

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JASON MAKARIADES	:	DETERMINATION
	:	DTA NO. 828858
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and the New York City Administrative Code	:	
for the Year 2013.	:	

Petitioner, Jason Makariades, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2013.

On November 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The parties were given until February 14, 2019 to respond to said notice. On January 8, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by February 14, 2019, which date triggered the 90-day deadline for issuance of this determination. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. On April 9, 2018, petitioner's then-representative, Dominick Dimino, filed a request for conciliation conference with the Division of Taxation's (Division's) Bureau of Conciliation and

Mediation Services (BCMS) in protest of a notice of deficiency (notice), issued on November 20, 2017.¹

2. On April 27, 2018, BCMS issued a conciliation order, CMS number 000302401, to petitioner and his then-representative dismissing his request for a conciliation conference as the request was not timely filed.²

3. Petitioner, Jason Makariades, filed a petition that was received by the Division of Tax Appeals on August 17, 2018. The envelope containing the petition bears a United States Postal Service (USPS) label, indicating the petition was mailed on August 15, 2018.

4. On November 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition was filed in excess of 90 days after issuance of the conciliation order, the petition was not timely filed.

5. To show proof of proper mailing of the conciliation order dated April 27, 2018, the Division submitted, among other documents: (i) the affidavit, dated January 8, 2019, of Christopher O'Brien, an attorney employed in the Office of Counsel of the Division; (ii) an affidavit, dated December 27, 2018, of Robert Farrelly, Supervisor of Tax Conferences of BCMS; (iii) a "Certified Record for Manual Mail - CMS-37 - BCMS Order" (CMR) postmarked April 27, 2018; (iv) a copy of the conciliation order, cover letter and cover sheet, dated April 27, 2018; (v) an affidavit, dated January 7, 2019, of Fred Ramundo, a supervisor in the Division's

¹ While Mr. Dimino represented petitioner, Jason Makariades, at BCMS, petitioner is appearing pro se before the Division of Tax Appeals.

² Both the cover letter signed by Daniel Abbott, a conciliation conferee from BCMS, and the mailing cover sheet contain a typographical error in the last name of petitioner's then-representative. Both documents identifying petitioner's then-representative as Dominick Cimino, rather than Dominick Dimino.

mail room; (vi) an affidavit, dated January 8, 2019, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the USPS for delivery information; and (vii) two postal service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) pertaining to petitioner and his then-representative and the USPS response to such requests dated December 20, 2018.

6. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the conciliation orders by 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 orders and cover letters 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 (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 Manual Mail." The CMR is a listing of taxpayers 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 (000). 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.

10. 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.

11. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

12. 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, "4/27/18" 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 are picked up from BCMS by an employee of the Division's Mail Processing Center.

14. Mr. Farrelly attests to the truth and accuracy of the copy of the three-page CMR, which contains a list of the conciliation orders issued by the Division on April 27, 2018. The CMR lists 26 certified control numbers. 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 or CMS number, and the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, the CMR indicates that a conciliation order with a certified control number 7104 1002 9735 4213 0407 and reference or CMS number 000302401, was mailed to petitioner at the New York, New York, address listed on the conciliation order cover letter. The corresponding mailing cover sheet, attached to the Farrelly affidavit as exhibit "D," bears this certified control number and petitioner's name and address as noted.

16. Page one of the CMR also indicates that a conciliation order with a certified control number 7104 1002 9735 4213 0353 and reference or CMS number 000302401 was mailed to petitioner's then-representative, Mr. Dimino at the New York, New York, address listed on the conciliation order cover letter. The corresponding mailing cover sheet, attached to the Farrelly affidavit as exhibit "D," bears this certified control number and petitioner's then representative's name and address as noted.

17. 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 control 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.

18. In this particular instance, the postal employee affixed a postmark dated April 27, 2018, to each page of the three-page CMR. The postal employee circled the typed number “26” corresponding to the hearing “Total Pieces and Amounts” to indicate the total pieces of mail received at the post office and initialed each page of the CMR.

19. 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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on April 27, 2018, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his New York, New York, address, and his then-representative at his New York, 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 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 April 27, 2018, for the records of BCMS. 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 April 27, 2018.

21. The affidavit of Heidi Corina describes the Division’s requests to the USPS for delivery information. Specifically, using two separate PS form 3811-A, the Division requested

delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9735 4213 0407 and 7104 1002 9735 4213 0353. The USPS response to the first request indicates that the article bearing the certified control number 7104 1002 9735 4213 0407 that was addressed to petitioner was delivered at 6:41 p.m. on April 30, 2018, in New York, New York 10011. The USPS response to the second request indicates that the article bearing the certified control number 7104 1002 9735 4213 0353 that was addressed to petitioner's then-representative was delivered at 1:42 p.m. on April 30, 2018, in New York, New York 10018. Attached to the Corina affidavit as exhibit "A" are the Division's "Requests for Delivery Information" for article numbers 7104 1002 9735 4213 0407 and 7104 1002 9735 4213 0353. Exhibit "B" to the Corina affidavit are the USPS responses to each of the Division's requests indicating delivery of the same articles on April 30, 2018.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. 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]).

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.*).

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 in question (*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 met its burden of establishing proper mailing of the conciliation order. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue, along with the cover sheet, and cover letter were actually mailed to petitioner by certified mail on April 27, 2018, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR 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 April 27, 2018. There are 26 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "26," that the post office received 26 items for mailing. In short, the Division established that it mailed the order by certified mail on April 27, 2018 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

G. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals

Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]). Here the evidence demonstrated that the conciliation order was sent by certified mail to Mr. Dimino, petitioner's then-representative, at his last known address on April 27, 2018, thus fulfilling the case law requirement for doing so.

H. In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 27, 2018, properly addressed to petitioner at his last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which a protest had to be filed. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer. Specifically, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed "within ninety days after the conciliation order is issued." As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*).³

I. In sum, the Division has established that the conciliation order was properly mailed as addressed to petitioner at his last known address and his then-representative at his last known address on April 27, 2018. Having established that the conciliation order was properly mailed to petitioner and his then-representative, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until August 15, 2018, a date that falls more than 90 days after the issuance of the conciliation order.

³ It should also be noted that the Division, through the affidavit of Heidi Corina, also established delivery of the April 27, 2018 conciliation order.

Accordingly, the petition is untimely and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. The petition of Jason Makariades is dismissed.

DATED: Albany, New York
April 25, 2019

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE