

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DEV CONVENIENCE CORPORATION	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 828990
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 2013 through February 29, 2016.	:	

Petitioner, Dev Convenience Corporation, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2013 through February 29, 2016.

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). The parties were given until May 23, 2019 to respond to said notice. On March 25, 2019, petitioner, through its president, Naresh Patel, submitted a letter in opposition to dismissal. On May 14, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel) 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 began on May 23, 2019. After due consideration of the documents submitted, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner was subject to a sales and use tax audit for the period June 1, 2013 through February 29, 2016. Following the audit, petitioner was issued notice of determination L-045726589, dated December 12, 2016, assessing sales and use taxes of \$84,125.57, plus penalty and interest.

2. Petitioner filed a request, dated January 11, 2017, for a conciliation conference regarding the notice of determination with the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS). As a result, a conciliation conference was held on May 3, 2017.

3. On April 6, 2018, BCMS issued a conciliation order, CMS number 273245, to petitioner denying its request and sustaining notice of determination number L-045726589.

4. On November 21, 2018, petitioner, through its president, Naresh Patel, filed a petition with the Division of Tax Appeals by United States Postal Service (USPS). The USPS postage-paid priority mail express label on the envelope containing the petition is dated November 21, 2018. The petition was received by the Division of Tax Appeals on November 26, 2018. In its petition, petitioner asserts that the BCMS conciliation order "was not received by the taxpayer."

5. On March 8, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition. The notice of intent to dismiss petition provided that the petition appeared to have been

filed more than 90 days after the issuance of the conciliation order, therefore, the petition was not timely filed.

6. To show proof of proper mailing of the conciliation order dated April 6, 2018, the Division submitted, among other documents: (i) the affirmation of Brian D. Evans, an attorney employed in the Office of Counsel of the Division, dated May 13, 2019; (ii) an affidavit of Heidi Corina, Legal Assistant 2 of the Office of Counsel of the Division, dated April 12, 2019; (iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated April 29, 2019; (iv) a "CERTIFIED RECORD FOR MANUAL MAIL" (CMR) postmarked April 6, 2018; (v) a copy of: the petition; petitioner's power of attorney form (POA-1) executed April 19, 2016; the conciliation order; two cover letters dated April 6, 2018; two cover sheets; the request for conciliation conference; and the three-windowed mailing envelope used to mail the order; (vi) an affidavit of Fred Ramundo, a supervisor in the Division's mail room, dated April 29, 2019; and (vii) a copy of petitioner's New York State sales and use tax return covering the period December 1, 2017 through February 28, 2018, filed by petitioner's president, Naresh Patel, on March 21, 2018.

7. 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.

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 (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.

10. 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 (000). The AFP Unit prints the CMR, cover sheets, and cover letters using 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. 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 "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner 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 the pages of the CMR. In this case, the date "4-6-18" 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. 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 6, 2018. The CMR lists 22 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. The CMR is maintained by BCMS in the regular course of business.

16. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 4184 0376 is reference or CMS number 000273245, along with the name and last known address of petitioner. Specifically, the 2419 S Salina St, Syracuse, New York 13205 address listed on the CMR is the same address to which the notice of determination was issued, the address provided on the December 1, 2017 through February 28, 2018 sales tax return filed by petitioner, and the return address provided on the USPS postage-paid priority mail express envelope in which the petition was mailed to the Division of Tax Appeals.

17. Information regarding the conciliation order issued to petitioner's power of attorney is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 4184 0437 is reference or CMS number 000273245, along with the name and address

of petitioner's power of attorney. Specifically, the CMR indicates the BCMS order was mailed to Mark C. Peters, Peters and Associates CPAs, 731 James St., Suite 400, Syracuse, NY 13203.

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 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 sealed and 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.

19. In this particular instance, the postal employee affixed a postmark dated April 6, 2018, and initialed each page of the three-page CMR. The postal employee circled the typed number "22" corresponding to the heading "Total Pieces and Amounts" to indicate the number of pieces of mail received.

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.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on April 6, 2018, an employee of the Mail Processing

Center delivered 22 items of certified mail to a branch of the USPS in Albany, New York. One item mailed was a prepaid certified mailing to petitioner at its 2419 S Salina St, Syracuse, New York 13205 address, and another item mailed was a prepaid certified mailing to Mark C. Peters, Peters and Associates CPAs, 731 James St., Suite 400, Syracuse, NY 13203.

22. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, attested to the fact that she has been in that position since April of 2005. The affidavit also attested to the fact that as part of her regular duties, Ms. Corina prepares, or requests someone to prepare, USPS form 3811-A (request for delivery information/return receipt), and that she prepared and filed two USPS forms 3811-A for the case at hand. In response to the filing of the subject USPS forms 3811-A, Ms. Corina attested that the USPS sent back two responses. Ms. Corina provided the USPS responses as exhibits to her affidavit. The first response from the USPS shows that the article with certified control number 7104 1002 9735 4184 0376 was delivered by the USPS and accepted by the recipient on April 9, 2018 at 9:34 a.m. to an address in Syracuse, NY with a zip code of 13205. The person's name signing receipt for the USPS envelope is illegible cursive, however the address for receipt is signed as "2419 S Salina St." The second response from the USPS shows that the article with certified control number 7104 1002 9735 4184 0437 was delivered by the USPS and accepted by the recipient on April 11, 2018 at 11:57 a.m. to an address in Syracuse, NY with a zip code of 13203. The person's name signing receipt for the USPS mail envelope is illegible cursive, and the address for receipt is signed as "731 Jam [illegible] 400."

23. In his response to the notice of intent to dismiss petition, petitioner submitted a letter dated March 25, 2019 claiming, for the first time in pertinent part, that the BCMS conciliation

order was not received by petitioner's "representative, Matthew Hill." The petition does not assert that the petitioner's representative did not receive the BCMS conciliation order.

24. The request for conciliation conference filed out by petitioner lists its representative as: "Matthew Hill, Peters & Associates CPAs -see POA-." On the request for a conciliation conference form, the address provided for the representative is 731 James Street, Suite 400, Syracuse, NY 13203. A power of attorney form does not appear to have been attached to the conciliation conference request form filed by petitioner. However, the petition included a copy of a power of attorney form (form POA-1) executed by the petitioner on April 19, 2016 that appears to be the power of attorney form the petitioner had on file with the Division at the time it filed a BCMS conciliation conference request. The POA-1 form filled out by petitioner provided two individuals with power of attorney for petitioner. The first representative listed on the power of attorney form was Mark C. Peters, and the second representative listed on the form was Matthew G. Hill. Both representatives worked for Peters and Associates, CPAs. On the power of attorney form, both representatives had the same address of 731 James St., Suite 400, Syracuse, NY 13203.

25. Section 5 of the April 19, 2016 power of attorney form (form POA-1) filed by petitioner notes under the bold heading "Notices and certain other communications":

"In those instances where statutory notices and certain other communications involving the tax matter(s) listed on page 1 [of the form] are sent to a representative, these documents will be sent to the first representative named in [the section the representatives are listed on the form]. If you **do not** want notices and certain other communications sent to the first representative, enter the name of the representative designated [earlier on the form, or on another effective power of attorney form] that you want to receive notices, etc. [blank line provided for the representative's name]" (emphasis in original)

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, with the accompanying cover sheet and cover letter. Specifically, BCMS was required to mail the conciliation order to petitioner at its 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 for service by certified mail on April 6, 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 6, 2018. There are 22 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "22," that the post office received 22 items for mailing. In short, the Division established that it mailed the order by certified mail on April 6, 2018 (*see Matter of Auto Parts Center*, 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 on April 6, 2018, to Mark C. Peters, the representative petitioner had designated to receive legal notices on the power of attorney form (form POA-1) it had executed before its BCMS conciliation conference request was made. The request for a BCMS conciliation conference petitioner submitted, indicates that parties should look to the power of attorney form to find its appropriate representative. There is nothing in the record that indicates an amended power of attorney form was ever filed with BCMS or the Division. Form POA-1 clearly provides that, unless designated otherwise on the form itself, the first listed representative would

be the party to whom the Division would send legal notices. Mark C. Peters is the first listed representative on the only power of attorney form in the record, and petitioner never indicated on that form, or an amended form, that someone other than Mr. Peters should be the party receiving legal notices. Given the record presented, mailing of the BCMS order to petitioner's power of attorney, Mark C. Peters, fulfilled the case law requirements for providing petitioner's representative a copy of the legal notice. Even if petitioner had multiple representatives, the Division's obligation to mail a copy of a statutory notice to a taxpayer's representative may be met where the Division mails such a notice to one representative (*see Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015, citing *Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

H. In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 6, 2018, properly addressed to petitioner at its last known address, and petitioner's representative at the address that was provided, with the requisite amount of postage affixed, and it is that 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*). Hence, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, i.e., April 6, 2018 (*see Matter of Dean*).

I. In sum, the Division has established that the conciliation order, with the accompanying cover sheet and cover letter, was properly mailed as addressed to petitioner at its last known

address on April 6, 2018, and that the same was properly mailed on April 6, 2018, to petitioner's representative at the address that was provided for such. Having established that the conciliation order, with the accompanying cover sheet and cover letter were properly mailed to petitioner and its 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 November 21, 2018, a date that falls more than 90 days after the issuance of the April 6, 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 Dev Convenience Corporation is dismissed.

DATED: Albany, New York
August 15, 2019

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE