

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ABIR M. ELSAYAD AND MOHAMED HAMZA** : DETERMINATION  
DTA NO. 831632  
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 Administrative Code of the City of New York for the Year 2021. :  
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Petitioners, Abir M. Elsayad and Mohamed Hamza, 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 Administrative Code of the City of New York for the year 2021.

On April 30, 2024, the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioners pursuant to 20 NYCRR 3000.9 (a) (4). By a letter, dated May 29, 2024, the date by which both parties could file a response to the notice of intent to dismiss petition was extended to July 15, 2024, which date began the 90-day period for the issuance of this determination. The Division of Taxation, appearing by Amanda Hiller, Esq. (Emil N. Kambala), submitted affidavits and other documents in support of the dismissal. Petitioners, appearing pro se, submitted a letter in response to the notice of intent to dismiss petition.

After due consideration of the documents submitted, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

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

***FINDINGS OF FACT***

1. On October 23, 2022, petitioners, Abir M. Elsayad and Mohamed Hamza, filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of a notice of deficiency, bearing assessment number L-055858106 (notice), pertaining to tax year 2021.

2. BCMS subsequently issued a conciliation order, CMS No. 000345892, dated September 1, 2023, to petitioners at an address in East Elmhurst, New York. The conciliation order sustained the notice issued to petitioners for the year 2021.

3. On February 22, 2024, petitioners filed a petition with the Division of Tax Appeals in protest of the conciliation order.

4. On April 30, 2024, a notice of intent to dismiss petition was issued to petitioners. The notice of intent to dismiss petition stated that the petition appeared to be untimely filed as it was filed more than 90 days after the issuance of the conciliation order.

5. In response to the notice of intent to dismiss petition, the Division of Taxation (Division) submitted a letter, dated July 11, 2024, in support of dismissal of the petition. To show proof of proper mailing of the conciliation order, dated September 1, 2023, the Division submitted, among other documents: (i) an affidavit, dated July 11, 2024, of Emil N. Kambala, an employee in the Division's Office of Counsel; (ii) an affidavit, dated June 18, 2024, of Joseph DiGaudio, Assistant Director of BCMS; (iii) an affidavit, dated June 20, 2024, of Susan Ramundo, manager of the Division's mail room; (iv) a "Certified Record for Manual Mail -

CMS-37 - BCMS Order,” (CMR) postmarked September 1, 2023; (v) a copy of the notice with the associated mailing cover sheet addressed to petitioners at an address in East Elmhurst, New York; (vi) a copy of the request for conciliation conference, dated October 23, 2022, wherein petitioners checked the box on the request for conciliation conference indicating that the address on the notice was correct; (vii) a copy of the conciliation order addressed to petitioners, with the associated cover sheet and cover letter, dated September 1, 2023, and (viii) a copy of petitioners’ electronically filed form IT-201, New York State resident income tax return, for tax year 2022, filed on January 29, 2023, listing the same East Elmhurst, New York, address for petitioners as was listed on the conciliation order. The Division states that the East Elmhurst, New York, address was petitioners’ last known address at the time the conciliation order was issued.

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 order by United States Postal Service (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 signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a conference supervisor for final 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 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.

9. The AFP Unit also produces a computer-generated CMR entitled “Certified Record for Manual Mail.” 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.” 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.

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 where 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 each page of the CMR. In this case, “9-1-23” 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 8-page CMR, which contains a list of the conciliation orders issued by the Division on September 1, 2023.

Each such certified control number is assigned to an item of mail listed on eight 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.

15. Information regarding a conciliation order issued to petitioners is contained on page one of the CMR. Specifically, corresponding to certified control number 9207 1041 0029 7353 925601 is reference number 000345892, along with petitioners' name and the East Elmhurst, New York, address.

16. The affidavit of Susan Ramundo, a manager of 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. In this particular instance, the postal employee affixed a postmark, dated September 1, 2023, to each page of the 8-page CMR. The postal employee wrote the number "97" and initialed or signed the last page to indicate the total pieces of mail received at the post office.

18. 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.

19. Based upon her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo avers that on September 1, 2023, an employee of the mail processing center delivered an item of certified mail addressed to petitioners at the East Elmhurst, 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 1, 2023, 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 petitioners on September 1, 2023.

20. In a letter, filed on June 7, 2024, in response to the notice of intent to dismiss petition, petitioners allege that "we sent the appeal on the time frame that was given to us and the division of tax appeals is claiming they didn't receive it, but I swear to God we sent it on time and I sent it again when they told me they haven't received it." However, petitioners submitted no evidence to support this claim.

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

A. In *Matter of Victory Bagel Time* (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 at the taxpayer’s last known address (*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 (*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*). A conciliation order is properly mailed when it is delivered in 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 a conciliation 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 conciliation 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. Petitioners responded to the notice of intent to dismiss petition but offered no evidence to contest the facts asserted in the Division's supporting documents. Accordingly, those facts are deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

G. 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 to petitioners' last known address. As indicated by the CMR, and by the 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 conciliation order at issue, along with the cover sheet and cover letter, was actually mailed to petitioners by certified mail on September 1, 2023, the date appearing on the CMR. The affidavits described the various stages of producing and mailing conciliation orders and attested to the authenticity and accuracy of the copy of the conciliation 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 petitioners. Petitioners' 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 1, 2023. There are 97 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "97," that the post office received 97 items for mailing. In short, the Division established that it mailed the conciliation order by certified mail on September 1, 2023 (*see Matter of DiScenza*, Tax Appeals Tribunal, February 16, 2017).

H. The conciliation order was properly mailed when it was delivered into the custody of the USPS on September 1, 2023, and properly addressed to petitioners at their last known address with the requisite amount of postage affixed. Hence, the 90-day limitations period for filing a petition in this matter commenced as of the date of the mailing, i.e., on September 1, 2023. However, the petition was not filed until February 22, 2024, 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. It is ORDERED, on the motion of the supervising administrative law judge, that the petition is dismissed with prejudice as of this date.

DATED: Albany, New York  
August 22, 2024

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE