

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARY A. SKINNER	:	REVISED DETERMINATION DTA NO. 826749
	:	
for Redetermination of Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2010.	:	

Petitioner, Gary A. Skinner, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2010.

On March 6, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until May 21, 2015 to respond to the proposed dismissal. On March 18, 2015, petitioner’s representative, his sister, submitted a letter in opposition to the dismissal. On May 18, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted 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 determination commenced on May 18, 2015. After due consideration of the documents submitted, Daniel J. Ranalli, Supervising 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. On January 23, 2015, petitioner, Gary A. Skinner, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a Conciliation Order (CMS Number 261582), issued by the Bureau of Conciliation and Mediation Services (BCMS) on October 24, 2014.

2. On March 6, 2015, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates the relevant Conciliation Order was issued on October 24, 2014, but the petition was not filed until January 23, 2015, or 91 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, (i) the affidavit of Leo Gabovich, a law clerk employed by the Office of Counsel of the Division, dated May 18, 2015; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated April 20, 2015; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked October 24, 2015; (iv) an affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s mail room, dated April 22, 2015; and (v) petitioner’s Request for Conciliation Conference, received by BCMS on April 14, 2015, showing petitioner’s address as 172 Lemoyne Avenue, Rochester, New York 14612.

4. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of 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 United States Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’ receipt of a postmarked copy of the CMR.

5. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to 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 of Taxation’s Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet indicating 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. 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 using a printer located in BCMS and 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 address of taxpayers and taxpayers' representatives 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 where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

9. The "Total Pieces and Amounts" is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk 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 the pages of the CMR. In this case, "10-24-14" is written in the upper right corner of pages 1 through 3 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of October 24, 2014.

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. The Division's Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters, and conciliation orders to the USPS.

12. Mr. Farrelly attested to the truth and accuracy of the copy of the three-page CMR

relevant to this matter, which contains a list of the conciliation orders issued by the Division on October 24, 2014. This CMR lists 29 computer-printed certified control number. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number and the name and address of the addressees. There are no deletions from the list.

13. Information regarding the conciliation order issued to petitioner is contained on pages two and three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0305 7328 is reference/CMS number 000261582, along with petitioner's name and a Rochester, New York address that is identical to the address on petitioner's request for a conciliation conference. A copy of the conciliation order was also issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9730 0305 7335 is reference/CMS number 000261582, along with the name of petitioner's representative and a Rochester, New York address, both of which are identical to the name and address of petitioner's representative on petitioner's request for a conciliation conference.

14. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk in 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 place in the "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member 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 control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and either his or her initials or signature to the CMR indicating receipt by the post office.

15. In this particular instance, the postal employee affixed a postmark dated October 24, 2014 to and also wrote his or her initials on pages one through three of the CMR. The postal

employee also wrote the preprinted number “29” corresponding to the heading “Total Pieces and Amounts.” The rewriting of the Total Pieces and Amounts number was done at the Division’s specific request and is intended to indicate all 29 pieces of mail listed in the CMR were received at the post office.

16. Mr. Peltier’s affidavit states 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. 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.

17. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto, and the CMR, Mr. Peltier avers on October 24, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at petitioner’s Rochester, New York, address, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail; he also avers that on October 24, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner’s representative at the representative’s Rochester, New York, address, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on October 24, 2014 for the records of BCMS. Mr Peltier asserts 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 these procedures were followed in mailing the piece of certified mail to petitioner and petitioner’s representative on October 24, 2014.

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]). This deadline is strictly enforced and protests filed even one day late are considered untimely (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). 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). Accordingly, a conciliation order is binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Thus, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where, as here, the timeliness of a request for a conciliation conference is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing of the conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by either 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 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 CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process generating and issuing conciliation orders, establish the Division's standard mailing procedure. Additionally, 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). The Division has thus established the conciliation order at issue was mailed as addressed to petitioner and petitioner's representative on October 24, 2014.

E. The address to which the conciliation order was mailed is the address designated by petitioner on his request for conciliation conference. At no time did petitioner provide BCMS with notice of any new or alternative address. This same address appears on the petition filed by petitioner in this matter. The order was thus properly addressed and petitioner does not dispute the conciliation order was mailed to the proper address.

F. The 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing of the conciliation order, October 24, 2014. The petition in this matter having been filed on January 23, 2015, or 91 days after the issuance of the order, was therefore untimely. As noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

G. The petition of Gary A. Skinner is hereby dismissed.

DATED: Albany, New York
June 30, 2015

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE