STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	ORDER
PAUL A. WILLIAMS	:	DTA No. 821220
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax Under Article 22 of the Tax Law for the Years 2001, 2002 and 2003.	:	

Petitioner, Paul A. Williams, 116 Westminster Drive, Yonkers, New York 10710-4222, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2001, 2002 and 2003.

On December 4, 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, with attached documentation, from his representative, Allen Lokensky, filed on January 5, 2007. The Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal on January 17, 2007, the date which 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 issues raised in the petition.

FINDINGS OF FACT

1. The specific issue of jurisdiction in this matter turns on whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a Conciliation Order by the Bureau of Conciliation and Mediation Services which sustained three notices of deficiency issued for the years 2001, 2002 and 2003, each dated March 14, 2005, collectively asserting additional personal income tax of $6,019.30 plus interest.

2. Petitioner filed a request for conference in the Bureau of Conciliation and Mediation Services ("BCMS") on May 18, 2005. The Conciliation Order referred to above was issued on January 27, 2006 and denied the request and sustained the statutory notices. Petitioner filed a petition with the Division of Tax Appeals on July 7, 2006.

3. On September 20, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition which informed petitioner that his petition, signed by his representative, Mr. Allen Lokensky, did not include a power of attorney for Mr. Lokensky or a legible copy of the Conciliation Order. Due to these failures, the Division of Tax Appeals proposed to dismiss the petition and gave the parties 30 days to comment. The Division of Taxation responded on September 25, 2006, agreeing that without the properly executed power of attorney and legible copy of the Conciliation Order the petition should be dismissed. Petitioner, as his response to the notice, supplied a power of attorney and legible copy of the Conciliation Order on November 10, 2006, beyond the 30-day limit provided by the notice. However, the Division of Tax Appeals granted petitioner the extra time and accepted the documents.

In a second Notice of Intent to Dismiss Petition, issued on December 4, 2006, the Division of Tax Appeals rescinded the first Notice of Intent to Dismiss Petition and notified petitioner of its intent to dismiss the petition on the basis of timeliness. It stated:

> You are hereby notified of our intent to dismiss the petition in the above-referenced matter.
>
> Pursuant to § 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 appears to have been issued on January 27, 2006 and it appears the petition was not filed until July 7, 2006 or one hundred and sixty-one days later.
>
> Pursuant to § 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 on the proposed dismissal.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation ("Division") submitted the following: affidavits of three Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel, Bruce Peltier, the Mail and Supply Supervisor in the Division's Registry Unit, and Robert Farrelly, the Assistant Supervisor of Tax Conferences of BCMS of the New York State Department of Taxation and Finance; a copy of the petition filed with the Division of Tax Appeals on July 7, 2006; a copy of the Conciliation Order issued on January 27, 2006; and a copy of the New York State Department of Taxation and Finance certified mail record for Presort Mail - BCMS Cert Letter ("CMR") containing a list of the conciliation orders issued by the Division on January 27, 2006. Although the Division's response was received beyond the 30-day limit set forth in the Notice of Intent to Dismiss Petition, it was accepted in the same spirit that petitioner's tardy response to the first Notice of Intent to Dismiss was received to preserve his appeal on November 10, 2006.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Allen Lokensky, submitted an unsworn, undated two-page statement, a letter to the Division of Tax Appeals, dated November 9, 2006, and several letters and documents concerning the background of the audit of petitioner conducted by the Division. Mr. Lokensky's documentation stated that petitioner had been selected for audit in retaliation for Mr. Lokensky's representation of another taxpayer and filing a complaint with the tax commissioner. Mr. Lokensky argued that he waited for all the cases he had pending before BCMS to be completed before filing his petition on behalf of petitioner, since he considered the cases a "group" and did not want to separate them for purposes of filing petitions, regardless of the statutory time limits. However, petitioner did not argue that the petition was filed timely within the time limits set forth in the Tax Law.

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 order and cover letter 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 mail 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 "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit" on the last page of the CMR.

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 "1/27/06" 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 7-page CMR which contained a list of the 69 conciliation orders issued by the Division on January 27, 2006. The CMR listed 70 certified control numbers with one deletion from the list. Each such certified control number was assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number was a reference 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 two of the CMR. Corresponding to certified control number 7104 1002 9730 1140 5845 was reference number 000209517, along with petitioner's name and address, which was 116 Westminster Drive, Yonkers, NY 10710-4222. This was the same address listed by petitioner on his request for a conciliation conference, i.e., his last known address. A copy of the Conciliation Order was also mailed to petitioner's representative, Allen Lokensky, by certified mail, which was referenced on the same CMR on page four as certified number 7104 1002 9730 1140 5975 and reference number 000209517.

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 January 27, 2006 to each page of the seven-page CMR. The postal employee also wrote his or her initials and the number "69" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page seven of the 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 69 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 January 27, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Paul Williams, 116 Westminster Drive, Yonkers, NY 10710-4222, and a piece of certified mail addressed to Allen Lokensky, 209 Brittany Court, Valley Cottage, NY 10989, 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 U.S. Postal Service on January 27, 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 pieces of certified mail to petitioner and their representative on January 27, 2006.

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 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 a petitioner's 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 January 27, 2006, the date appearing on the CMR, to his last known address. 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 January 27, 2006. There are 69 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "69" near his initials, that he received 69 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on January 27, 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 January 27, 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 January 27, 2006 date of mailing was April 27, 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 July 7, 2006. 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 April 27, 2006. The unsworn letter of Mr. Lokensky does not raise a valid defense to the untimely filing of the petition. Merely because he chose to wait for the completion of other cases does not excuse the failure to file the petition within the statutory time limit. Petitioner's arguments concerning the alleged "illegal" origin of the audit and his arrangement to have his cases reexamined by audit are irrelevant and immaterial to whether he filed a timely petition with the Division of Tax Appeals. Mr. Lokensky stated in his response herein that he filed petitions to "protest [sic] the interests of his clients," indicating that he was aware of the right of appeal and the statutory requirements for filing a petition with the Division of Tax Appeals. (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4].)

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

F. The petition of Paul A. Williams is dismissed.

DATED: Troy, New York
March 22, 2007

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