

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RENATO T. MARCHIONE** : DETERMINATION  
DTA NO. 829237  
for Redetermination of a Deficiency or for Refund of New :  
York State and New York City Personal Income Tax under :  
Article 22 of the Tax Law and the New York City :  
Administrative Code for the Year 2015. :  
\_\_\_\_\_ :

Petitioner, Renato T. Marchione, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2015.

On June 21, 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 September 5, 2019. On August 19, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), submitted documents in support of dismissal. On September 5, 2019, petitioner, appearing by Anthony Marro, submitted documents 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 September 5, 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 July 5, 2017, the Division of Taxation ((Division) issued petitioner a notice of disallowance, disallowing petitioner's refund requested on his 2015 income tax return and advising petitioner that if he disagreed with the Division's decision, he must file a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals within two years of the date of the notice.

2. On March 15, 2018, BCMS received petitioner's request for conciliation conference dated February 28, 2018. Petitioner's address as printed on his request was an Ozone Park, New York, address. Petitioner's representative's address as printed on his request was a separate Ozone Park, New York, address.

3. In response to his request, BCMS issued petitioner a conciliation order, CMS number 302055, dated November 30, 2018, sustaining the notice.

4. On March 4, 2019, petitioner filed a petition with the Division of Tax Appeals protesting the conciliation order. Petitioner asserted that he had substantiated the reasons he was entitled to a refund during the BCMS conference, with the exception of documentation regarding a dependent. He also stated that he sent BCMS additional information supporting his position thereafter on October 25, 2018.

5. On June 21, 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 November 30, 2018, but that the petition was not filed until March 4, 2019, in excess of 90 days later.

6. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Joseph DiGaudio, sworn to on July 25, 2019, and Fred Ramundo, sworn to on July 31, 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 issued to petitioner, copies of the mailing cover sheets sent to petitioner and his representative, and a copy of the certified mail record (CMR) containing a list of conciliation orders issued by the Division on November 30, 2018.

7. The affidavit of Joseph DiGaudio, Assistant 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.

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 submits the orders and cover letters to the conference supervisor for final approval.

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 Manual 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 conciliation order number is recorded under the heading "Reference 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.

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 "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.

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 "11-30-18" 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. DiGaudio 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 November 30, 2018. The CMR lists 27 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.

16. The CMR indicates that the conciliation order with certified control number 7104 1002 9735 4562 3951 and reference number 000302055, was mailed to petitioner at the Ozone Park, New York, address set forth on petitioner's request for conciliation conference. The corresponding mailing cover sheet, attached to the DiGaudio affidavit as exhibit "D," bears this certified control number and petitioner's name and address as noted. The CMR also indicates that the conciliation order with certified control number 7104 1002 9735 4562 3739 and reference number 000302055, was mailed to petitioner's representative, Anthony Marro, of A & M Accounting Services, at the Ozone Park, New York, address set forth on the request for conciliation conference. The corresponding mailing cover sheet, attached to the DiGaudio affidavit as exhibit "D," bears this certified control number and the representative's name and address as noted.

17. 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 initial or signature to the CMR indicating receipt by the post office.

18. In this particular instance, the postal employee affixed a postmark dated November 30, 2018, to each page of the three-page CMR. The postal employee also wrote and circled the number "27" and initialed page three to indicate the total pieces of mail received at the post office.

19. Mr. Ramundo stated that the postmark on the CMR is the official acknowledgment of receipt by the post office of the mail recorded on that CMR and therefore, the CMR is the Division's record of receipt from the USPS.

20. 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 the following day and is 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 Joseph DiGaudio, the exhibits attached thereto, and the CMR, Mr. Ramundo stated that on November 30, 2018, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner at his Ozone Park, New York, address, and a piece of certified mail addressed to petitioner's representative at his Ozone Park, 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

November 30, 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 pieces of certified mail to petitioner and his representative on November 30, 2018.

22. In response to the notice of intent to dismiss petition, petitioner submitted a document titled “Affidavit in Opposition to Dismiss Petition DTA # 829237,” that was signed by his representative, Anthony Marro, and publication 501 of the Internal Revenue Service, titled, “Exemptions, Standard Deduction, and Filing Information For use in preparing 2017 Returns.” Petitioner requests that the Division of Tax Appeals review the disallowed portion of the refund that was for the earned income credit and that the Division of Tax Appeals not dismiss the petition.

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

A. The standard of review of a notice of intent to dismiss petition is the same as for reviewing a motion for summary determination (*see Matter of Ahmed*, Tax Appeals Tribunal June 29, 2017).

B. A motion for summary determination:

“shall 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]).

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).

C. Once a proponent of summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial on the merits (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562).

D. 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 (*see Matter of Moschetta a/k/a Perrotta*, Tax Appeals Tribunal, June 19, 2008). 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 id.*). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

E. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing of the conciliation order to the petitioner's last known address (*see Matter of Castillo*, Tax Appeals Tribunal, November 12, 2015; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of its standard mailing procedure and proof that such procedure was followed in that particular instance in order to meet its burden of proving proper mailing (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*). The Division may meet its burden of establishing proper mailing by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Construction, LLC*, Tax Appeals Tribunal, March 3, 2011). Additionally, where the CMR has been properly completed, it constitutes highly probative evidence of the date and fact of mailing (*see Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

F. In this case, the CMR, and the affidavits of Joseph DiGaudio and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establishes the Division's standard mailing procedure and that such procedure was followed with respect to the conciliation order mailed to petitioner and his representative on November 30, 2018. The Division has thus established that the conciliation order at issue was mailed as addressed to petitioner and his representative on November 30, 2018. 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 (*see Matter of McAleese*, Tax Appeals Tribunal, June 30, 2016).

G. The addresses to which the conciliation order was mailed are the addresses designated by petitioner and his representative on his request for conference. At no time did petitioner provide notice of any new or alternative address. The order was thus properly addressed to petitioner's last known address and petitioner's representative (*see Matter of Liaquat Ali, Inc.*). Petitioner also does not dispute that the conciliation order was mailed to the proper address. Therefore, the Division has established proper mailing of the conciliation order at issue here.

H. Petitioner did not submit any credible evidence that he filed his petition within 90 days of the issuance of the conciliation order. The document submitted by petitioner's representative does not raise a valid defense to the untimely filing of the petition. Additionally, because the statement is not sworn to by Mr. Marro, it is not a valid affidavit (*see Qi Shen Lu v World Travel of Greater New York, Ltd.*, 111 AD3d 690 [2nd Dept 2013]).

I. In sum, the Division has established that the conciliation order was properly mailed as addressed to petitioner at his last known address and to petitioner's representative on November 30, 2018. Since the petition was filed on March 4, 2019, or more than 90 days after the November 30, 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*, Tax Appeals Tribunal, November 8, 2007).

J. The petition of Renato T. Marchione is dismissed.

DATED: Albany, New York  
November 21, 2019

/s/ Jessica DiFiore  
ADMINISTRATIVE LAW JUDGE