

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**HANLET CABRERA** : DETERMINATION  
: DTA NO. 828566  
for Redetermination of a Deficiency or for Refund of New :  
York State Personal Income Tax Under Article 22 of the :  
Tax Law for the Year 2014. :

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Petitioner, Hanlet Cabrera, 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 year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), brought a motion dated June 14, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on July 16, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a conciliation order, bearing CMS number 274901, and dated September 15, 2017.

2. Petitioner, Hanlet Cabrera, filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of a notice of disallowance of his claimed income tax refund for the year 2014 (notice of refund denial), dated August 5, 2016. The request lists petitioner's hand-printed address as "100 Herriet Yonkers N.Y. 10701," and the envelope, in which the request was sent, lists petitioner's hand-printed address as "100 Herriet St Yonker [sic], N.Y. 10701 Apt 1D Hanlet Cabrera."

3. A conciliation conference was conducted by Daniel Abbott, Conciliation Conferee, on July 19, 2017. Subsequently, BCMS issued a conciliation order, dated September 15, 2017, denying the request and sustaining the statutory notice, i.e., the notice of refund denial. The cover letter, accompanying the conciliation order, was addressed to petitioner at the "Herriet" Street, Yonkers, New York, address.

4. In a letter, dated November 22, 2017, to Mr. Abbott, the BCMS conciliation conferee, petitioner stated that he disagreed with the conciliation order and wanted to take the matter to the Division of Tax Appeals.<sup>1</sup> In his November 22, 2017 letter, petitioner listed his address as "100 Herriet Street Apt 1D Yonkers NY 10701." On November 29, 2017, in response to his request, the Division of Tax Appeals sent a letter to petitioner, at the "Herriet" Street address, that

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<sup>1</sup> The letter was forwarded to the Division of Tax Appeals, where it was date stamped as received on November 24, 2017.

provided him with a petition form TA-100, a power of attorney form, a copy of the Tax Appeals Tribunal Rules of Practice and Procedure, and a mailing label. The letter stated, in relevant part, “IMPORTANT NOTE: Your request for forms does not constitute a filing of a petition under the Tax Law nor does it extend the time limits for filing.”

5. On January 19, 2018, the Division of Tax Appeals received a petition seeking review of the conciliation order issued in this matter. The envelope in which the petition was mailed bears a United States Postal Service (USPS) Certified Mail stamp dated January 17, 2019. The petition lists petitioner’s address as “100 Herriot St 1D (zip code 10701) Yonkers, N.Y.”

6. To show proof of proper mailing of the conciliation order, the Division provided the following with its motion papers: (i) an affidavit, dated April 19, 2018, of Heidi Corina, a Legal Assistant 2 in the Office of Counsel for the Division; (ii) a Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS response to such request dated February 27, 2018; (iii) an affidavit, dated April 26, 2018, of Robert Farrelly, the Supervisor of Tax Conferences of BCMS; (iv) a copy of a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) containing a list of conciliation orders issued by the Division on September 15, 2017; (v) an affidavit, dated April 30, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (vi) a copy of the petition filed with the Division of Tax Appeals on January 17, 2018 and a copy of the envelope in which the petition was mailed; (vii) a copy of petitioner’s request for conciliation conference, received by BCMS on April 24, 2017, and a copy of the envelope in which the request was mailed; (viii) a copy of the conciliation order and cover sheet, dated September 15, 2017, and a copy of the three-windowed mailing envelope; and (ix) a copy of petitioner’s November 22, 2017 letter to BCMS, and a copy of the Division of Tax Appeals’ November 29, 2017 response to said letter.

7. 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 culminates in the mailing of conciliation orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. 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 orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

9. 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." 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 AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk's regular duties include associating 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. It is the general office practice that the BCMS clerk stamps “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas” on the last page of the CMR and also stamps “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on each page of the CMR.

13. 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 “9-15-17” was written in the upper right corner of each page of the CMR.

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

15. 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.

16. 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 item specifically pulled appears on page two, and a line has been drawn through the entry on the CMR for that item to indicate that it was pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number “16,” 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 and circled number "15" to reflect the piece pulled from the run.

17. Mr. Farrelly attests to the truth and accuracy of the copy of the two-page CMR, which contains a list of the conciliation orders issued by BCMS on September 15, 2017. The CMR lists 15 certified control numbers. Each such certified control number is assigned to an item of mail listed on the two pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee, and postage and fee amounts. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

18. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0165 0293 is reference number 000274901, along with the name and address of petitioner, "HANLET CABRERA 100 HERRIET STREET, APT 1D YONKERS NY 10701." This was the same address listed by petitioner on his request for conciliation conference and his November 22, 2017 letter to the BCMS conciliation conferee. The cover sheet bears petitioner's name and the same "Herriet" Street, Yonkers, New York, address that appears on the CMR and shows the same certified control number 7104 1002 9730 0165 0293, as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

19. 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 is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. 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 signature to the CMR indicating receipt by the post office.

20. In this particular instance, the postal employee affixed a barely legible postmark dated September 15, 2017, to each page of the two-page CMR. The postal employee also wrote and circled the number “15” and wrote his or her initials on the first page of the CMR. In addition, the postal employee wrote the number “15” on page two of the CMR for the purpose of indicating that “15” total pieces of mail were received at the post office.

21. 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.

22. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on September 15, 2017, an employee of the Mail Processing Center delivered a piece of certified mail addressed to “Hanlet Cabrera, 100 Herriet Street, Apt 1D, Yonkers, NY 10701,” 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 September 15, 2017, 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 this piece of certified mail to petitioner on September 15, 2017.

23. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0165 0293 on September 15, 2017, from the Stuyvesant Plaza, Albany, New York, branch of the USPS to petitioner at 100 Herriet Street Apt 1D, Yonkers, NY 10701. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0165 0293 on September 19, 2017 at 2:08 p.m. in Yonkers, New York 10701. The scanned image of the recipient's signature as shown on the USPS response is illegible. The scanned address of the recipient is only partially legible, indicating the same number ("100"), and first letter of the street name ("H"), as contained in petitioner's address.

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

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a)



of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may be granted:

“if, upon all the 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]).

Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As the Tribunal noted in *Matter of United Water New York*:

“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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or for summary judgment, the opponent must 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, 449 [1st Dept 1992], *quoting Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. Petitioner did not respond to the Division’s motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Corina, Farrelly and Ramundo affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden* at 544; *Whelan v GTE Sylvania*).

C. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

D. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax

Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, 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 bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. 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 the particular instance (*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 Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Ramundo, Division employees

involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders.

G. The Division failed to present sufficient documentary proof, i.e., the CMR, to establish that the conciliation order was mailed as addressed to petitioner on September 15, 2017. Specifically, this document does not contain legible USPS postmarks on each page, indicating the mailing date of September 15, 2017, despite the fact that both the Ramundo and Farrelly affidavits assert that a postmark was affixed to each page.<sup>2</sup> Rather, on all of the pages, a barely legible postmark dated September 15, 2017 was stamped. It is noted that no legible USPS postmarks appeared on any page of the CMR, including the last page, page two, which set forth and verified vital information: the total number of pieces being mailed on the date contained in the USPS postmark. In addition, although the postal employee handwrote the number “15” on the last page of the CMR, the postal employee’s initials or signature do not appear on that page.

In sum, the CMR was not properly completed and does not constitute adequate documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. Where proper mailing cannot be proved, demonstration of receipt of the conciliation order by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). The affidavit of Heidi Corina, the Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the response of the

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<sup>2</sup> USPS Domestic Mail Manual § 503[5.1.1] provides that each individual firm sheet (form 3877) is postmarked (round-dated) at the time of mailing; and the form(s) are then returned to the mailer and become the mailer’s receipt, i.e., certificate of mailing. A “local” postmark shows the full name of the Post Office, a two-letter state abbreviation, “ZIP CODE,<sup>TM</sup>” and date of mailing (*see* USPS Handbook PO-408[1-1.3]).

USPS indicate that the conciliation order was received by petitioner on September 19, 2017 at the “Herriet” Street, Yonkers, New York, address. It is noted that petitioner listed the “Herriet” Street, Yonkers, New York, address in his request for conciliation conference and in his November 22, 2017 correspondence to BCMS, but listed a “Herriot” Street, Yonkers, New York, address in his petition. Petitioner has not alleged that the “Herriet” Street, Yonkers, New York, address was inaccurate.<sup>3</sup> Nor has he contended nonreceipt of the conciliation order. In fact, petitioner did not respond to the Division’s motion. Therefore, running the statute of limitations from receipt of the conciliation order on September 19, 2017, the 90-day period ends on December 18, 2017.

I. The subject petition was mailed on January 17, 2018. This date falls after the 90-day period of limitations for the filing of such petition. As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

J. As noted above, the Division brought the present matter as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). The standard of review for both such motions is the same (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). As discussed above, the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition and the Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (20 NYCRR 3000.9 [a] [ii]). Since the petition was filed on January 17, 2018, or more than 90 days after the September 19, 2017 date of receipt of the conciliation order, the

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<sup>3</sup> It is unclear what the correct spelling of petitioner’s street name is. The inconsistency in the spelling of petitioner’s street name was merely an error and is adjudged inconsequential. (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994.)

petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Accordingly, the Division's motion to dismiss is granted, and the motion for summary determination is thereby rendered moot (*Matter of Urrego; Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

K. The Division of Taxation's motion to dismiss is granted and the petition of Hanlet Cabrera is hereby dismissed.

DATED: Albany, New York  
October 11, 2018

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE