

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**HOWARD FOSTER** : DETERMINATION  
**AND MAURA WALSH-FOSTER** : DTA NO. 825308  
: :  
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 2007 and 2008. :  
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Petitioners, Howard Foster and Maura Walsh-Foster, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax for the years 2007 and 2008.

On November 29, 2012, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 2, 2103, Administrative Law Judge Winifred M. Maloney issued an Order withdrawing the Notice of Intent with respect to the Conciliation Order.

On July 31, 2013, the Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Accompanying the motion was the affidavit of John E. Matthews, dated July 31, 2013 and annexed exhibits supporting the motion. On August 13, 2013, petitioners, appearing pro se, filed a letter and annexed exhibits in opposition to the motion. The Division of Taxation filed a reply to petitioners' response on August 16, 2013, which date began the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented, Winifred

M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioners timely filed their petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. In protest of Notice of Deficiency L-036550723, petitioners, Howard Foster and Maura Walsh-Foster, filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS). On their request for conciliation conference, petitioners' preprinted address was listed as a Farmingville, New York, address.

2. A conciliation conference was held on March 27, 2012. Subsequently, BCMS issued a Conciliation Order (CMS No. 249015), dated June 8, 2012, recomputing Notice of Deficiency L-036550723 to tax due of \$9,541.00, plus interest and penalty.

3. On October 15, 2012, the Division of Tax Appeals received a petition in this matter. The petition lists petitioners' address as the Farmingville, New York, address. The envelope in which the petition was mailed indicates that it was sent by United States Postal Service (USPS) Express Mail and reflects the date of mailing as "Oct 09, 12." The handwritten note, "[p]lease allow a 1 month grace period due to illness Thank you!", appears on a Post-It note affixed to the first page of the petition.

4. On November 29, 2013, the Petition Intake 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 subject petition was filed in protest of the Conciliation Order issued to petitioners on June 8, 2012, and that the petition was not filed until October 9, 2012. After further proceedings and consideration, the notice was withdrawn by an order, dated May 2, 2013, and the Division of Taxation was directed to file an answer to the petition within 75 days. Said

answer was filed July 3, 2013. This motion for summary determination was filed on July 31, 2013.

5. In support of the motion and to prove proper and timely mailing of the Conciliation Order under protest, the Division of Taxation (Division) submitted, among other documents, the following: (i) copies of petitioners' petition filed in this matter and the envelope in which it was sent to the Division of Tax Appeals; (ii) a copy of the Division's answer filed in response thereto; (iii) a copy of petitioners' Request for Conciliation Conference sent to BCMS; (iv) affidavits of Division employees Robert Farrelly and Bruce Peltier, dated July 29, 2013 and August 7, 2013, respectively; (v) a copy of the certified mail record (CMR) containing a list of conciliation orders allegedly issued by the Division on June 8, 2012; and (vi) a copy of the subject June 8, 2012 conciliation order.

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS since 2002, sets forth the Division's general procedure for preparing conciliation orders for mailing.

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 cover 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 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 zeroes. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. 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 places the cover sheet, cover letter and conciliation order into a three-windowed envelope.

11. On the last page of the CMR the BCMS clerk stamps on the bottom left corner “**MAILROOM: RETURN LISTING TO: BCMS BLDG 9 (RM 180) ATT: CONFERENCE UNIT.**” The BCMS clerk also stamps on the bottom right corner of the last page “**POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.**”

12. 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, “6-8-12” is written in the upper right corner of each page of the CMR.

13. 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.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR that contains a list of the conciliation orders issued by the Division on June 8, 2012. This CMR lists 64 computer-printed certified control numbers. There are no deletions from the list. Each 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 and the name and address of the addressee.

15. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1137 0877 is reference/CMS number 000249015, along with the names and address of petitioners, Howard Foster and Maura Walsh-Foster, Farmingville, NY 11738-2829. This was the address listed on petitioners' Request for Conciliation Conference, i.e., petitioners' last known address.

16. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently a Principal Mail and Supply Supervisor in the Division's Mail Processing Center (Center) attests to the regular procedures followed by Center 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 USPS employee affixes a postmark and his or her initials or signature to the CMR, indicating receipt by the post office. The Center further requested that the USPS either circle the number of pieces

received or indicate the number of pieces received by writing the number on the last page of the CMR.

17. In this particular instance, the postal employee affixed a postmark dated June 8, 2012 of the Colonie Center branch of the USPS to each page of the six-page CMR. On page six, the postal employee also circled and wrote the number "64" and wrote his or her initials near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

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 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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on June 8, 2012, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Howard Foster and Maura Walsh-Foster, Farmingville, New York 11738-2829, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He avers 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 8, 2012 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 pieces of certified mail to petitioners on June 8, 2012.

20. In opposition to the Division's motion for summary determination, petitioners filed a letter and attached documents. Petitioners asserted that they have been subjected to prolonged life-threatening illnesses that resulted in delays in filing the petition. They further asserted that they were told that there was a 30-day grace period to file an appeal, and the appeal was filed on the 30<sup>th</sup> day. Among the attached documents is a copy of the USPS Express Mail envelope in which petitioners' petition was sent to the Division of Tax Appeals. Petitioners maintain that the USPS postmark of October 9, 2012 on that USPS Express Mail envelope clearly shows that their petition was filed within such 30-day grace period. In their opposition papers, petitioners also addressed the merits of the petition.

#### ***CONCLUSIONS OF LAW***

A. A motion for summary determination shall be granted:

if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317-318 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac*

*Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992], *citing Zuckerman* at 562).

C. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see* Tax Law § 170[3-a][a]). A Conciliation Order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the Conciliation Order (Tax Law § 170[3-a][e]). A Conciliation Order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a Conciliation Order (*Matter of Cato*; *Matter of DeWeese*).



D. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the Conciliation Order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of conciliation orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

F. The Division has also presented sufficient documentary proof in the form of the CMR, to establish that the subject Conciliation Order was mailed as addressed to petitioners on June 8, 2012. The CMR listed certified control numbers with corresponding names and addresses and bore USPS postmarks on each page, dated June 8, 2012. Petitioners' names, address and the CMS No. appear on page four of the CMR. There are 64 certified control numbers listed on the CMR, and the USPS employee circled and wrote the number "64" on the last page of the CMR with his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has 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).

G. A conciliation 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 Western Aries*

**Construction**, Tax Appeals Tribunal, March 3, 2011). In this case, the Conciliation Order was properly mailed when it was delivered into the custody of the USPS on June 8, 2012, and it is this date which commenced the 90-day period within which the protest had to have been filed. Ninety days after the June 8, 2012 date of mailing was September 6, 2012, and in order to be considered timely petitioners' protest had to have been filed on or before such date. Petitioners' petition was not filed until it was mailed on October 9, 2012, or 33 days late. Even one day late precludes petitioners from having their petition heard since deadlines for filing petitions are strictly enforced (*see Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). Petitioners assertion of ill health 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). Petitioners' assertion that they were told there was an additional grace period in which to file their petition is meritless. 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 Lamanna*, Tax Appeals Tribunal, March 13, 2003). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Accordingly, as the petition was untimely filed, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

H. Finally, it is observed that petitioners are not entirely without recourse. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund

(Tax Law § 687[a]). If the claim for refund is disallowed, petitioners may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division of Taxation's motion for summary determination is granted and the petition of Howard Foster and Maura Walsh-Foster is dismissed.

DATED: Albany, New York  
October 31, 2013

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE