, Ex. 2).

5. The Statutory Notice provides, “[i]f you do not agree with the audit adjustments, you may file an appeal with the Tax Commission. To protect your appeal rights, you must file a Petition for Redetermination, TC-738, by January 28, 2021. This form is available on our website at tax.utah.gov/forms. If you need a form mailed to you, call us at (801) 297-6700. Interest will continue to accrue during the appeal process on any unpaid balance.” (RESPONDENT-1 Declaration, Ex. 1).
6. On June 10, 2021, the Division received a Petition for Redetermination from REPRESENTATIVE-2 FOR TAXPAYER, an employee of the Taxpayer. (RESPONDENT-1 Declaration, Ex. 2).
7. The Petition for Redetermination listed the same address to which the Statutory Notice was mailed. (RESPONDENT-1 Declaration, Ex. 2).

ADDITIONAL FACTS²

8. As of November 2020, the Taxpayer's Sales and Use Tax Manager, REPRESENTATIVE-3 FOR TAXPAYER, was engaged in discussions with RESPONDENT-2, an Auditor III with the Division, regarding the Audit Report for the period from July 1, 2016 through March 31, 2019. (Taxpayer's Response).
9. During a November 2020 call between REPRESENTATIVE-3 FOR TAXPAYER and RESPONDENT-2, RESPONDENT-2 indicated the Division would be sending the newest version of the Audit Report to the Taxpayer. (Taxpayer's Response).
10. On May 6, 2021, REPRESENTATIVE-3 FOR TAXPAYER sent an email to RESPONDENT-2 as to the status of the Audit Report. (Taxpayer's Response).
11. The Taxpayer received the final Audit Report (Statutory Notice) on May 27, 2021. (Taxpayer's Response).

DISCUSSION

In its Motion for Summary Judgment, the Division cited Utah Code Ann. §59-1-501(2), which provides that “[a] person may file a request for agency action, petitioning the commission for redetermination of deficiency...within a 30-day period after the date the commission mails a notice of

² The Commission notes that the Division objected to the Taxpayer's statement of facts on the grounds that they are not of consequence in determining the Motion for Summary Judgment. The Commission notes the additional facts are included in this Order as they were discussed by the parties during arguments.

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deficiency...” The Division noted that if no petition for redetermination is filed prior to the expiration of the 30-day period, an assessment is made and the balance becomes a liability to that person, in accordance with Utah Code § 59-1-1408(2). The Division’s representative argued that the time allowed for appeal is not discretionary and may not be extended. He stated that in order for the Commission to rule on this issue, it must know when the Statutory Notice was mailed, and when the Petition for Redetermination was filed. The Division’s representative maintained that any other facts raised by the Taxpayer are not relevant.

The Division’s representative noted that the Statutory Notice was issued on December 29, 2020 to the Taxpayer’s last-known address, as shown on the records of the Commission. He stated that the Petition for Redetermination was due on or before January 28, 2021 under Utah Code Ann. §59-1-501(2). However, the Taxpayer’s petition was not filed until June 9, 2021. The Division’s representative argued that because the Taxpayer did not meet the statutory deadline, the appeal should be dismissed.

The Division’s representative stated that in its brief, the Taxpayer argued that the Division deprived them of the right to timely appeal, and falsely claims that the burden is on the Division to show it did not deprive the Taxpayer of its rights. He stated that it is the Taxpayer who must show that the Division deprived the Taxpayer of their right to appeal. The Division’s representative noted that the Statutory Notice was sent via certified mail, but was not required to be, and is in compliance with Utah Code Ann. §59-1-1404(4). He stated that sending the Statutory Notice via certified mail only ensured that it was either received by the Taxpayer or that it was undeliverable. The Division’s representative stated that it added some level of security to ensure the Statutory Notice was delivered.

The Division’s representative argued that in determining whether the limitations period has lapsed, the triggering event is the mailing of the notice, not whether the Taxpayer received the notice. He stated that as long as the Division establishes the Statutory Notice was sent to the address listed on the records of the Commission, it has satisfied the trigger. The Division noted that in *A-Fab Eng’g v. Prop. Tax Div. of Utah State Tax Comm’n*, 444 P.3d 547, 553 (Utah Ct. App. 2019), the Court found that whether the notice was received is immaterial to the jurisdictional question.

REPRESENTATIVE-1 FOR TAXPAYER stated that the Taxpayer agrees that the facts are not in dispute, and that the statutory provisions are not discretionary. However, he argued that under Utah Code Ann. § 59-1-1404, the date of mailing is the date of the postmark. He stated that per the USPS Handbook, a postmark is an official mark of the United States Postal Service that is applied to a stamped mailpiece by the Postal Service once the mailpiece is accepted into custody by the Postal Service.

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REPRESENTATIVE-1 FOR TAXPAYER argued that the Taxpayer has never received a postmarked notice, and that without a postmarked document, the Division has not established that the thirty-day time period started to run. He argued that it is the Division's burden to show that the petition was not timely filed.

Alternatively, REPRESENTATIVE-1 FOR TAXPAYER argued that the fact that the Division mailed the Statutory Notice via certified mail placed an additional requirement that deprived the Taxpayer of the right to file a timely appeal. In its Response to the Division's Motion for Summary Judgment, the Taxpayer noted that the Commission addressed a number of appeals that arose due to taxpayers missing deadlines because of complications arising from COVID-19.³ REPRESENTATIVE-1 FOR TAXPAYER acknowledged that COVID-19 alone is not a basis to grant a late filed appeal; however, he argued that the Division has the burden of showing that the additional signature requirement did not deny the Taxpayer sufficient time to file its Petition for Redetermination.

REPRESENTATIVE-1 FOR TAXPAYER argued that when something is sent via certified mail, there is a separate receipt, and that receipt would have a postmark insignia. He stated that the Taxpayer is not certain how the Statutory Notice was sent out, because the Taxpayer did not receive the Notice of Deficiency until it was sent via email in May of 2021. REPRESENTATIVE-1 FOR TAXPAYER argued that the only fact that matters is the date on the postmark. He stated that there is nothing in the record to show the postmark, and argued it is the Division's burden to provide the postmark.

In rebuttal, the Division's representative noted that proof of a postmark on the Statutory Notice, as the Taxpayer has argued is required, would not be available to the Division. He noted that the postmark is not applied until the envelope is in the USPS custody. The Division's representative argued that in this case, because the Statutory Notice was sent via certified mail, there is actual proof of delivery on January 4, 2021. He stated that the facts support a finding that the Statutory Notice was mailed prior to the January 4, 2021 date, and that there was a six month gap between the time of delivery and the date that the Petition for Redetermination was filed. The Division's representative also noted that Certified Mail service only provides signature proof upon request at the time of mailing, and no signature proof was requested. He reiterated that RESPONDENT-1's declaration is that the Statutory Notice was mailed on December 29, 2020, and that should be sufficient for the Division to prevail on its motion.

ANALYSIS

³ The Taxpayer cited to Appeal No. 20-1605. Prior Commission decisions are available in redacted format online at tax.utah.gov/commission-office/decisions.

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A motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure is appropriate in this matter. There are no genuine disputes as to any material facts. The Division submitted a Motion for Summary Judgment on the issue of whether the Taxpayer timely filed a Petition for Redetermination. As explained in detail below, the Commission finds the Division is entitled to judgment as a matter of law on this issue.

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. The Statutory Notice was issued by the Division on December 29, 2020.⁴ The Taxpayer's Petition for Redetermination was not received by the Commission until June 10, 2021. This is beyond the 30-day deadline provided in Utah Code Ann. §59-1-501. Utah Administrative Code R861-1A-20 provides that a Petition for Redetermination must be received in the commission offices, or postmarked, no later than 30 days from the date of the statutory notice. This language is not discretionary, and the appeal should be dismissed absent extraordinary circumstances that interfered with Taxpayer's due process rights. In general, such extraordinary circumstances involve actions by the Tax Commission that interfered with a taxpayer's due process rights.

The Taxpayer has argued that the fact that the Statutory Notice was sent via certified mail interfered with its due process rights, in that it created an additional burden that denied the Taxpayer sufficient time to timely file a Petition for Redetermination. The Commission disagrees. There is proof that the Statutory Notice was delivered to the Taxpayer's offices on January 4, 2021. Additionally, based on the Taxpayer's statement of facts, REPRESENTATIVE-3 FOR TAXPAYER knew in November 2020 that the Statutory Notice would be forthcoming, and did not contact the Division for nearly six months to inquire after the Statutory Notice was issued. In this case, there is no evidence that the Taxpayer was not given due process, and the appeal should be dismissed.

Although the appeal is dismissed, there may be another remedy available to the Taxpayer. Utah Code Ann. §59-1-501(7) allows taxpayers who have not previously filed timely appeals to object to a final assessment by paying the tax and then filing a claim for a refund as provided in the statutes. The Tax Commission will either grant or deny the claim for a refund. If the Tax Commission denies the claim, then a taxpayer may appeal the denial by filing a petition with the commission within 30 days of the denial. *See* Utah Code Ann. §59-1-1410(9). A taxpayer's claim of refund must still meet the general

⁴ In *Dusty's, Inc. v. Auditing Div.*, 842 P.2d 868 (Utah 1992), the Utah Supreme Court determined that the date an order bears on its face is the date that the Tax Commission issues an order. The Commission applies the same reasoning to statutory notices issued by the Auditing Division.

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deadline for all claims of refunds, which is generally two years from the date of payment. *See* Utah Code Ann. §59-1-1410(8)(a)(ii). Taxpayer's Petition for Redetermination was untimely, therefore, this remedy may be available to the Taxpayer. Accordingly, if the tax is paid, the Taxpayer may still pursue administrative remedies by filing a claim for refund at any time within two years of that payment.

Jan Marshall
Administrative Law Judge

ORDER

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. Because the Taxpayer did not file a Petition for Redetermination within the thirty days provided by Utah law, the Commission hereby grants the Division's Motion for Summary Judgment and dismisses the Taxpayer's appeal. It is so ordered.

DATED this _____ day of _____, 2022.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N Fresques
Commissioner

Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied. If you disagree with this order you have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission in accordance with Utah Code Ann. §63G-4-302. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.