

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARA AGUERO	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 831146
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2017.	:	

Petitioner, Mara Aguero, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion on March 31, 2025, seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response by April 30, 2025, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Nicholas Behuniak, 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. The Division of Taxation (Division) issued petitioner, Mara Agüero, a notice of disallowance for tax year 2017, dated March 11, 2019 (notice). The notice was addressed to petitioner at an address in Staten Island, New York.

2. Petitioner filed a request for conciliation conference (request), dated March 28, 2019, with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. On the request, petitioner included the same Staten Island, New York, address as reflected on the notice.

3. BCMS issued a conciliation order, CMS No. 000310721, dated September 10, 2021 (conciliation order), to petitioner sustaining the notice.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order. Petitioner signed the petition on October 18, 2022. The petition was received by the Division of Tax Appeals on October 25, 2022. The envelope in which the petition was mailed bears a United States Postal Service (USPS) postmark of October 2022 on the envelope.¹

5. In support of its motion and to show proof of proper mailing of the conciliation order, the Division provided the following documents: (i) an affirmation of Maria Matos, Esq., an attorney in the Office of Counsel of the Division, dated March 11, 2025; (ii) an affidavit, sworn to on July 27, 2023, of Joseph DiGaudio, Assistant Director of the BCMS; (iii) an affidavit, sworn to on July 28, 2023, of Susan Ramundo, manager of the Division's mail room; (iv) a "CERTIFIED RECORD FOR MANUAL MAIL - CMS-37 - BCMS Order (CMR)," postmarked September 10, 2021; (v) a copy of the request for conciliation conference, dated March 28, 2019, with a BCMS facsimile receipt stamp of April 11, 2019; and (vi) a copy of the conciliation order

¹ The exact calendar day of the USPS postmark on the envelope is not visible.

with the associated cover sheet and cover letter, each addressed to petitioner at the same Staten Island, New York, address as reflected on the notice and request. Both the conciliation order and associated cover letter are dated September 10, 2021. In her affirmation, Ms. Matos represents that the Staten Island, New York address was petitioner's last known address at the time the conciliation order was mailed to her.

6. 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.

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 review and 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 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, recipient'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 - CMS-37 - BCMS Order." The CMR is a listing of recipients 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." The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents, along with the conciliation orders and cover letters, are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk's regular duties include 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.

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 "MAILROOM: 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, "9-10-21" 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. DiGaudio attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by BCMS on September 10, 2021. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR.

Specifically, corresponding to each listed certified control number is a reference number or CMS number and the name and address of the addressee.

15. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 0903 2577 is reference number 000310721, along with the name and address of petitioner.

Specifically, the Staten Island, New York, address listed on the CMR is the same address listed on the request for conciliation conference.

16. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an Associate Administrative Analyst, whose duties include the management of the mail processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She 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 the Albany, New York, area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. Appearing below the certified control number entries on page five of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS [space] 56." On page five of the CMR is a stamp indicating "POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas."

18. In this particular instance, the postal employee affixed a postmark, dated September 10, 2021, to each page of the five-page CMR. The postal employee circled and wrote the number “56” and initialed page five to indicate the total pieces of mail received at the post office.

19. Ms. 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 Ms. 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 her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo avers that on September 10, 2021, an employee of the mail processing center delivered an item of certified mail addressed to petitioner at her Staten Island, New York, address to a branch of the USPS in the Albany, New York, area in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to, and accepted by, the post office on September 10, 2021, for the records of BCMS. Ms. Ramundo asserts that the procedures described in her 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 September 10, 2021.

21. Petitioner did not file a response to the Division’s motion.

CONCLUSIONS OF LAW

A. As noted, the Division brought a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the

alternative, a motion for summary determination in its favor under section 3000.9 (b) of the Rules. A motion to dismiss, rather than a motion for summary determination, is appropriate where, as here, the threshold issue is whether a petition has been timely filed with the Division of Tax Appeals. The standard of review on a motion to dismiss is the same as that for summary determination (*see Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016).

Such a motion “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” (20 NYCRR 3000.9 [b] [1]). 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]).

B. 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*, Tax Appeals Tribunal, September 13, 2012).

C. 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]). 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). 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, petitioner bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

D. The evidence required of the Division, in order to establish proper mailing, is twofold: 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).

E. Petitioner did not respond to the Division's motion and, thus, has offered no evidence to contest the facts asserted in the DiGaudio and Ramundo affidavits and supporting documents. Accordingly, those facts are deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

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's last known address. As indicated by the CMR, and by the affirmation of Maria Matos and affidavits of Joseph DiGaudio and Susan 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 at issue, along with the cover sheet and cover letter, was actually mailed to petitioner by certified mail on September 10, 2021, the date appearing on the CMR, to petitioner's last known address. 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 conciliation order, appear on the CMR, which bears a USPS postmark of September 10, 2021. There are 56 certified control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling and writing the number "56," that the post office received 56 items for mailing. In short, the Division established that it mailed the conciliation order by certified mail on September 10, 2021 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the conciliation order was properly mailed when it was delivered into the custody of the USPS on September 10, 2021, properly addressed to petitioner at her last known address and it is this date that commenced the 90-day period within which to file a petition. However, the petition was not filed until sometime in October 2022, a date that falls well 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).

H. The Division of Taxation's motion to dismiss is granted and the petition of Mara Aguero is dismissed.

DATED: Albany, New York
July 24, 2025

/s/ Nicholas Behuniak
ADMINISTRATIVE LAW JUDGE