

STATE OF NEW YORK

DIVISION OF TAX APPEALS

	:	
In the Matter of the Petition	:	
	:	
of	:	
	:	
<b>BALLOONACY, INC.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 831323</b>
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 March 1, 2017 through August 31, 2019.	:	

Petitioner, Balloonacy, Inc., 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 March 1, 2017 through August 31, 2019.

On December 27, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). By letter, dated January 15, 2025, the date by which the parties could file responses to the notice of intent to dismiss petition was extended to March 13, 2025. The Division of Taxation, appearing by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel), submitted an affirmation, dated February 24, 2025, and exhibits in support of the dismissal. Petitioner, appearing by James P. Napolitano, CPA, P.C. (James Napolitano, CPA), did not submit a response by March 13, 2025, which date began the 90-day period for the issuance of this determination.

Based upon all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, 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. The Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) issued a conciliation order, CMS No. 000327592, dated January 27, 2023, to petitioner, Balloonacy, Inc., at an address in Deer Park, New York. The conciliation order partially sustained a notice of determination issued to petitioner for the period March 1, 2017 through August 31, 2019. A copy of the conciliation order was also issued to James Napolitano, at an address in Hicksville, New York.

2. On May 30, 2023, petitioner filed a petition in protest of the conciliation order.<sup>1</sup>

3. On December 27, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition, which stated that the petition appeared to be untimely filed as it was filed more than 90 days after the issuance of the conciliation order.

4. On February 25, 2025, in response to the notice of intent to dismiss petition, and to show proof of proper mailing of the conciliation order, dated January 27, 2023, the Division submitted, among other documents: (i) the affirmation, dated February 24, 2025, of Kaitlyn Smith, an attorney employed in the Office of Counsel of the Division; (ii) the affidavit of Carla Podlucky, Assistant Supervisor of Tax Conferences of BCMS, sworn to on January 22, 2025; (iii) a “CERTIFIED RECORD FOR MANUAL MAIL - CMS-37 - BCMS Order” (CMR), postmarked January 27, 2023; (iv) a copy of petitioner’s electronically filed request for conciliation conference, which affirmatively answers that petitioner’s Deer Park, New York,

---

<sup>1</sup> The petition references August 31, 2017 as the end date for the period to be challenged. This appears to be a typographical error and will be treated as such.

address, as listed on the notice, is correct and lists petitioner's representative's address in Hicksville, New York; (v) copies of the conciliation order, cover letter and cover sheet, dated January 27, 2023, addressed to petitioner and a copy of the three-windowed mailing envelope used to mail these documents, as well as a copy of the cover sheet, dated January 27, 2023, addressed to petitioner's representative; (vi) a copy of the notice with petitioner's Deer Park, New York, address; (vii) a copy of a power of attorney form, which identifies both petitioner and its representative's addresses as the same Deer Park and Hicksville, New York addresses, respectively; and (viii) an affidavit of Justin Lombardo, a manager of the Division's mail room and current Associate Administrative Analyst, sworn to on January 27, 2025.

5. In the February 24, 2025, affirmation of Ms. Smith, the Division affirms that the Deer Park, New York, address was petitioner's last known address at the time the conciliation order was issued. The Division also affirms that petitioner's representative's last known address at that time was the Hicksville, New York, address.

6. The affidavit of Ms. Podlucky sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in mailing the orders by United States Postal Service (USPS) certified mail and confirming the mailing through BCMS's receipt of a postmarked copy of the CMR.

7. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee. The conciliation conferee reviews the orders and letters and forwards the same to the conferee. Then, the conciliation conferee reviews the orders and letters and submits them to a conference supervisor for 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 (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. 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." The AFP Unit prints the CMR and cover sheets using a printer located in BCMS. 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 duties include associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of addressees with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, conciliation order and cover letter into a three-windowed envelope where the BCMS return address, certified control number, bar code, name and address of the addressee appear.

11. The "TOTAL PIECES AND AMOUNTS" is indicated on the last page of the CMR. It is the general office practice that on the last page of the CMR, the clerk stamps "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT."

12. The BCMS clerk 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, "1-27-23" was written in the upper right corner of pages one through seven of the CMR.

13. The CMR, along with the envelopes containing the cover sheets, conciliation orders and cover letters, is picked up in BCMS by an employee of the Division's mail processing center.

14. Ms. Podlucky attested to the truth and accuracy of the copy of the relevant seven-page CMR, which contains a list of the conciliation orders issued by the Division on January 27, 2023. This CMR lists 85 computer-printed certified control numbers. Each 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 intended recipient. There are no deletions from the list. Each page of the CMR also contains a USPS postmark, dated January 27, 2023.

15. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, certified control number 7104 1002 9735 3078 8771 corresponds to reference number 000327592, along with petitioner's name and the Deer Park, New York, address. The cover sheet bearing petitioner's name also bears the same reference number and Deer Park, New York, address as is listed on the CMR for petitioner's entry. The Deer Park, New York, address is the same address that petitioner listed on the power of attorney form and petition.

16. Information regarding the conciliation order sent to petitioner's representative is contained on page four of the CMR. Specifically, certified control number 7104 1002 9735 3078 9075 corresponds to reference number 000327592, along with petitioner's representative's name and his Hicksville, New York, address. The cover sheet bearing petitioner's representative's name also bears the same reference number and Hicksville, New York, address as is listed on the CMR for petitioner's representative's entry. The Hicksville, New York, address is the same address listed on the power of attorney form.

17. The affidavit of Mr. Lombardo, a manager of the Division's mail room since 2016 and currently an Associate Administrative Analyst managing the Division's mail processing center staff, 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. After conciliation orders are placed in the "Outgoing Certified Mail" basket in the mail processing center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a USPS branch in Albany, New York. A USPS employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

18. In this instance, a USPS employee affixed a postmark, dated January 27, 2023, and also wrote his or her signature or initials on page seven, the last page of the CMR. The mail processing center further requests that the USPS employees either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the January 27, 2023, CMR indicates that the USPS employee complied with this request by writing the number "85" to indicate the number of items received, which corresponds to the amount listed next to the "TOTAL PIECES AND AMOUNTS" line.

19. Mr. Lombardo's affidavit states that the CMR serves as 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, a member of Mr. Lombardo's staff picks up the CMR from the post office on the day following its initial delivery. The CMR is then delivered to the originating office, in this case, BCMS, and is maintained in the regular course of business.

20. Based upon his review of the affidavit of Ms. Podlucky, the exhibits attached thereto and the CMR, Mr. Lombardo avers that on January 27, 2023, an employee of the mail processing center delivered two items in sealed postpaid envelopes for delivery by certified mail to a branch of the USPS in Albany, New York: one addressed to petitioner at the Deer Park, New York, address; and another addressed to petitioner's representative at the Hicksville, New York, address. 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 USPS on January 27, 2023, for the records of BCMS. Mr. Lombardo 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 pieces of certified mail to petitioner and petitioner's representative.

21. Petitioner did not respond to the notice of intent to dismiss petition.

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

A. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer files a petition 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; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this matter, the petition appears to have been filed beyond the 90-day period. Pursuant to section 3000.9 (a) (4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the Division of Tax Appeals issued a notice of intent to dismiss petition.

B. In *Matter of Victory Bagel Time*, the Tax Appeals Tribunal held that the standard of review for a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination. 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. 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]). 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).

D. The evidence required 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).

E. Petitioner did not respond to the notice of intent to dismiss within the required timeframe. It failed to challenge the Division’s proof of mailing of the conciliation order with



any evidence or arguments and, therefore, these facts are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

F. The Division has submitted sufficient proof of its standard mailing procedures through the affidavits of Ms. Podlucky and Mr. Lombardo, Division employees involved in and possessing knowledge of the process of generating, reviewing and mailing conciliation orders (*see Matter of Victory Bagel Time*). The CMR provides sufficient proof to establish that the conciliation orders, dated January 27, 2023, were mailed as addressed to petitioner and petitioner's representative. The seven-page CMR lists 85 certified control numbers. On the last page of the CMR, a postal employee initialed or signed and wrote the number "85" to indicate receipt by the post office of all the pieces of mail listed therein. Each page bears a USPS postmark, dated January 27, 2023. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. The issue remains as to whether the conciliation order was sent to petitioner's last known address at the time it was mailed (*see Matter of Wilson*). Tax Law § 1147 (a) (1) provides that any notice authorized or required under the provisions of Article 28 may be given by mailing the same to such person at the address given in the last return by him pursuant to the provisions of Article 28 or in any application made by him, or if no return or application, then to such address as may be obtainable (*see also* Tax Law § 1138 [a] [1]; *United Grocery & Deli Corp.*, Tax Appeals Tribunal, June 13, 2024, *Matter of Manthas*, Tax Appeals Tribunal, June 1, 2017 [applying Tax Law §§ 1138 (a) (1) and 1147 (a) to the issuance of BCMS orders]). In this case, Ms. Smith affirms that the Deer Park, New York, address was petitioner's last known

address. The electronically filed request for conciliation conference, the power of attorney form, as well as the petition in this matter, all confirm petitioner's address as the Deer Park, New York, address. Therefore, it must be concluded that the conciliation order was mailed to petitioner's last known address.

H. While the Tax Law does not specifically provide for service on a taxpayer's representative, the Tax Appeals Tribunal has held that the 90-day period for filing a protest is tolled if the taxpayer's representative is not served (*see e.g. Matter of Hulteen*, Tax Appeals Tribunal, September 29, 2022, *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003). In this case, Ms. Smith affirms that the Hicksville, New York, address was petitioner's representative's last known address at the time the conciliation order was issued. The electronically filed request for conciliation conference, the power of attorney form, as well as the petition in this matter, all confirm petitioner's representative's address as the Hicksville, New York, address. Accordingly, it is concluded that the conciliation order was mailed to petitioner's representative's last known address.

I. It is concluded that the Division properly mailed the conciliation order to petitioner and its representative on January 27, 2023, and the statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law § 170 [3-a] [e]). However, the petition was filed on May 30, 2023, a date that falls beyond the 90-day period to protest. As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's untimely protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*).

J. The petition of Balloonacy, Inc., is hereby dismissed.

DATED: Albany, New York  
June 5, 2025

/s/ Alexander Chu-Fong  
ADMINISTRATIVE LAW JUDGE