

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	DETERMINATION
<b>SUSIE HALL</b>	:	DTA NO. 822286
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2003.	:	

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Petitioner, Susie Hall, 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 year 2003.

On January 27, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion were the affidavit of John E. Matthews, dated December 8, 2008, and annexed exhibits supporting the motion. On February 24, 2009, petitioner, appearing pro se, submitted documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced February 24, 2009. After due consideration of the documents submitted, Thomas C. Sacca, 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, Susie Hall, timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of a notice of deficiency numbered L028145472. The address on the request form was petitioner's address in Freeport, New York.

2. Following a conciliation conference on December 4, 2007, BCMS issued to petitioner a conciliation order (CMS No. 218711), dated January 25, 2008. The conciliation order recomputed the tax due of the notice of deficiency to \$463.15, plus interest.

3. On May 19, 2008, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation order dated January 25, 2008. More specifically, the envelope in which the petition was delivered to the Division of Tax Appeals bore a United States Postal Service (USPS) postmark dated May 16, 2008.

4. In support of the motion to dismiss the petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

5. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, for the conciliation conferee for signature, who, in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. 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).

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.

7. 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. These documents are delivered to the BCMS clerk assigned to process conciliation orders.

8. 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.

9. On each 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."

10. 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 "1/25/08" is written in the upper right corner of each page of the CMR

11. 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.

12. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on

January 25, 2008. This CMR lists 65 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the six 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.

13. There are three deletions, or pulled items, from the list of 65 computer-printed certified control numbers. These pulled items are shown on the CMR by a line drawn through the relevant certified control numbers and corresponding information. These pulled items appear on pages three and four of the CMR and are unrelated to the conciliation order at issue in this matter. Consistent with these deletions, the computer-printed "total pieces" entry of "65" on page six of the CMR has been crossed out and "62" has been handwritten in its place.

14. 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 0557 2386 is reference/CMS number 000218771, along with petitioner's name and address as it appears on her request for conciliation conference.

15. The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit 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.

16. In this particular instance, the postal employee affixed a postmark dated January 25, 2008 to each page of the six-page CMR. The postal employee also wrote his or her signature and wrote and circled the number "62" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

17. 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.

18. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on January 25, 2008, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner 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 January 25, 2008 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 on January 25, 2008.

### **CONCLUSIONS OF LAW**

A. There is a 90-day statutory time limit for filing a petition 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), the conciliation order in this case would be binding upon petitioner unless she 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 notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or 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.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices 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; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. VanDerZee, Division employees

involved in and possessing knowledge of the process of generating and issuing conciliation orders.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject conciliation order was mailed as addressed to petitioner on January 25, 2008. Specifically, this document lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated January 25, 2008. Additionally, a postal employee wrote “62” next to the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Tax Law § 170(3-a)(e) provides that a conciliation order is binding unless a petition is filed “within ninety days after the conciliation order is issued.” A conciliation order is issued when it is delivered to the custody of the USPS for mailing (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Accordingly, the 90-day period in this case began on January 25, 2008, the date of mailing of the subject conciliation order.

G. The petition was filed on May 16, 2008, the date of the USPS stamp on the envelope containing the petition. By regulation, such date is deemed to be the date of filing (20 NYCRR 3000.22[a]). The petition was thus filed more than 90 days after the issuance of the conciliation order and was therefore untimely. It is well established that the deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Hence, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. Petitioner may not be without some remedy, for she may pay the disputed tax and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).

I. The petition of Susie Hall is hereby dismissed.

DATED: Troy, New York  
April 30, 2009

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE