

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JORGE E. TIRSE	:	DETERMINATION DTA NO. 828879
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 2013.	:	

Petitioner, Jorge E. Tirse, 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 2013.

On March 8, 2019, 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 basis that the petition did not appear to be timely filed. The 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to May 23, 2019. On April 11, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), submitted documents in support of dismissal. On May 22, 2019, petitioner, appearing pro se, 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 May 23, 2019. After due consideration of the documents and arguments submitted, Jessica DiFiore, 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 December 7, 2017, the Bureau of Conciliation and Mediation Services (BCMS) received petitioner's request for conciliation conference dated December 5, 2017. Petitioner's address as printed on his request was 53 Park Street, Gloversville, New York 12078. This was petitioner's last known address at all relevant times.

2. In response to his request, BCMS issued to petitioner conciliation order, CMS number 300698, dated June 8, 2018, sustaining the notice.

3. On September 7, 2018, petitioner filed a petition with the Division of Tax Appeals protesting the conciliation order. In an attachment to the petition, petitioner submitted a statement asserting that on July 13th, he received a letter dated June 8th. He did not state of what year, however, but noted that he attached the envelope as proof of why his appeal was late. Petitioner attached a copy of the front of an envelope that was sent to him by certified mail, with a postmark date of June 8, 2018, and a stamp of receipt by BCMS dated July 9, 2018. The front of the copy of the envelope also read "Return to sender no such number unable to forward," with a date of June 27, 2018.

4. On March 8, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent) on the basis that the petition did not appear to have been timely filed. The notice of intent indicated that the conciliation order was issued on June 8, 2018, but that the petition was not filed until September 7, 2018, or 91 days later.

5. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Robert Farrelly, dated April 5, 2019, and Fred Ramundo, dated April

8, 2019, both employees of the Division. The Division also submitted a copy of the request for conciliation conference filed by petitioner, a copy of the conciliation order and cover sheet issued to petitioner, and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on June 8, 2018.

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 culminates in the mailing of conciliation orders 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 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 the conference supervisor for final approval.

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, the 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." 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, cover sheets and

cover letters to a printer located in BCMS, and these documents, along with the conciliation orders, 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. 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 last page 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 each page of the CMR. In this case "6-8-18" 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 attested to the truth and accuracy of the copy of the three-page CMR, which contains a list of the conciliation orders issued by BCMS on June 8, 2018. The CMR lists 25 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 number and the name and address of the addressee.

15. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9735 4304 0712 is reference number 000300698, along with the name and then-last known address of petitioner. Specifically, the 53 Park Street, Gloversville, New York, address listed on the CMR is the same address for petitioner as he listed on his request for a conciliation conference that he filed with BCMS.

16. Fred Ramundo has been a supervisor in the Division's mail room since December of 2013, and he is currently a Stores and Mail Operations Supervisor. Mr. Ramundo 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.

17. In this particular instance, the postal employee affixed a postmark dated June 8, 2018, to each page of the three-page CMR. The postal employee also wrote and circled the number "25" and initialed page three to indicate the total pieces of mail received at the post office.

18. 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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto, and the CMR, Mr. Ramundo stated that on June 8, 2018, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner at his Gloversville, New York address, to a branch of the USPS in Albany, New York, in a sealed, postpaid envelope for delivery by certified mail. He stated 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, 2018, for the records of BCMS. Mr. Ramundo asserted 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 June 8, 2018.

20. In his response to the notice of intent to dismiss petition, petitioner submitted a letter dated May 19, 2019, claiming, in pertinent part, that two days before he mailed his petition, he called the Division of Tax Appeals asking for an extension because he was going to be late in submitting his petition. Petitioner asserted he was told to send the petition anyway.

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 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 (*see* 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 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*). 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 was actually mailed to petitioner by certified mail on June 8, 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 June 8, 2018. There are 25 certified mail control numbers listed on

the CMR, and the USPS employee who initialed the CMR indicated, by circling the number “25,” that the post office received 25 items for mailing. In short, the Division established that it mailed the orders by certified mail on June 8, 2018 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the order was properly mailed when it was delivered into the custody of the USPS on June 8, 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. In fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. 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*). Hence, notwithstanding that the conciliation order issued to petitioner was returned to the Division (*see* finding of fact 3), the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, i.e., on June 8, 2018 (*see Matter of Dean*).

H. Petitioner asserts that he called the Division of Tax Appeals two days before he submitted his petition requesting an extension of time to file it because it was going to be late and that the Division of Tax Appeals told him to send the petition anyway. It is well established that the deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). 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). 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). 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). Accordingly, petitioner's request for an extension does not empower the Division of Tax Appeals to waive the 90-day time period for filing a petition and petitioner's appeal is untimely.

I. In sum, the Division has established that the conciliation order was properly mailed as addressed to petitioner at his last known address on June 8, 2018. Since the petition was filed on September 7, 2018, or more than 90 days after the June 8, 2018 date of issuance of the conciliation order, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*).

J. The petition of Jorge E. Tirse is dismissed.

DATED: Albany, New York
August 15, 2019

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE