

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MARK FISCHER** : DETERMINATION  
 : DTA NO. 821410  
for Redetermination of Deficiencies or for Refund :  
of New York State and New York City Personal :  
Income Taxes under Article 22 of the Tax Law :  
and the Administrative Code of the City of New :  
York for the Period January 1, 2000 through :  
December 28, 2001. :  
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Petitioner, Mark Fischer, 8 Pickering Place, Dix Hills, New York 11746-5511, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the period January 1, 2000 through December 28, 2001.

The Division of Taxation, by Mark F. Volk, Esq. (Jennifer A. Murphy, Esq., of counsel), brought a motion, filed March 5, 2007, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5(b); 3000.9(b). Petitioner, appearing by Gary Schwartz, CPA, did not file a response to the motion, and thus the 90-day period for issuance of this determination commenced on April 5, 2007. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***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, Mark Fischer, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of four notices of deficiency issued against petitioner by the Division of Taxation (“Division”) numbered L-025339867 and L-025339868 (pertaining to unpaid withholding taxes due from N.Y.M.P.C.) and L-025339873 and L-025339874 (pertaining to unpaid withholding taxes due from Direct Central Monitoring, Inc.). Each of the four notices was dated May 9, 2005.

2. Petitioner’s request for conference, filed June 7, 2005, lists the following as his address:

Mark Fischer  
8 Pickering Place  
Dix Hills, NY 11746-5511

3. The power of attorney form filed with regard to petitioner’s request for conference, and appointing Gary Schwartz, CPA, as petitioner’s representative, lists the following as Mr. Schwartz’s address:

Gary Schwartz  
456 Links Drive  
East Oceanside, NY 11572

4. BCMS conducted a conciliation conference on May 3, 2006, and subsequently issued to petitioner a Conciliation Order (CMS No. 209910) dated August 4, 2006, which denied petitioner’s request and sustained the four statutory notices in question.

5. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated August 4, 2006. The petition is signed and hand-dated October 31, 2006, the envelope in which the petition was mailed bears a United States Postal Service (“USPS”) postmark dated November 7, 2006, and the petition and envelope each

bear a date stamp indicating that the petition was, in turn, received at the offices of the Division of Tax Appeals on November 9, 2006.

6. The Division filed its answer to the petition, and thereafter filed the subject motion for summary determination seeking dismissal of the petition on the ground that the petition was untimely since it had not been filed, as required, within 90 days after the issuance of the Conciliation Order. In support of its motion for summary determination, the Division submitted the affidavits of James Steven Vanderzee and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on August 4, 2006, and a copy of the subject Conciliation Order dated August 4, 2006.

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 USPS, via certified mail, and confirmation of such mailing through the 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 cover 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 of Taxation'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 "Assessments Receivable, Certified Record for Presort Mail." 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 cover 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, 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.

12. 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 "8/4/06" is written in the upper right corner of each page of the CMR.

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

15. Mr. Farrelly attested to the truth and accuracy of the copy of the seven-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on August 4, 2006. This CMR lists 68 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the seven 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.

16. Information regarding the Conciliation Order issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1342 7319 is reference/CMS number 000209910, along with the following address:

Mark Fischer  
8 Pickering Place  
Dix Hills, NY 11746-5511

17. Information regarding the Conciliation Order issued to petitioner's representative, Mr. Schwartz, is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1342 7289 is reference/CMS number 000209910, along with the following address:

Gary Schwartz  
456 Links Drive  
E. Oceanside, NY 11572

18. The affidavit of James Steven Vanderzee, Principal 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 envelopes. 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 his or her initials or signature to the CMR indicating receipt by the post office.

19. In this particular instance, the postal employee affixed the postmark of the Stuyvesant Plaza branch of the USPS in Albany, New York, dated August 4, 2006, to each page of the seven-page CMR. The postal employee also wrote his or her initials on each page of the CMR and wrote the number "68" next to the printed listing of the "total pieces received at post office," 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.

20. Mr. Vanderzee 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. Vanderzee'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.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Vanderzee states that on August 4, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Mark Fischer, 8 Pickering Place, Dix Hills, NY 11746-5511, and a piece of certified mail addressed to Gary Schwartz, 456 Links Drive, E. Oceanside, NY 11572, to a branch of the USPS in Albany, New York in a sealed envelope 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 August 4, 2006

for the records of BCMS. Mr. Vanderzee 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 pieces of certified mail to petitioner and to his representative on August 4, 2006.

22. Petitioner did not respond to this motion, nor has petitioner offered any arguments or evidence to support a claim that his petition against the notices at issue was filed within the requisite period of time, i.e., within 90 days after the issuance of the Conciliation Order.

### ***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 notices 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, and mail a copy of such order to petitioner's duly appointed representative (Mr. Schwartz), at their respective last known addresses (*see, e.g., Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of James Steven Vanderzee 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 that a copy of the order was actually mailed to petitioner's representative, by certified mail, on August 4, 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 Vanderzee and Farrelly affidavits were followed with respect to the order issued to petitioner and the copy of the order issued to petitioner's representative. Petitioner's name and address, and Mr. Schwartz'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 August 4, 2004 on each of its seven pages. There are 68 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "68" near his initials, that he received 68 items for mailing. In short, the Division established that it mailed the order to petitioner and mailed a copy of the order to petitioner's representative by certified mail on August 4, 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 August 4, 2006, and it is this date which triggered the 90-day period within which a petition had to have been filed (*Id.*). In turn, 90 days after the August 4, 2006 date of mailing of the order was November 3, 2006, and in order to be considered timely, petitioner's petition had to have been filed on or before such date. Petitioner's protest was not filed until it was mailed on November 7, 2006, or four days beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a resulting matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop, supra*).

E. The petition of Mark Fischer is hereby dismissed.<sup>1</sup>

DATED: Troy, New York  
May 31, 2007

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed tax sought by the Division via the underlying notices of deficiency and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.