

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THERESA MERRIWEATHER	:	
for Redetermination of a Deficiency or for Refund of	:	DETERMINATION
New York State and New York City Personal Income	:	DTA NO. 850813
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the Year	:	
2020.	:	

Petitioner, Theresa Merriweather, 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 2020.

On August 23, 2024, the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner pursuant to 20 NYCRR 3000.9 (a) (4). By letter, dated September 18, 2024, the date by which the parties could file responses to the notice of intent to dismiss petition was extended to November 7, 2024. The Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by November 7, 2024, which date commenced the 90-day period for the issuance of this determination.

After due consideration of the documents submitted, Donna M. Gardiner, Supervising 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 Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Taxation) issued a conciliation order, CMS No. 000338122, dated December 8, 2023, to petitioner, Theresa Merriweather, at an address in Brooklyn, New York. The conciliation order sustained a notice of deficiency issued to petitioner for the tax year 2020.

2. On March 15, 2024, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order. The date on the petition next to petitioner's signature is February 29, 2024. There is no United States Postal Service (USPS) postmark on the envelope. The petition was date-stamped received by the Division of Tax Appeals on March 15, 2024.

3. On August 23, 2024, a notice of intent to dismiss petition was issued to petitioner. 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.

4. On October 29, 2024, in response to the notice of intent to dismiss petition, and to show proof of proper mailing of the conciliation order, the Division submitted the following documents: (i) an affirmation, dated October 28, 2024, of Peter B. Ostwald, Esq., an attorney in the Division's Office of Counsel; (ii) an affidavit, sworn to on October 7, 2024, of Carla Podlucky, Assistant Supervisor of Tax Conferences of BCMS; (iii) a "CERTIFIED RECORD FOR MANUAL MAIL - CMS-37 - BCMS Order" (CMR), postmarked December 8, 2023; (iv) a copy of the request for conciliation conference, dated March 11, 2022, wherein petitioner checked the box on the request for conciliation conference indicating that the address on the

notice was correct; (v) a copy of the conciliation order addressed to petitioner, with the associated cover letter, dated December 8, 2023; and (vi) an affidavit, sworn to on October 15, 2024, of Justin Lombardo, a manager of the Division's mail room and currently an Associate Administrative Analyst. The Brooklyn, New York, address was petitioner's last known address at the time the conciliation order was issued.

5. The affidavit of Ms. Podlucky sets forth the general practice and procedure of BCMS for preparing and mailing conciliation orders. The procedure culminates with BCMS mailing the conciliation orders by USPS, via certified mail, and confirming 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 review. The conciliation conferee, in turn, submits the orders and cover letters to the conference supervisor for final approval.

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, addressee'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. The CMR is a listing of addressees 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.

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

10. A piece of mail may be pulled from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of items being mailed, to allow for correction or issuance at another time. When a conciliation order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

11. The CMR in this case shows that four pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on pages one and five, and lines have been drawn through those entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listings pertaining to petitioner. The preprinted number "72," as appearing next to the heading "TOTAL PIECES AND AMOUNTS," on the last page of the CMR was crossed out and replaced with the handwritten number "68" to reflect the four pieces pulled from the run. 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, “12-8-23” was written in the upper right corner of each page of the CMR.

13. An employee of the Division’s mail processing center picks up the CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, from BCMS.

14. Ms. Podlucky attests to the truth and accuracy of the copy of the six-page CMR, which contains a list of the conciliation orders issued by BCMS on December 8, 2023. Each such certified control number is assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or BCMS number, and the name and address of the addressee.

15. Information regarding a conciliation order issued to petitioner is contained on page six of the CMR. Specifically, corresponding to certified control number 9207 1041 0029 7359 112715 is reference number 000338122, along with petitioner’s name and her Brooklyn, New York, address. The Brooklyn, New York, address listed on the CMR is the same address that petitioner indicated was her correct address on the request for conciliation conference.

16. Mr. Lombardo, a manager of the Division’s mail room since 2016 and currently an Associate Administrative Analyst whose duties include the management of the 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. 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 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. Here, the postal employee affixed a postmark, dated December 8, 2023, to each page of the six-page CMR. The postal employee wrote the number “68” and initialed or signed the last page to indicate the total pieces of mail received at the post office.

18. Mr. Lombardo 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, a member of Mr. Lombardo’s staff collects the CMR at the post office on the day after its initial delivery and delivers it to the originating office, in this case, BCMS. BCMS maintains the CMR in the regular course of business.

19. Based upon his review of the affidavit of Ms. Podlucky, the exhibits attached thereto and the CMR, Mr. Lombardo avers that on December 8, 2023, an employee of the mail processing center delivered an item of certified mail addressed to petitioner at her Brooklyn, 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. 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 December 8, 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 piece of certified mail to petitioner on December 8, 2023.

20. Petitioner did not submit a response to the notice of intent to dismiss petition.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (*see* Tax Law § 170 [3-a] [e]). This deadline is strictly enforced, and protests filed even one day later are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Accordingly, a conciliation order is binding upon petitioner unless she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Thus, the Division of Tax Appeals issued a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4).

B. 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.

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). 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 Dean*, Tax Appeals Tribunal,

July 24, 2014; *see also Matter of Cato; Matter of DeWeese*). 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 in turn 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 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 United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *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 petition and, thus, has offered no evidence to contest the facts asserted in the Division's documents supporting dismissal. Accordingly, those facts are deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

F. In this case, the CMR, along with the affidavits of Ms. Podlucky and Mr. Lombardo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, establishes the Division's standard mailing procedure. Additionally, the CMR has been properly completed and, therefore, constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has established that the conciliation order was mailed as addressed to petitioner by certified mail on December 8, 2023. Further, the address to which the conciliation

order was mailed is the address designated by petitioner in her request for conciliation conference. As such, the address used satisfies the “last known address” requirement.

G. It is concluded that the Division properly mailed the conciliation order on December 8, 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]). Ninety days after the December 8, 2023, date of mailing was March 7, 2024, and in order to be considered timely, petitioner’s protest was required to be filed on or before such date. Petitioner’s petition was filed on March 15, 2024, a date that falls beyond the 90-day period of limitations for filing a petition following the issuance of the conciliation order and, therefore, was untimely (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015). As such, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

H. The petition of Theresa Merriweather is dismissed.

DATED: Albany, New York
January 23, 2025

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE