

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD BIVONA	:	ORDER
	:	DTA NO. 827978
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, 2007 through	:	
February 28, 2009.	:	

Petitioner, Richard Bivona, 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, 2007 through February 28, 2009.

On March 30, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner, appearing by Irwin Popkin, Esq., filed his letter in response on April 14, 2017. On May 24, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), submitted affidavits and other documents in support of dismissal.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced June 15, 2017. After due consideration of the documents and arguments submitted by the parties, Donna M. Gardiner, Administrative Law Judge, renders the following order.

¹ By letter dated April 25, 2017, the due date for the parties to respond to the notice of intent to dismiss petition was extended until June 15, 2017.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of the conciliation order.

FINDINGS OF FACT

1. Petitioner, Richard Bivona, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on or about January 20, 2016. The request was in response to a notice of determination issued by the Division of Taxation (Division) assessing additional sales and use taxes due against petitioner for the period March 1, 2007 through February 28, 2009.

2. BCMS issued to petitioner a Conciliation Order Dismissing Request (CMS No. 269272), dated February 12, 2016, dismissing petitioner's request as untimely filed.

3. On December 5, 2016, petitioner filed a petition with the Division of Tax Appeals.

4. On March 30, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition, on the basis that the petition had not been timely filed.

5. The Division submitted the affidavits of Robert Farrelly and Melissa Kate Koslow, employees of the Division. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, dated May 3, 2017, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

6. The BCMS Data Management Services Unit prepared and forwarded 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, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed 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 taxpayer appear.

10. It was the general office practice that the BCMS clerk stamps on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

11. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “2-12-16” was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

13. 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 conciliation orders being mailed, so as to allow for correction and issuance at another time. When an 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.

14. The CMR in this case reflects that two 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 three and four, and a line has been drawn through the 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 listing pertaining to petitioner and his former representative. The preprinted number “44,” 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 “42” to reflect the two pieces pulled from the run.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the 5-page CMR, which contained a list of the 42 conciliation orders issued by the Division on February 12, 2016. The CMR also listed 42 certified control numbers. Each such certified control number was assigned

to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

16. Information regarding the conciliation order issued to petitioner was contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0757 3657 was reference number 000269272, along with the name and address of petitioner at his Water Mill, New York, address that is listed on both his request for conciliation conference and his petition.

17. Information regarding the conciliation order issued to petitioner's former representative was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0757 3329 was reference number 000269272, along with the name and address of petitioner's representative, Arnold Spiegel, 424 Madison Ave, 16th Floor, New York, NY 10017.

18. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since 2010 and currently Head Mail & Supply Clerk, dated May 8, 2017, describes the mail room's general operations and procedures followed 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 mail 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.

19. Here, the postal employee affixed a postmark date of February 12, 2016, to each page of the five-page CMR. The postal employee circled the number 44 to indicate "TOTAL PIECES RECEIVED AT POST OFFICE" on page five of the CMR, in compliance with the Division's specific request that postal employees circle the number, indicating that 44 pieces of mail were actually received.

20. Ms. Koslow does not address Mr. Farrelly's assertion that two pieces of mail were pulled from the run nor does she explain his assertion that only 42 pieces of mail were received by the USPS on February 12, 2016, from the Division.

21. Ms. Koslow 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 was picked up at the post office by a member of the staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

22. Based upon her review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Ms. Koslow stated that on February 12, 2016, an employee of the Mail Processing Center delivered pieces of certified mail addressed to petitioner and his former representative, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Ms. Koslow stated that she could also determine that a member of the staff obtained a copy of the CMR delivered to and accepted by the post office on February 12, 2016, for the records of BCMS. She asserted that the procedures described in her affidavit were 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 February 12, 2016.

23. Petitioner responded to the notice of intent to dismiss with a letter stating that the focus of his petition is not technically upon the notice of determination that was the subject of the conciliation order dismissing request. Rather, petitioner claims that he was not held to be a responsible officer with respect to other notices of determination and, as such, by res judicata, such reasoning would absolve him of any liability under the notice of determination that he protests in his petition.

CONCLUSIONS OF LAW

A. There is a 90-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c]). Pursuant to Tax Law § 170(3-a)(e), the conciliation order and underlying assessment in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. 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).

Inasmuch as a determination issued following a notice of intent to dismiss petition under section 3000.9(a)(4) of the Tax Appeals Tribunal's Rules and Procedures (Rules) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii)(vii) of the Rules, i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a notice of intent to dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination, and "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]).

B. 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 mailed (*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 (*Matter of Dean*, Tax Appeals Tribunal, July 1, 2014; *Matter of Cato*; *Matter of DeWeese*). When an order is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or register mail, the petitioner bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

C. 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 orders 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*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has failed to establish proper mailing. In her affidavit, Ms. Koslow attests to the fact that the CMR for February 12, 2016 lists 44 pieces of mail that were received by the USPS from the Division. However, Mr. Farrelly attests that, although the CMR had 44 pieces of mail listed thereon, two items were pulled as indicated by the lines drawn

through the entry for the two taxpayers, and only 42 pieces of mail were delivered to the USPS by the Division on February 12, 2016. Therefore, the affidavits do not corroborate the general procedures followed by the Division regarding pulled pieces of mail, if any, on February 12, 2016. Furthermore, the affiants do not agree on the number of pieces of mail that were delivered to the USPS on February 12, 2016.

E. Based on the record presented, there appear to be triable issues of fact and, accordingly, the notice of intent to dismiss petition, dated March 30, 2017, is withdrawn. The Division of Taxation shall have 75 days from the date of this order to file an answer to the petition, after which time a hearing will be scheduled in due course.

DATED: Albany, New York
August 31, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE