

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>WILLIAM D. LIABOTIS</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 821187</b>
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law and	:	
the Administrative Code of the City of New York for the	:	
Years 2001 and 2002.	:	
	:	

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Petitioner, William D. Liabotis, 322 Hicks Street, Apt. 3, Brooklyn, New York 11201, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2001 and 2002.

On October 19, 2006, 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 was not filed in a timely manner. Petitioner responded by letter dated October 30, 2006. The Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), filed its response, including affidavits and other documents in support of dismissal, to the Notice of Intent to Dismiss Petition on November 21, 2006, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted by the parties, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

## ***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the issues raised in the petition.

## ***FINDINGS OF FACT***

1. Petitioner, William D. Liabotis, filed a request for a conciliation conference dated May 6, 2005 with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-025134633-4, and pertaining to the years 2001 and 2002.

2. BCMS subsequently issued to petitioner a Conciliation Order, dated March 17, 2006, which denied petitioner’s request for redetermination of the notice of deficiency and sustained the statutory notice in its entirety.

3. Thereafter, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order, dated June 18, 2006 and received by the Division of Tax Appeals on June 26, 2006.

4. On October 19, 2006, the Petition Intake, Review and Exception 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 Conciliation Order in this matter was issued on March 17, 2006, but that the petition was not filed until June 26, 2006, or 101 days later. The notice also stated that the envelope containing the petition did not have a United States Postal Service postmark.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (“Division”) submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner’s petition and the envelope in which it was sent to the Division of Tax Appeals, a copy of the Request for

Conciliation Conference, a copy of the certified mail record (“CMR”) containing a list of the conciliation orders issued by the Division on March 17, 2006, and a copy of the Conciliation Order.

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (“USPS”) via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

7. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each Conciliation Order to be issued were electronically sent to the Division’s Advanced Function Printing Unit (“AFP Unit”). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, taxpayer’s name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produced a computer-generated CMR entitled “Certified Record for Presort Mail - BCMS Cert Letter.” The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading “Certified No.” The BCMS numbers were recorded on the CMR under the heading “Reference No.” and were preceded by three

zeros. The AFP Unit printed the CMR and cover sheets via a printer located in BCMS and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk, as part of her regular duties, associated each cover sheet, Conciliation Order, and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and Conciliation Order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

11. Pursuant to the general office practice the BCMS clerk stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas,” and also stamped “Mail Room: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit” on the last page of the CMR. In this case, the clerk stamped each page with these notices.

12. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “3/17/06” was written in the upper right corner of each page of the CMR.

13. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, was picked up in BCMS by an employee of the Division’s Mail Processing Center.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR which contained a list of the 38 conciliation orders issued by the Division on March 17, 2006. The CMR listed 38 certified control numbers and there were no deletions from the list. Each such certified control number was assigned to an item of mail listed on the four pages of the

CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

15. Information regarding the Conciliation Order issued to petitioner was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 1161 9051 was reference number 000209530, along with petitioner's name and address, which, at that time, was 9 W. 8<sup>th</sup> Street #5, New York, NY 10011-9012.<sup>1</sup> A copy of the Conciliation Order was also mailed to petitioner's representative at the conference, Marc Strohl, CPA, who did not appear on petitioner's behalf before the Division of Tax Appeals.

16. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a Conciliation Order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. Here the postal employee affixed a postmark dated March 17, 2006 to each page of the four-page CMR. The postal employee also wrote his or her initials and the number "38" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page four of the

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<sup>1</sup>This address corresponds with the address listed by petitioner on his request for conciliation conference, dated May 6, 2005, and the Nonresident Audit Questionnaire he submitted to the Audit Division on February 22, 2004. However, when petitioner submitted his petition in this matter he listed his address as 322 Hicks Street, Apt. 3, Brooklyn, NY 11201.

CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 38 pieces of mail were actually received.

18. Mr. Peltier stated that the CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

19. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on March 17, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to William D. Liabotis, 9 W. 8<sup>th</sup> Street, #5, New York, NY 10011-9012 and a piece of certified mail addressed to Mark Strohl, 14 Penn Plaza, Suite 1513, New York, NY 10122 to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 17, 2006 for the records of BCMS. Mr. Peltier asserted that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on March 17, 2006.

20. In a letter filed in response to the Notice of Intent to Dismiss Petition, petitioner and his wife allege that they were “absolutely certain that [he] mailed [his] petition Saturday, June 3, 2006.” However, petitioner submitted no evidence to support this claim.

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

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation order in this case and the underlying Notice of Deficiency would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer’s petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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 (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite*,

*Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

C. 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 orders 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, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the Conciliation Order to petitioner at his last known address (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on March 17, 2006, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR which bears a USPS date stamp of March 17, 2006. There are 38 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "38" near his or her initials, that the post office received 38 items for mailing. In short, the



Division established that it mailed the order to petitioner by certified mail on March 17, 2006 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on March 17, 2006, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the March 17, 2006 date of mailing was June 15, 2006, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until it was received on June 26, 2006, or eleven days late. As a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop, supra*).

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 have timely filed a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. 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 credible evidence that he filed his petition within the time required, i.e., by June 15, 2006. His unsworn letter, jointly signed by his wife, submitted on November 2, 2006, has little probative weight. Although he asserted that he and his wife

recalled mailing the petition on June 3, 2006, he dated his own petition June 18, 2006, three days after the due date. As between the two documents, it is noted that the unsworn letter was submitted as an argument and was unsupported by any independent evidence. The petition, however, was submitted with the knowledge that making a wilfully false representation was punishable under New York Penal Law § 210(45). Therefore, of petitioner's own submissions, the more credible petition supports the conclusion that it was not timely filed.

In addition, petitioner has failed to directly challenge the Division's proof of mailing of the Conciliation Order with any credible evidence. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

F. The petition of William D. Liabotis is dismissed.

DATED: Troy, New York  
February 8, 2007

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE