

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LCAV ENTERPRISES, LLC.	:	DETERMINATION
	:	DTA NO. 829650
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods September 1, 2014 through May 31, 2017.	:	

Petitioner, LCAV Enterprises, LLC., 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 September 1, 2014 through May 31, 2017.

On November 25, 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 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until February 8, 2020 to respond to said notice. On December 11, 2019, petitioner, appearing by Larry A. Cavallaro, submitted a letter in opposition to dismissal. On January 27, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth Lyons, 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 order began on February 8, 2020. As a result of the COVID-19 public health emergency, the deadline for the issuance of the determination was extended by an additional three months consistent with Tax Law § 2010 (3). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On July 19, 2019, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 304981, to petitioner sustaining notice of determination number L-048883650.

2. Petitioner filed a petition challenging the conciliation order that was received by the Division of Tax Appeals on October 21, 2019. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on October 18, 2019.

3. On November 25, 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 was filed more than 90 days after the issuance of the conciliation order and, therefore, was not timely filed.

4. In response to the issuance of the notice of intent to dismiss, to show proof of proper mailing of the conciliation order dated July 19, 2019, the Division submitted, among other documents: (i) an affidavit of Elizabeth Lyons, an attorney employed in the Office of Counsel of the Division, dated January 24, 2020; (ii) a copy of the request for a conciliation conference filed on November 8, 2018; (iii) an affidavit of Joseph Digaudio, Assistant Supervisor of Tax Conferences of BCMS ; (iv) a Certified Record for Presort Mail - BCMS Cert Letter (CMR) postmarked July 19, 2019; (v) a copy of the conciliation order, cover letter and cover sheet, dated July, 19, 2019, as well as a copy of the three-windowed mailing envelope used to mail the order;

(vi) an affidavit of Fred Ramundo, Stores and Mail Operations Supervisor of the Department of Taxation and Finance, Supervisor of Tax Conferences of BCMS, dated January 14, 2020; and
(vii) a copy of the notice of determination bearing assessment number L-048883650 dated October 15, 2018.

5. The affidavit of Joseph Digaudio sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The 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.

6. 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.

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

8. The AFP Unit also produces a computer-generated CMR entitled Certified Record for Presort Mail - BCMS Cert Letter. 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.

9. The clerk's regular duties including associating each cover sheet, cover letter, and conciliation order. 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.

10. 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.

11. 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, "7-19-19" was written in the upper right corner of each page of the CMR.

12. 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.

13. Mr. Digaudio attests to the truth and accuracy of the copy of the seven-page CMR, which contains a list of the conciliation orders issued by the Division on July 19, 2019. The CMR lists 79 certified control numbers. Each such certified control number is assigned to an item of mail listed on the seven 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.

14. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 5009 3244 is reference or CMS number 000304981, along with the name and last known address of petitioner. Specifically, the Johns Island, South Carolina, address listed on the CMR is the same address listed on the request for conference and confirmed by petitioner.

15. 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.

16. In this particular instance, the postal employee affixed a postmark dated July 19, 2019, to each page of the seven-page CMR. The postal employee wrote the number "79" and initialed page seven to indicate the total pieces of mail received at the post office. The postal employee also circled the typed number "79" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

17. 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.

18. Based upon his review of the affidavit of Joseph Digaudio, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on July 19, 2019, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at its Johns Island, South Carolina, address to a branch of the USPS in Albany, New York, in 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 July 19, 2019, 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 July 19, 2019.

19. In its response to the notice of intent to dismiss petition, petitioner's principal, Larry Cavallaro, submitted a letter dated December 11, 2019, claiming, in pertinent part, that he unintentionally missed the deadline for filing the petition due to medical reasons.

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 (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 Joseph Digaudio 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 July 19, 2019, 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 Digaudio 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 July 19, 2019. There are 79 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number “79,” that the post office received 79 items for mailing. In short, the Division established that it mailed the order by certified mail on July 19, 2019 (*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 July 19, 2019, properly addressed to petitioner at its last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which protests had to have been filed. Hence, the 90-day limitations period for the filing of a petition in this matter, with regard to the conciliation order, commenced as of the date of mailing, i.e., on July 19, 2019.

H. 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 July 19, 2019. Having established that the conciliation order, with the accompanying cover sheet and cover letter was properly mailed to petitioner, 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 October 18, 2019, a date that falls beyond 90 days after the issuance of the 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).

I. The petition of LCAV Enterprises, LLC is dismissed.

DATED: Albany, New York
August 6, 2020

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