

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RONALD MUTAI** : DETERMINATION  
 : DTA NO. 828180  
for Redetermination of a Deficiency or for Refund of New :  
York State Personal Income Taxes Under Article 22 of the :  
Tax Law for the Year 2012. :

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Petitioner, Ronald Mutai, filed a petition for redetermination of a deficiency or for refund of New York State personal income taxes under article 22 of the Tax Law for the year 2012.

On May 25, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that the petition did not appear to be timely filed. By request of the Division of Taxation, the 30-day period to respond to the notice of intent to dismiss petition was extended to August 10, 2017. On July 20, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. On August 7, 2017, petitioner submitted a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on August 10, 2017. After due consideration of the documents and arguments submitted, Donna M. Gardiner, 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, Ronald Mutai, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on or about April 25, 2016. The request was in response to a notice of deficiency issued by the Division of Taxation (Division) assessing additional income taxes due against petitioner for the tax year 2012.

2. BCMS issued to petitioner a conciliation order, CMS No. 270256, dated September 23, 2016, sustaining the notice of deficiency.

3. On April 26, 2017, petitioner filed a petition with the Division of Tax Appeals protesting the conciliation order.

4. On May 25, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the conciliation order was issued on September 23, 2016, but that the petition was not filed until April 26, 2017, or 215 days later.

5. In response to the issuance of the notice of intent, the Division submitted the affidavits of Robert Farrelly, dated June 29, 2017, and Fred Ramundo, dated June 30, 2017, both employees of the Division. The Division also submitted a copy of the notice of deficiency issued to petitioner, a copy of a request for conciliation conference filed by petitioner, a copy of the conciliation order issued to petitioner and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on September 23, 2016.

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

procedure culminated in the mailing of the conciliation order by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail or CMR.

7. The BCMS Data Management Services Unit prepared and forwarded 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, signed and forwarded 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 were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

11. It was the general office practice that the BCMS clerk stamps on the bottom left corner “Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the last page of the CMR.

12. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “9-23-16” was written in the upper right corner of each page of the CMR.

13. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

14. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of items being mailed, so as to allow for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

15. The CMR in this case reflects that one piece of mail was pulled from the run, and this deletion is reflected in the change to the listing for total pieces received at the post office. The specific pulled item appears on page three, and a line has been drawn through the entry on the CMR for this item to indicate that it was pulled from the run. There is no such line drawn on or near the CMR listing pertaining to petitioner. The preprinted number “40,” as appearing next to the heading “Total Pieces and Amounts,” on the last page of the CMR was crossed out and replaced with the handwritten number “39” to reflect the one piece pulled from the run.

16. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR, which contained a list of the 39 conciliation orders issued by the Division on September 23, 2016. The CMR listed 39 certified control numbers. Each such certified control number was assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number and the name and address of the addressee, and postage and fee amounts.

17. Information regarding the conciliation order issued to petitioner was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0032 7738 was reference number 000270256, along with the name and address of petitioner, Ronald Mutai, at his New York, New York, address. This was the same address listed by petitioner on his request for a conciliation conference filed with BCMS and on his petition filed with the Division of Tax Appeals.

18. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her signature to the CMR indicating receipt by the post office.

19. In this particular instance, the postal employee affixed a postmark dated September 23, 2016, to each page of the four-page CMR. The postal employee also wrote and circled the number “39” and initialed page four to indicate the total pieces of mail received at the post office.

20. Mr. Ramundo stated 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. Ramundo’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.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on September 23, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Ronald Mutai 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 September 23, 2016, for the records of the Division. Mr. Ramundo 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 September 23, 2016.

22. Petitioner responded to the notice of intent to dismiss with a letter stating that he never received the conciliation order from BCMS. Moreover, petitioner asserts that the Division failed

to prove that he received the conciliation order and, thus, his petition should be deemed timely filed.

### **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 689 (b), the conciliation order in this case and the underlying assessment 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 the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses 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 (*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 to the taxpayer's 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, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634 [3d Dept 1983] *affd* 64 NY2d 688 [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 conciliation order to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly and Fred Ramundo, 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 September 23, 2016, the date appearing on the CMR, to his last known address. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order, and the CMR was submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation 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 September 23, 2016. Thus, the Division established that it mailed the order to petitioner by certified mail on September 23, 2016 (*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 September 23, 2016, and it is this date which commenced the 90-day period within which a protest had to have been filed.

E. Petitioner asserts that he never received written notice of the conciliation order. Having determined that the Division is entitled to the presumption of receipt based upon proof of proper mailing, petitioner cannot merely assert that he did not receive the conciliation order, but he must rebut the presumption with evidence (*see Matter of Huggins*, Tax Appeals Tribunal, April 8, 1999). Petitioner did not submit any evidence on this issue and, thus, has failed to rebut the presumption of receipt (*Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. As noted previously, petitioner's petition was filed on April 26, 2017. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of the conciliation order and was, therefore, untimely (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003). As such, the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006).

G. The petition of Ronald Mutai is dismissed.

DATED: Albany, New York  
November 2, 2017

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE