

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M. FIRZAMODEEN ALLY	:	DETERMINATION
	:	DTA NO. 818869
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 Ended June 13, 2000.	:	

Petitioner, M. Firzamodeen Ally, J&N Indian Grocery, 173-23 Jamaica Avenue, Jamaica, New York 11432-5523, 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 ended June 13, 2000.

On January 17, 2002, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 14, 2002, the Division of Taxation, by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. On February 19, 2002, petitioner, appearing *pro se*, submitted a letter in response. After due consideration of the documents submitted, Jean Corigliano, Administrative Law Judge, issues the following order.

ISSUE

Whether petitioner filed a timely petition following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, M. Firzamodeen Ally, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") seeking review of a notice of sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law.

2. Following a conference, BCMS issued a Conciliation Order, dated August 10, 2001, denying petitioner's request and sustaining the statutory notice (Assessment ID number: L-018984308).

3. On December 31, 2001, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked December 29, 2001.

4. On January 17, 2002, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation ("Division"). The notice states:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on August 10, 2001 but the petition was not filed until December 29, 2001 or one hundred and forty-one days later.

Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Carl Decesare and Daniel Lafar. The affidavit of Carl Decesare, Assistant Supervisor of Tax Conferences, sets forth the Division's general procedure for

preparing conciliation orders. The affidavit of Daniel Lafar, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the U.S. Postal Service. Findings of fact "6" through "11" are taken from their affidavits.

6. All conciliation orders mailed within the United States are sent by certified mail. The Division's Data Management Services Unit prepares the final copy of each conciliation order and an accompanying cover letter. The computer-generated conciliation order and cover letter are predated with the anticipated date of mailing. From electronically pulled data, the Advanced Function Printing Unit (AFP) assigns a certified control number to each order and produces a cover sheet that contains the following information: the Division's return address, the anticipated date of mailing, the taxpayer's name and mailing address, a control number assigned by BCMS (the "CMS" number), a certified mail control number and a certified number bar code. The AFP Unit produces a computer-generated document entitled Assessments Receivable, Certified Record for Non-Presort Manual Mail ("CMR"). The CMR is a listing of taxpayers to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified NO." At the bottom of the CMR there are spaces to record the "Total Number of Pieces and Amounts Listed" and the "Total Pieces Received at Post Office."

7. The Data Management Services Unit forwards the conciliation orders and cover letters to BCMS where they are reviewed and signed by the appropriate conciliation conferee. The conferee then forwards the signed Conciliation Order and cover letter to a clerk assigned to process conciliation orders. The AFP Unit forwards the CMR and cover sheets to this same clerk.

8. The BCMS clerk associates each cover sheet provided by the AFP unit with the appropriate Conciliation Order and cover letter. The clerk verifies that the information on the cover sheet, the respective conciliation order and the cover letter are the same. All three are then folded and placed in a three-windowed envelope which allows the Division's return address, the certified mail control number, the bar code and the name and address of the taxpayer to show.

9. The CMR, along with the envelopes, are picked up in the BCMS office by an employee of the Division's Mail Processing Center. A staff member weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service ("USPS") in Albany. The postal employee affixes a postmark or his or her signature or both to the certified mail record as evidence of receipt by the USPS. The CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Mail Processing Center staff member. A BCMS clerk then notes the date of actual mailing of the items listed on the CMR in the upper right hand corner of the page.

10. Mr. Decesare states that the copy of the three-page CMR attached to his affidavit is a true and accurate copy of the original. Portions of the CMR have been redacted to protect the confidentiality of the taxpayers listed on the CMR. It contains a list of the conciliation orders allegedly issued by the Division on August 10, 2001. There are 30 certified control numbers on

this document. They do not run consecutively. Petitioner's name and address appear on page 2 with the certified mail number, 7104 1002 9739 0038 2950, appearing next to his name.

11. Each of the three pages of the CMR is date stamped August 10, 2001 by the Colonie Center branch of the U.S. Postal Service ("U.S.P.S.") in Colonie, New York. At the bottom of page three, the number "30" has been entered as the "Total Pieces and Amounts Listed." This number has been circled and the number "30" has also been entered as the "Total Pieces Received at Post Office." Initials appear next to the circled number "30."

12. In the upper left hand corner of the CMR, "Conciliation and Mediation Bureau" is shown as the originating unit.

13. Attached to Mr. Decesare's affidavit is a copy of the Conciliation Order, CMS No. 184582, dated August 10, 2001, which denied petitioner's request and sustained the statutory notice.

14. In response to the Notice of Intent to Dismiss Petition, petitioner submitted a letter addressing the merits of his claim. He did not address any issues related to the timeliness of the petition.

CONCLUSIONS OF LAW

A. A petition contesting a notice of determination of sales tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order was issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider

a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Carl Decesare and Daniel Lafar, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders like the one mailed to petitioner by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Decesare and Lafar affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appear on page two of the certified mail record which bears a USPS date stamp of August 10, 2001. There are 30 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he received 30 items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioner by certified mail on August 10, 2001.

The envelope containing petitioner's petition bears a postmark of December 29, 2001. In accordance with 20 NYCRR 3000.22(b), the Division of Tax Appeals treated this date as the date of filing of the petition. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

C. The petition of M. Firzamodeen Ally is dismissed with prejudice.

DATED: Troy, New York
March 21, 2002

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE