

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| TONYA DAKARI | : | ORDER |
| | : | DTA NO. 822520 |
| 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 2004 through 2006. | : | |

Petitioner, Tonya Dakari, 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 2004 through 2006.

On September 29, 2008, 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 17, 2008, petitioner, appearing pro se, submitted documents in opposition to dismissal. On November 13, 2008, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time, submitted documents in support of dismissal. On December 2, 2008, petitioner, having been granted leave to do so, submitted additional 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 December 2, 2008. After due consideration of the documents submitted, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of conciliation orders.

FINDINGS OF FACT

1. Petitioner, Tonya Dakari, timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency numbered L028812345, L028759843, and L028812342. Petitioner wrote her Binghamton, New York, address on the request form under the entry for any change of address.

2. Following a conciliation conference on April 21, 2008, BCMS issued to petitioner two conciliation orders (CMS Nos. 221501 and 221201), both dated June 20, 2008. The conciliation orders sustained the notices of deficiency.

3. On September 19, 2008, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation orders dated June 20, 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 September 19, 2008.

4. On September 29, 2008, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the conciliation orders in this matter were issued on June 20, 2008, but that the petition was not filed until September 19, 2008, or 91 days later.

5. In response to the issuance of the Notice of Intent to Dismiss 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).

6. 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.

7. 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.

8. 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.

9. 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.

10. 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."

11. 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 “6/20/08” is written in the upper right corner of each page of the CMR

12. 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.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on June 20, 2008. This CMR lists 49 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the five 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.

14. There are two deletions, or pulled items, from the list of 49 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 five of the CMR and are unrelated to the conciliation orders at issue in this matter. Consistent with these deletions, the computer-printed “total pieces” entry of “49” on page five of the CMR has been crossed out and “47” has been handwritten in its place.

15. Information regarding the conciliation orders issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control numbers 7104 1002 9730 0760 3934 and 7104 1002 9730 0760 3941, respectively, are reference/CMS numbers 000221201 and 000221501, along with petitioner’s name and address as written by petitioner on her requests for conciliation conference.

16. 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.

17. In this particular instance, the postal employee affixed a postmark dated June 20, 2008 to each page of the five-page CMR. The postal employee also wrote his or her signature and wrote and circled the number "47" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

18. 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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on June 20, 2008, an employee of the Mail Processing Center delivered two pieces of certified mail addressed to petitioner to a branch of the USPS in

Albany, New York in sealed 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 June 20, 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 June 20, 2008.

20. The covering letter which accompanied the conciliation orders at issue in this matter advised petitioner that the orders would be binding unless petitioner filed a petition within 90 days of the date of the order with the Division of Tax Appeals.

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 orders 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 orders were mailed as addressed to petitioner on June 20, 2008. Specifically, this document lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated June 20, 2008. Additionally, a postal employee wrote “47” 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. In her papers filed in response to the notice of intent to dismiss, petitioner acknowledges receipt of the conciliation orders on June 23, 2008 and contends that the 90-day period for the filing of a petition should commence upon such receipt. This contention is without

merit. 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 June 20, 2008, the date of mailing of the subject conciliation orders.

Petitioner also takes issue with the date of mailing of her petition, claiming that the petition was mailed on September 18, 2008. This assertion is also without merit. The USPS stamp on the envelope containing the petition is dated September 19, 2008 (*see* Finding of Fact 3). By regulation, such date is deemed to be the date of filing regardless of when the envelope was deposited in the mail (20 NYCRR 3000.22[a]).

The conciliation orders in this matter were thus issued on June 20, 2008 and the petition was filed on September 19, 2008. The petition was thus filed 91 days after the issuance of the conciliation orders 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, although filed only one day late, 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).

G. 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]).

H. The petition of Tonya Dakari is hereby dismissed.

DATED:Troy, New York
January 22, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE