

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEE BIEBER	:	DETERMINATION
	:	DTA NO. 851085
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 December 1, 2012	:	
through February 28, 2013.	:	

Petitioner, Lee Bieber, 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 December 1, 2012 through February 28, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brendan Roche, Esq., of counsel), brought a motion on February 5, 2025, seeking dismissal of the petition or, in the alternative, summary determination in its favor matter pursuant to Tax Law sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Fine & Clear Tax Solutions (Guy Finocchiaro, CPA), filed his response by March 7, 2025, 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. On August 23, 2024, a notice of intent to dismiss petition was issued to petitioner, Lee Bieber. 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 a notice of determination, bearing assessment number L-039890782, dated August 6, 2013. This notice of intent to dismiss petition was rescinded on January 24, 2025.

2. The subject of the Division of Taxation's (Division's) motion is the timeliness of petitioner's protest of a conciliation order dismissing request (conciliation order) issued to him by the Division's Bureau of Conciliation and Mediation Services (BCMS). The conciliation order, CMS No. 000343061, dated August 26, 2022, was issued to petitioner at an address in Dix Hills, New York. A copy of the conciliation order was also issued to Milton J. Pirsos, CPA, at an address in Astoria, New York.

3. On May 24, 2024, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order. The address listed for petitioner on the petition is the same Dix Hills, New York, address that is listed on the conciliation order.

4. To show proof of proper mailing of the conciliation order, the Division submitted the following documents: (i) an affirmation, dated October 30, 2024, of Brendan Roche, Esq., an attorney employed in the Office of Counsel of the Division; (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 August 26, 2022; (iv) a copy of the request for conciliation conference, dated June 15, 2022, that indicated petitioner's address as the same Dix Hills, New York, address as listed on the petition; (v) a copy of the conciliation order addressed to petitioner, with the associated cover letter, dated

August 26, 2022, addressed to petitioner at the same Dix Hills, New York, address; (vi) a copy of a power of attorney, form POA-1, dated June 30, 2022, signed by petitioner that authorized Milton J. Pirsos, CPA, to represent him for sales and use taxes for the period ended February 28, 2013. Form POA-1 lists the same Astoria, New York, address that is listed on the cover sheet addressed to Mr. Pirsos that accompanied the conciliation order; and (vii) 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.

5. Petitioner's request for conciliation conference lists the same Dix Hills, New York, address that was listed on the conciliation order (and on the petition). Therefore, the Dix Hills, New York, address was petitioner's last known address at the time the conciliation order was issued.

6. 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 the United States Postal Service (USPS), via certified mail, and confirming 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. The conciliation conferee, in turn, submits 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, addressee'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 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.

10. 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.

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, "8-26-22" 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 eight-page CMR, which contains a list of the conciliation orders issued by BCMS on August 26, 2022. Each such certified control number is assigned to an item of mail listed on the 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 petitioner is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 1994 3320 is reference number 000343061, along with petitioner's name and his Dix Hills, New York, address. The Dix Hills, New York, address listed on the CMR is the same address that petitioner listed on the request for conciliation conference and petition.

16. Information regarding a copy of the conciliation order issued to petitioner's former representative is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 1994 3337 is reference number 000343061, along with petitioner's former representative's name and his Astoria, New York, address. The Astoria, New York, address listed on the CMR is the same address that his former representative listed on form POA-1.

17. 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.

18. Here, the postal employee affixed a postmark, dated August 26, 2022, to each page of the eight-page CMR. The postal employee wrote the number “88” and initialed or signed the last page to indicate the total pieces of mail received at the post office.

19. 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.

20. Based upon his review of the affidavit of Ms. Podlucky, the exhibits attached thereto and the CMR, Mr. Lombardo avers that on August 26, 2022, an employee of the mail processing center delivered items of certified mail addressed to petitioner at his Dix Hills, New York, address and to petitioner’s former representative at his Astoria, New York, address to a branch of the USPS in the Albany, New York, area in sealed, postpaid envelopes 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 August 26, 2022, 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 his former representative on August 26, 2022.

21. In response to the motion, petitioner states that the Division failed to prove that he received a notice of determination in this matter. Petitioner did not address the issue of whether his petition was timely filed in protest of the conciliation order.

CONCLUSIONS OF LAW

A. As noted, the Division brought a motion to dismiss the petition under section 3000.9 (a) (1) (ii) 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 (*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 Uni. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

B. 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 he files a timely petition with the Division of Tax Appeals.

C. Where the timeliness of a taxpayer's petition following the issuance of 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*, 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 argues that he never received the notice of determination issued to him. Petitioner did not address whether he timely filed a petition with the Division of Tax Appeals following the issuance of the conciliation order. Petitioner has offered no evidence to contest the

facts asserted in the Division's documents supporting the 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 August 26, 2022. Further, the address to which the conciliation order was mailed is the address designated by petitioner in his request for conciliation conference and in his petition. As such, the address used satisfies the "last known address" requirement.

G. While the Tax Law does not specifically provide for service of a statutory notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see e.g. Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Here, the evidence demonstrates that the conciliation order was sent by certified mail, on August 26, 2022, to petitioner's former representative at his address in Astoria, New York. The same Astoria, New York, address was listed on form POA-1 and on the request for conciliation conference.

H. It is concluded that the Division properly mailed the conciliation order to petitioner and his former representative on August 26, 2022, 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 24, 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 Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The Division of Taxation's motion to dismiss is granted and the petition of Lee Bieber is dismissed.

DATED: Albany, New York
May 22, 2025

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE