

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CHARLES LUKACS</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 821248</b>
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New	:	
York City Administrative Code for the Year 2001.	:	

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Petitioner, Charles Lukacs, 147-05 Sanford Avenue, Flushing, New York 11355-1259, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

On September 14, 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 October 12, 2006, petitioner's representative, Terrence P. Buckley, Esq., submitted a letter in opposition to dismissal. On November 8, 2006,<sup>1</sup> the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced November 8, 2006. After due consideration of the documents and arguments submitted, Brian L. Friedman, Administrative Law Judge, renders the following order.

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<sup>1</sup> By letter dated October 10, 2006, the Division of Taxation requested an extension to respond to the Notice of Intent to Dismiss Petition. By letter of October 16, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals granted the Division of Taxation until November 13, 2006 to respond thereto.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

***FINDINGS OF FACT***

1. Petitioner, Charles Lukacs, filed a request for a conciliation conference, dated January 31, 2005, with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Deficiency L-024693823-1 and pertaining to the year 2001. The request was received by BCMS on February 1, 2005.

2. Petitioner’s request for conciliation conference, listed the following as his address: “LUKACS-CHARLES, 147 05 SANFORD AVE., FLUSHING, NY 11355-1259.” The request further indicated that petitioner’s representative was Terrence P. Buckley, Esq., whose address was 1 Suffolk Sq., Islandia, New York 11749.

3. By a Conciliation Order (CMS No. 207619) dated April 21, 2006, BCMS denied petitioner’s request and sustained the statutory notice.

4. Petitioner, by his representative, Terrence P. Buckley, Esq., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order. The petition, dated July 20, 2006, was received by the Division of Tax Appeals on July 24, 2006. The envelope in which the petition was sent indicates that it was sent by UPS Next Day Air and the envelope further indicates that the date of shipment was “7/21/06.”

5. On September 14, 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 April 21, 2006, but that the petition was not filed until July 21, 2006, or 91 days later.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (“Division”) submitted the affidavits of its representative, John E. Matthews, Esq., along with the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner’s petition filed with the Division of Tax Appeals and the envelope in which it was mailed, petitioner’s Request for Conciliation Conference and the envelope in which it was mailed, a copy of the certified mail record (“CMR”) containing a list of the conciliation orders allegedly issued by the Division on April 21, 2006, and a copy of the subject April 21, 2006 Conciliation Order.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates 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.

8. The BCMS Data Management Services Unit prepares and forwards 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, signs and forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

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

10. The AFP Unit also produces a computer-generated CMR entitled “CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER.” The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “CERTIFIED NO.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, Conciliation Order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering 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.

12. The “Total Pieces and Amounts” is indicated on the last page of the CMR. On the last page of the CMR the BCMS clerk stamps “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas,” and also stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “04/21/06” is written in the upper right corner of each page of the CMR

14. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up in BCMS by an employee of the Division’s Mail Processing Center which is

responsible for delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

15. A piece may be “pulled” for a number of reasons including, but not limited to, a discrepancy in the name or address. A piece of mail so “pulled” will be segregated from the remaining group of orders for correction or issuance at another time. In this case, a review of the CMR indicates that one piece of mail was “pulled.” This piece is listed on page two of the CMR and a line was placed through the entry for this taxpayer by the clerk after the order was “pulled.”

16. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on April 21, 2006. This CMR lists 41 certified control numbers and as noted there is one deletion, on page 2 thereof, from the list for a total of 40 pieces. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

17. Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1177 1827 is reference/CMS number 000207619, along with the following address:

Charles Lukacs  
147-05 Sanford Avenue  
Flushing, NY 11355-1259

18. Information regarding the copy of the Conciliation Order issued to petitioner’s representative is also contained on page three of the CMR. Specifically, corresponding to

certified control number 7104 1002 9730 1177 1872 is reference/CMS number 000207619, along with following address:

Terrence Buckley  
One Suffolk Square - Suite 520  
Islandia, NY 11747

19. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a Conciliation Order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

20. In this particular instance, the postal employee affixed a postmark dated April 21, 2006 to each page of the four-page CMR. The postal employee also wrote his or her initials and wrote the number "40" next to the printed listing of the "number of pieces" of mail, 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.

21. Mr. Peltier states 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 is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered

to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

22. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on April 21, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Charles Lukacs, 147-05 Sanford Avenue, Flushing, NY 11355-1259 and a piece of certified mail to Terrence Buckley, One Suffolk Square- Suite 520, Islandia, NY 11747 to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 21, 2006 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are 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 and his representative on April 21, 2006.

23. Petitioner raises no dispute as to the Division's mailing date of April 21, 2006. The letter from his representative, in response to the Notice of Intent to Dismiss Petition, alleges that "the petition was faxed and overnighted within the 90 day period and therefore that any dismissal would not only be improper, but unjust."

### ***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, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is 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 (*id; 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, i.e., sent to the taxpayer (and his representative, if any) at 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, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id; see also, 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 subject Conciliation Order to petitioner at his last known address (*see, e.g., 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 and to his representative, by certified mail, on April 21, 2006, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the order issued to petitioner. Petitioner's name and address and that of his representative, as well as the numerical information on the face of the order, appear on the CMR which bears a USPS date stamp of April 21, 2006. There are 41 certified mail control numbers listed on the CMR and one piece of mail was "pulled," thereby leaving 40 pieces of certified mail on the CMR for April 21, 2006. The USPS employee who initialed the CMR indicated, by writing the number "40" near his initials, that he received 40 items for mailing. In short, the Division established that it mailed the order to petitioner and to his representative, by certified mail, on April 21, 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 April 21, 2006, and it is this date which triggered the 90-day period within which a protest had to have been filed (*id*). In turn, 90 days after the April 21, 2006 date of mailing of the order was July 20, 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 sent by UPS Next Day Air on July 21, 2006, or one day beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop, supra*).

E. Petitioner's representative contends that the petition was faxed and overnighted within the 90-day period within which the petition had to have been filed. With respect to the petition which was sent by UPS Next Day Air, this private delivery service is one of three private delivery services which the U.S. Secretary of the Treasury and the New York State Commissioner of Taxation and Finance have designated as qualified for the "timely postmarked is timely filed" rule (*see*, Publication 55 of the New York State Department of Taxation and Finance). This rule, in essence, states that the date on which the private delivery service records receiving the item is treated in the same way as the postmark date (*see*, 20 NYCRR 3000.22[a][1]). However, in the present matter, the only date on the UPS Next Day Air envelope containing the petition is July 21, 2006, the date on which the envelope was sent to the Division of Tax Appeals, which date is one day beyond the 90-day statutory period for the filing of the petition.

As to petitioner's contention that the petition was faxed within the 90-day period, it must first be noted that petitioner has offered no proof that the petition was faxed on or before July 20, 2006. Even assuming, *arguendo*, that the petition was, in fact, sent by fax on or before July 20, 2006, the Tribunal has held that there are no provisions in the mailing rules of the Tribunal for filing by means of facsimile transmission (*Matter of Rubo Sales Corp.*, Tax Appeals Tribunal, February 25, 1993).

F. The petition of Charles Lukacs is hereby dismissed.

DATED: Troy, New York  
January 25, 2007

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE