

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AMINATA DIOP</b>	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 825671
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2009.	:	

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Petitioner, Aminata Diop, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2009.

On July 25, 2013, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In response to a request for additional time, the parties were granted until October 10, 2013 to respond to the proposed dismissal. On September 12, 2013, petitioner, appearing pro se, submitted a letter in opposition to dismissal. On September 27, 2013, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced September 27, 2013. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Default Order.

***FINDINGS OF FACT***

1. On May 13, 2013, petitioner, Aminata Diop, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a refund denial in respect of an earned income credit claim for the tax year 2009. Said refund denial was the subject of a request for conciliation conference dated July 8, 2011 and filed by petitioner with the Bureau of Conciliation and Mediation Services (BCMS). That request for conciliation conference resulted in the issuance of a Conciliation Default Order dated August 31, 2012 and bearing CMS number 250434.

2. On July 25, 2013, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Conciliation Default Order was issued on August 31, 2012, but that the petition was not filed until May 13, 2013, or 255 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

4. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

5. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit

(AFP). 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.

6. 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." and are preceded by three zeros. 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.

7. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. 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.

8. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and, on each page of the CMR, also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

9. 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 "8/31/12" is written in the upper right corner of each page of the CMR.

10. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on August 31, 2012. This CMR lists 62 computer-printed certified control numbers. 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/CMS number, and the name and address of the addressees. There are no deletions from the list.

12. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1306 1872 is reference/CMS number 000250434, along with petitioner's name and a New York, New York, address that is identical to the address on petitioner's request for conciliation conference.

13. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, 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 places postage and fee amounts on the envelopes. 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 Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

14. In this particular instance, the postal employee affixed a postmark dated August 31, 2012 to and also wrote his or her signature on each page of the six-page CMR. The postal employee also circled the preprinted number "62" corresponding to the heading "Total Pieces

and Amounts.” The circling of the Total Pieces Received number was done at the Division’s specific request and is intended to indicate that all 62 pieces of mail listed in the CMR were received at the post office.

15. Mr. Peltier’s affidavit states 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 Mr. Peltier’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.

16. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on August 31, 2012, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at her New York, New York, address to a branch of the USPS in Albany, New York, 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 August 31, 2012 for the records of BCMS. Mr. Peltier 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 on August 31, 2012.

17. A BCMS clerk’s handwritten note next to petitioner’s name on page one of the CMR indicates that the subject Conciliation Default Order was returned to BCMS as unclaimed, that the address was then verified, and that the order was subsequently remailed. Mr. Farrelly’s

affidavit indicates that the order was remailed to petitioner by regular USPS mail on October 31, 2012, in accordance with BCMS policy.

18. Petitioner responded to the Notice of Intent to Dismiss by letter dated September 3, 2013. In her letter, petitioner requested that her petition not be dismissed, stressing her financial need for the refund in caring for her children. Petitioner did not address the issue of the timeliness of her petition.

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

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced (*see e.g. 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 a taxpayer unless he or 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. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing

procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish 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 thus established that the Conciliation Default Order at issue was mailed as addressed to petitioner on August 31, 2012.

E. The address to which the Conciliation Default Order was mailed is the address designated by petitioner on her request for conciliation conference. At no time did petitioner provide BCMS with notice of any new or alternative address. The order was thus properly addressed.

F. Where, as here, a conciliation order has been properly mailed, Tax Law § 170(3-a)(e) does not require actual receipt of the order by the taxpayer. Specifically, section 170(3-a)(e) provides that a conciliation order is binding unless a petition is filed "within ninety days after the conciliation order is *issued* (emphasis added)." Issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Hence,

notwithstanding that the subject conciliation default order was returned to the Division as unclaimed, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, August 31, 2012. The petition in this matter, having been filed on May 13, 2013, or 255 days after the date of issuance of the order, was therefore untimely.

G. As noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest. Accordingly, petitioner's concerns as indicated in her letter (*see* Finding of Fact 18) may not be considered herein.

H. The petition of Aminata Diop is dismissed.

DATED: Albany, New York  
December 5, 2013

/s/ Timothy Alston  
ADMINISTRATIVE LAW JUDGE