

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSEPH SLAVIN** : ORDER  
for Redetermination of a Deficiency or for Refund of : DTA NO. 823483  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 2003 and 2004. :

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Petitioner, Joseph Slavin, 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 tax years 2003 and 2004.

On February 23, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 22, 2010, petitioner, appearing pro se, submitted a letter in opposition to dismissal with attachments, and on March 17, 2010, the Division of Taxation, by Daniel Smirlock, 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 March 25, 2010. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following order.

***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, Joseph Slavin, filed a request for a conciliation conference, dated January 20, 2009, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Deficiency L-030825613, pertaining to tax years 2003 and 2004. The request was timely received by BCMS.

2. By a Conciliation Order (CMS No. 228009) dated November 13, 2009, BCMS noted that after consideration of the evidence presented, petitioner's request was denied, and the statutory notice was sustained.

3. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order. The petition, dated February 10, 2010, was received by the Division of Tax Appeals on February 16, 2010. The envelope in which the petition was mailed indicates that it was sent by FedEx Priority Overnight Mail and reflects a mailing date of "12FEB10."

4. On February 23, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioners 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 November 13, 2009, but that it appeared the petition was not filed until February 12, 2010, or 91 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit of its representative, John E. Matthews, Esq., along with 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 dated January 20, 2009; a copy of the FedEx US Airbill No. 867112812975 dated January 20, 2009 and in-dated by BCMS on January 21, 2009; a copy of the petition filed with

the Division of Tax Appeals; a copy of the certified mail record (CMR) containing a list of the conciliation orders allegedly issued by the Division on November 13, 2009; and a copy of the subject November 13, 2009 Conciliation Order.

6. 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 receipt by BCMS of a postmarked copy of the CMR.

7. 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.

8. 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.

9. 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 CMR and cover sheets are delivered to the BCMS clerk assigned to process conciliation orders. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet.

10. 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.”

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 “11/13/09” 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, which is responsible for delivering the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on November 13, 2009. This CMR lists 61 certified control numbers and each such certified control number is assigned to an item of mail listed on the six pages of the CMR.

14. Information regarding the Conciliation Order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1686 0656 is reference/CMS number 000228009, along with petitioner’s address in Rumson, New Jersey.

15. The affidavit of James Steven VanDerZee, 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 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 November 13, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the six-page CMR. The postal employee also wrote his or her initials and wrote the number "61" 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. One item on the CMR was redacted, having been removed from the delivery and the computer generated "62" was manually changed to "61."

17. 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.

18. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on November 13, 2009, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Joseph Slavin in Rumson, New Jersey, to a branch of the USPS in Albany, New York, in a sealed postpaid 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 November 13, 2009 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 piece of certified mail to petitioner on November 13, 2009.

19. Petitioner raises no challenge to the Division's claimed mailing date of the conciliation order of November 13, 2009, but rather argues that he mailed his petition in response thereto in a timely manner on February 10, 2010. Petitioner's airbill was manually dated February 10, 2010. The services chosen on the airbill, by checkmarks, included "FedEx Priority Overnight" and "SATURDAY Delivery."

In addition, petitioner attached a New York Times article concerning an extreme snow storm in New York on February 10, 2010, and claims it continued through February 11, 2010. Petitioner requests reconsideration of the dismissal of his petition.

20. The petition filed with the Division of Tax Appeals was delivered by FedEx on February 16, 2010, bearing a tracking number of 871279821081. It bore a package sticker with a dated reference under a Saturday Priority Overnight bar code of "12 Feb10." Another sticker listed the following delivery information: "13FEB10 Attempted delivery: 09:01 Reattempt Delivery By:10:30 on 15FEB Recpt Addr: 500 FEDERAL ST RCPT NOT IN/BUSINESS CLOSED."

### ***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 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 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

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*; *Matter of Novar TV & Air Conditioner Sales & Serv.*). 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 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 by certified mail on November 13, 2009, 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 copy 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. 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 November 13, 2009. There are 61 certified mail control numbers listed on the CMR for November 13, 2009, and the USPS employee who initialed the CMR indicated, by writing the number "61" near such initials, that 61 items were received for mailing. In short, the Division established that it mailed the order to petitioner, by certified mail, on November 13, 2009 (*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 November 13, 2009, 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 November 13, 2009 date of mailing of the order was February 11, 2009, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. When using Fed Ex, the postmark date is the date on the label generated and applied by Fed Ex, even if the item has a label generated by the customer (*see* Tax Law § 691[a][2][A]; Department of Taxation and Finance Publication 55). Thus, petitioner's protest was not filed until it was sent by FedEx Saturday Priority Overnight Mail on February 12, 2009, or one day beyond the statutory period within which a timely protest had to have been filed. This is supported by a dated reference under a Saturday Priority Overnight bar code of "12 Feb10," the fact that the first attempted delivery was "13Feb10" and a notation was made to "Reattempt delivery by 10:30 on 15Feb," and "RCPT NOT IN/BUSINESS CLOSED." Even one day late precludes petitioner from having his petition heard since deadlines for filing petitions are strictly enforced (*see Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). Petitioner included as part of the record an article about a winter blizzard affecting New York City and many surrounding areas on February 10 and 11, 2010. No doubt the storm may have very well affected the ease of mailing a petition by any means. However, absent a declaration by the Governor of a State Disaster Emergency which might lead the Commissioner of Taxation and Finance to officially postpone tax filing and payment dead lines for taxpayers directly affected by such storm conditions (*see Announcement Regarding the Ice Storm, N-08-17*), such explanation, which may have contributed to the late filing of one day, does not remedy a jurisdictional defect. The Division of Tax Appeals simply lacks subject matter jurisdiction over a late-filed petition. Personal tragedy, ill health or extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990). Unfortunately, as a matter

of law, there is simply no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

E. The petition of Joseph Slavin is hereby dismissed.<sup>1</sup>

DATED: Troy, New York  
June 17, 2010

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioner is not entirely without recourse in this matter. That is, petitioner may pay the disputed tax 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 (*see Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).