BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 68657
Petitioner: **5690 LLC,** v. Respondent: **DOUGLAS COUNTY BOARD OF EQUALIZATION.**	

ORDER

I. Factual Background

On May 28, 2015, Petitioner submitted an online appeal with the Douglas County Assessor's Office, protesting the value placed on Petitioner's property for tax year 2015 by the Douglas County Assessor (the "Assessor").

An online appeal confirmation form indicated that the appeal was submitted successfully. This form included the following language:

> **ASSESSOR'S DETERMINATION:** The Assessor must make a decision on your appeal and mail a Notice of Determination to you by the last regular working day of August.
>
> **APPEALING THE ASSESSOR'S DECISION:** If you are not satisfied with the Assessor's determination, or if you do not receive a Notice of Determination from the Assessor, you ***must*** file a written appeal with the County Board of Equalization on or before September 15.
>
> The appeals process is not available online; an appeal form will be included with your Notice of Determination, or you can print by going to the Assessor's homepage following the 'Forms' link.

On August 21, 2015, the Assessor's office issued a Notice of Determination on Petitioner's protest. The Notice of Determination was mailed to the address on file with the Assessor's Office: 56Ninty LLC, 5263 S. Commerce Drive, Murray UT (the "Utah Address").

According to David Wick, an officer of Petitioner, the sole owner of Petitioner (Art Pasker) was on site at the Utah Address in August 2015 and has worked at the Utah Address for more than 25 years.

On or about August 27, 2015, the Notice of Determination was returned by the United States Postal Service to the Assessor's office. Mr. Wick asserts that the Postal Service returned the Notice of Determination without delivery because the address was deemed an insufficient address for delivery when the business name was not recognized. The Postal Service included the following notation on the envelope: "Return to Sender. Insufficient Address. Unable to Forward." The Assessor's office acknowledges receiving the undelivered Notice of Determination that was returned by the Postal Service.

On or about the first week of September 2015, Brenda Davis, an employee with the Assessor's office, was asked by the Deputy Assessor to attempt to either locate a forwarding address for or contact the owners of properties for which protests were filed but whose mailed Notice of Determinations were returned to the Assessor by the United States Postal Service.

On or about the second week of September 2015, Ms. Davis contacted the owner of Petitioner regarding the address. Ms. Davis learned that Petitioner had another address: 5690 E. County Line Place, Highlands Ranch, CO 80126 (the "Highlands Ranch Address"). Pursuant to Assessor procedure, Ms. Davis told the owner of Petitioner that a request for address change must be submitted in writing before the Assessor's office would use the Highlands Ranch Address.

On September 14, 2015, Mr. Wick sent an email to Ms. Davis asking her to change the address on file for Petitioner to the Highlands Ranch Address.

On September 15, 2015, the Assessor's office mailed the Notice of Determination (including the original envelope with the Utah Address) to the Highlands Ranch Address. Mr. Wick received the Notice of Determination on September 17, 2015.

On October 1, 2015, Mr. Wick appealed the Assessor's determination by signing the "Written Petition to the County Board of Equalization" form which was on the back of the Notice of Determination and filing the form with Respondent. The form includes the following language:

> Please note that the County Board of Equalization will sit to hear appeals September 1st – November 1st, and that such appeals will be scheduled on a first come, first serve basis …
>
> You may wish to seek an administrative denial and file a higher appeal without appearing before the County Board of Equalization. If so, please check here:
> ☐ Please deny this petition. I will file a higher appeal without appearing before the CBOE.

By letter dated October 9, 2015, Respondent notified Petitioner that it had received Petitioner's request to appeal but that Respondent could not consider the appeal because it was post-marked after the September 15, 2015 deadline.

Petitioner subsequently filed a timely petition for a de novo hearing before the Board of Assessment Appeals, appealing the Assessor's August 21, 2015 decision and Respondent's October 9, 2015 decision concerning the valuation of Petitioner's property for tax year 2015.

Respondent filed a Motion to Dismiss on March 2, 2016 and an Amended Motion to Dismiss on March 28, 2016. The Amended Motion to Dismiss included the Affidavit of Ms. Davis. Petitioner filed a response to the Amended Motion to Dismiss on April 11, 2016. The Board heard arguments of the parties on the Amended Motion to Dismiss on May 18, 2016.

II. Respondent's Arguments

Respondent argues that the Board lacks jurisdiction to hear this appeal.

Respondent contends that the Board's jurisdiction under Section 39-2-125(1)(c), C.R.S. is limited to reviewing "decisions" of county boards of equalization. Respondent asserts that it did not consider Petitioner's petition because it was not timely filed, and therefore it did not render a "decision" on the petition. Respondent argues that, since it did not render a decision on the petition, the Board does not have jurisdiction under Section 39-2-125(1)(c), C.R.S.

Respondent contends that the Board's jurisdiction under Section 39-2-125(1)(e), C.R.S. is limited to hearing appeals from determinations by county assessors when a county board of equalization or county assessor "failed to respond". Respondent asserts that it responded to Petitioner's appeal by letter dated October 9, 2015. Therefore, Respondent argues, there was no "failure to respond", and the Board does not have jurisdiction under Section 39-2-125(1)(e), C.R.S.

III. Petitioner's Arguments

Petitioner argues for the opportunity to be heard on the merits of its appeal – that the Assessor's valuation of its property for tax year 2015 is too high.

Petitioner contends that it was not notified of the Assessor's decision in a timely manner through no fault of its own. Petitioner also contends that had the notice of determination been delivered by the United States Postal Service to the Utah Address (where the sole owner of Petitioner was located), it would have had adequate time to appeal to Respondent.

IV. Due Process Analysis

The Board recognizes the potential due process issues raised by Petitioner's failure to receive the notice of determination mailed by the Assessor. Due process concerns may arise if a taxpayer fails to receive a mailed notice. *Tri-Havana Limited Liability Company v. Arapahoe County Board of Equalization*, 961 P.2d 604 (Colo.App.1998), citing *Omnibank Iliff, N.A. v. Tipton*, 843 P.2d 71 (Colo.App.1992).

Procedural due process requires notice and opportunity to be heard. Notice is constitutionally adequate if it is reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them opportunity to present objection.

Mullane v. Central Hanover Bank Trust, 339 U.S. 306 (1950). The test as to whether a party is afforded procedural due process is fundamental fairness in light of total circumstances. *Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966).

Pursuant to Section 24-4-105(2), C.R.S., any person entitled to notice of a hearing shall be given timely notice of the time and place of the hearing. Unless otherwise provided by law, such notice shall be served personally or by mailing first-class mail to the last address furnished the agency by the person to be notified. A letter properly mailed is presumed received by its addressee. However, the mailing of a notice denying a taxpayer's appeal is insufficient to start the time period for the taxpayer to appeal to a higher level if the taxpayer did not receive the denial letter. *See Utah Motel Assoc. v. Denver County*, 844 P.2d 1290 (Colo.App.1992).

Here, the mailed notice of determination was not delivered to Petitioner and was returned to the Assessor's office by the U.S. Postal Service even though the sole owner for Petitioner (Art Pasker) was present at the address of record where the notice of determination was addressed. Ms. Davis from the Assessor's office spoke with Mr. Pasker after the notice of determination was returned undelivered to the Assessor's office. The Board believes that in the conversation, Mr. Pasker was only requested to provide a written change of address, and he was not told that the Assessor had denied Petitioner's appeal or that he only had a few days to file a petition with Respondent in order to preserve Petitioner's rights.

While the Board applauds the Assessor's office for reaching out to and actually speaking with Mr. Pasker when the notice of determination was returned to the Assessor's office by the Postal Service, the Board believes that, once the Assessor's office actually spoke with Mr. Pasker, fundamental fairness in this situation required a very candid explanation of the imminent deadline. The Board can easily see how a taxpayer might be confused or believe that the September 15 deadline (which was included in the online confirmation received by the taxpayer when it filed a protest with the Assessor's office) would be extended due to the fact that the mailing had been delayed. Under the circumstances presented here, the Board does not believe that it was fundamentally fair for the Assessor's office to simply re-mail the notice of determination on September 15, when it was clearly evident that it would not provide timely notice to the taxpayer.

The Board also notes that the actions taken by the Assessor's office in contacting Petitioner after the Notice of Determination was returned undelivered to the Assessor's office and then re-mailing the Notice of Determination to the Highlands Ranch Address are inconsistent with the legal argument advanced by Respondent in the motion to dismiss. In the motion to dismiss, Respondent essentially argues that the mailing of the Notice of Determination by the Assessor's office on August 21, 2015 was legally sufficient notice to Petitioner. The actions taken by the Assessor's office are contrary to this position. The actions taken by the Assessor's office indicate that it recognized that the August 21, 2015 mailing wasn't proper notice to Petitioner and that additional steps were needed to provide notice to Petitioner under the particular factual situation presented.

The Board finds that Petitioner was not provided timely notice of the Assessor's determination or the September 15 filing deadline. The Board also finds that Petitioner was not apprised of the pendency of the action or afforded with a fair opportunity to present objections

before Respondent. In light of these circumstances, the Board finds Petitioner is entitled to a de novo hearing on the merits of its appeal before the Board.

V. Analysis of Sections 39-2-125(1)(c) and (e), C.R.S.

The Board is unpersuaded that it lacks jurisdiction to hear this appeal under Section 39-2-125(1)(c), C.R.S. and under Section 39-2-125(1)(e), C.R.S.

Section 39-2-125(1)(c), C.R.S. directs the Board to "hear appeals from decisions of county boards of equalization filed not later than thirty days after the entry of any such decision." Section 39-2-125(1)(e), C.R.S. directs the Board to "hear appeals from determinations by county assessors when a county board of equalization or an assessor has failed to respond within the time provided by statute to an appeal properly filed by a taxpayer." The Board is to perform these duties "in accordance with the applicable provisions of article 4 of title 24, C.R.S."

The Board does not read Section 39-2-125(1)(c), C.R.S. as narrowly as Respondent. The Board finds that Respondent's October 9, 2015 letter to Petitioner was a decision by Respondent that could be appealed to the Board. The effect of the letter was to deny Petitioner a hearing before Respondent during the September 1, 2015 through November 1, 2015 period when Respondent was meeting to hear appeals. The Board has jurisdiction under Section 39-2-125(1)(c), C.R.S. to hear Petitioner's appeal.

In reaching the conclusion that the October 9, 2015 letter to Petitioner was a decision by Respondent that could be appealed to the Board, the Board notes that Respondent does not conduct hearings for all appeals it receives. A petitioner may simply request an "administrative denial" and appeal to the Board without appearing before Respondent. The petition form used by Respondent includes a check box allowing this process.

The Board also has jurisdiction to hear Petitioner's appeal under Section 39-2-125(1)(e), C.R.S. As explained below, the Board finds that Petitioner's appeal to Respondent was properly filed, and as such, Respondent was required by statute to set the appeal for hearing and notify Petitioner of the time for the hearing. Upon denying the appeal, Respondent was also required under Section 39-8-107(1), C.R.S. to inform Petitioner of the right to appeal within the thirty-day period following the denial and to apprise Petitioner of other information about the appeal process. Respondent failed to respond to Petitioner with this information. The Board has jurisdiction under Section 39-2-125(1)(e), C.R.S. to hear Petitioner's appeal because Respondent failed to respond to Petitioner as required by statute.

Section 39-8-106(1), C.R.S. states that the county board of equalization **shall** receive and hear petitions from any person whose objections or protests have been refused or denied by the assessor. Section 39-8-106(2), C.R.S. states that the county board of equalization **shall** note the filing of petitions, set a time for hearing petitions and notify petitioners by mail of such time for hearing.

The Board is not convinced that Petitioner should have been denied the opportunity for a hearing before Respondent. Respondent relies solely on Section 39-8-106(1)(a), C.R.S. as the basis for denying the hearing.

Section 39-8-106(1)(a), C.R.S. sets forth the contents which the property tax administrator must include in the county board of equalization petition form. In pertinent part, the statute requires the property tax administrator to include a statement in the form indicating that, "by mailing or delivering one copy of the form to the county board of equalization that is received or postmarked on or before...September 15..., the person will be deemed to have filed his or her petition for hearing with the county board of equalization." The statute also requires county boards of equalization to stamp the date received on the form, and notes that all forms are presumed to be on time unless the county board of equalization can present evidence to show otherwise.

The Board is not persuaded that Section 39-8-106(1)(a), C.R.S. imposed a September 15 deadline for Petitioner to file its appeal with Respondent under the particular facts of this case. The statute does not state that taxpayers "shall" file petitions by September 15 or they lose their right to appeal. To the contrary, the statute simply states that the petition form shall include a statement indicating that if a petition is received or postmarked on or before September 15, the taxpayer will be "deemed to have filed" his petition for hearing with the county board of equalization. The statute does not state that petitions received or postmarked after September 15 are not valid and cannot be considered by county boards of equalization, even where, as in this appeal, the taxpayer did not receive timely notice of the Assessor's determination and where the Assessor's office actually spoke with the taxpayer by telephone mere days before September 15 but did not notify the taxpayer of the assessor's decision or the need to file by September 15.

The Board notes that Section 39-8-106(3), C.R.S. specifically allows taxpayers to present objections and protests **on any day during the meeting of a county board of equalization** held for the purpose of hearing appeals if an assessor fails or refuses to comply with statutory provisions relating to notices of determinations. In such event, the failure or refusal of the assessor shall not, in any manner, deprive the objecting person of his right to a full, fair and complete hearing of his objections and protests by the county board of equalization.

The Board also notes that Colorado courts have determined the ultimate deadline for filing protests. A protest against an alleged erroneous assessment is too late when made after the board of equalization has held its meetings. *Miller v. Bd. of County Comm'rs*, 21 P.2d 714 (Colo. 1933). It is undisputed that Petitioner filed its appeal during the September 1, 2015 through November 1, 2015 period when Respondent was meeting to hear appeals.

Colorado courts have also provided guidance to assist the Board in interpreting Section 39-8-106(1)(a), C.R.S., which is ambiguous and does not clearly define a deadline for filing a petition with the county board of equalization. In interpreting a statute, the reviewing court must presume that the General Assembly intended a just and reasonable result and must seek to avoid an interpretation that leads to an absurd result. In addition, the "taxing power and taxing acts are construed strictly against the taxing authority and in favor of taxpayer". *Landmark Petroleum, Inc. v. Board of County Commissioner of the County of Mesa*, 870 P.2d 610 (Colo.App.1993), citing *Utah Motel Associates v. Denver County Board of Commissioners*, 844 P.2d 1290, 1295 (Colo.App.1992).

Strictly construing Section 39-8-106(1)(a), C.R.S. against Respondent and in favor of Petitioner, the Board concludes that the statute did not impose a mandatory September 15 deadline on Petitioner to file its appeal with Respondent under the particular facts of this appeal.

The Board finds that Petitioner's petition to Respondent was timely and properly filed and Respondent failed to respond to Petitioner's petition within the time provided by statute. The Board also finds that Respondent's October 9, 2015 letter to Petitioner was a decision that could be appealed to the Board. Accordingly, the Board has jurisdiction to hear this appeal pursuant to Sections 39-2-125(1)(c) and (e), C.R.S.

VI. Order

Respondent's Motion to Dismiss is denied. The Board orders this appeal to be set for a hearing on the merits. This Order on Respondent's Motion to Dismiss is not the Board's final appealable order. The Board's final appealable order will be issued after the hearing on the merits of Petitioner's appeal. Respondent may appeal this Order after the Board issues its final appealable order.

DATED and MAILED this 9th day of June, 2016.

BOARD OF ASSESSMENT APPEALS

Diane M. DeVries

Sondra Mercier

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Milla Lishchuk

STATE OF COLORADO SEAL BOARD OF ASSESSMENT APPEALS