

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>IRA BRONNER</b>	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 828088
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2014.	:	

---

Petitioner, Ira Bronner, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2014.

On March 10, 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. In response to a request for additional time, the parties were granted until May 25, 2017 to respond to the proposed dismissal. Petitioner, appearing by James O. Druker, Esq., did not submit a response to the proposed dismissal. On May 16, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Stephanie Lane), 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 on May 25, 2017. After due consideration of the documents submitted, Winifred M. Maloney, 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 Order.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued a notice of deficiency (Assessment ID: L-04325433-4), dated June 26, 2015, asserting penalty due under Tax Law § 685(aa) in the amount of \$543,000.00 for the year 2014. The notice of deficiency is addressed to petitioner at a Seaman Avenue, Rockville Centre, New York, address.

2. In protest of the foregoing notice of deficiency, petitioner filed a request for conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS), hand-dated as signed September 22, 2015 by Scott E. Fink, petitioner's then representative, that was received by BCMS on September 23, 2015. The Request lists petitioner's address as the same Seaman Avenue, Rockville Centre, New York, address listed on the notice and his representative's address as Scott E. Fink, Greenberg Traurig, 200 Park Avenue, 16th Floor, New York, NY 10166. While the cover letter transmitting the Request and attachments indicates that a power of attorney, appointing Mr. Fink as petitioner's representative, was enclosed, the record does not include such power of attorney.

3. A conciliation conference was conducted on September 22, 2016, at which Frank Agostino, Esq., appeared for petitioner. The record does not include a power of attorney appointing Mr. Agostino as petitioner's representative. Subsequently, BCMS issued Conciliation Order (CMS No. 267943), dated November 10, 2016, sustaining the statutory notice.

4. On February 13, 2017, petitioner mailed a petition by United States Postal Service (USPS) Express Mail to the Division of Tax Appeals. The petition was hand-dated as signed on February 13, 2017, by petitioner's current representative, James O. Druker, Esq. It was received by the Division of Tax Appeals on February 14, 2017. The petition lists petitioner's address as the same Seaman Avenue, Rockville Centre, New York, address listed on the notice and Request.

In his petition, petitioner challenges the penalty asserted in the notice of deficiency.

5. On March 10, 2017, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner and the Division. The notice of intent to dismiss petition indicates that the relevant conciliation order was issued on November 10, 2016, but that the petition was not filed until February 13, 2017, or 95 days later.

6. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents: (i) the affidavit of Stephanie M. Lane, the Division's representative, dated May 15, 2017; (ii) the affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated April 17, 2017; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated November 10, 2016; (iv) a copy of the Conciliation Order and two cover sheets, dated November 10, 2016, and a copy of the three-windowed mailing envelope; (v) a copy of the petition filed with the Division of Tax Appeals on February 13, 2017; (vi) an affidavit, dated April 19, 2017, of Melissa Kate Koslow, a head mail and supply clerk and a supervisor in the Division's mail room since April 2010; (vii) an affidavit, dated April 21, 2017, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (viii) two USPS Forms 3811-A (requests for delivery information/return receipt after mailing) and the responses thereto; and (ix) a copy of petitioner's Request, received by BCMS on September 29, 2015.

7. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the USPS via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. The BCMS Data Management Services Unit prepares the computer-generated conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

9. 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. 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 zeroes. 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.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order and cover letter. The clerk verifies the name and address of the taxpayer 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 mail control number, bar code, and name and address of the taxpayer appear.

12. Pursuant to the general office practice, the BCMS clerk stamped "POST OFFICE

Hand write total # of pieces and initial. Do Not stamp over written areas” on the last page of the CMR and also stamped “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on each page of the CMR.

13. 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, “11-10-16” is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of November 10, 2016.

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

15. Mr. Farrelly attested to the truth and accuracy of the copy of the three-page CMR, which contains a list of conciliation orders issued by the Division on November 10, 2016. The CMR lists 29 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number was a reference/CMS number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

16. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0059 7186 is reference/CMS number 000267943, along with petitioner’s name and a Seaman Avenue, Rockville Centre, New York, address. A cover sheet bears petitioner’s name and the same

Rockville Centre, New York, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0059 7186, as that listed on the CMR for petitioner's entry. On page one of the CMR, corresponding to certified control number 7104 1002 9730 0059 7025 is reference/CMS number 000267943, along with the name "FRANK AGOSTINO," and a "14 WASHINGTON PL HACKENSACK NJ 07601" address. A cover sheet bears Mr. Agostino's name and the same Hackensack, New Jersey, address as that listed on the CMR for Mr. Agostino's entry. Additionally, both cover sheets bear the same CMS number as that listed on the CMR and the conciliation order.

17. The affidavit of Melissa Kate Koslow, a supervisor in the Division's Mail Processing Center, attests 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 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.

18. In this case, the postal employee affixed a postmark dated November 10, 2016 to each page of the CMR. The postal employee also circled the preprinted number "29" corresponding to the heading "TOTAL PIECES AND AMOUNTS," contained on the third and last page of the CMR, and circled the handwritten number "29" and his or her initials on the last page as well. The postal employee handwrote and circled the number 29 and also circled the "TOTAL PIECES AND AMOUNTS" number at the Division's specific request, and this was intended to indicate

that all of the 29 pieces of mail listed on the CMR were received at the post office.

19. Ms. Koslow'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 Ms. Koslow'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.

20. Based upon her review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Ms. Koslow avers that on November 10, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Seaman Avenue, Rockville Centre, New York, address, and an item of certified mail addressed to "Frank Agostino, 14 Washington Pl, Hackensack, NJ 07601," to a branch of the USPS in Albany, New York, in sealed postpaid envelopes 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 USPS on November 10, 2016 for the records of BCMS. Ms. Koslow asserts 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 piece of certified mail to petitioner and Mr. Agostino on November 10, 2016.

21. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS Forms 3811-A (requests for delivery information/return receipts after mailing) in this matter. In this instance, Ms. Corina filed Forms 3811-A seeking delivery information with respect to articles of mail bearing certified control numbers 7104 1002 9730

0059 7186 and 7104 1002 9730 0059 7025 on November 10, 2016, from the Albany, New York, branch of the USPS to “Ira Bronner” at “114 Seaman Ave., Rockville Ctr, NY 11570-3233,” and “Frank Agostino” at “14 Washington Pl., Hackensack, NJ 07601,” respectively. The USPS response confirmed delivery of the certified mail item 7104 1002 9730 0059 7186 on November 12, 2016 at 1:45 p.m. in Rockville Centre, NY 11570. The scanned image of the recipient’s signature as shown on the USPS response is “Ira Bronner.” The scanned address of the recipient indicates “114 Seaman Ave.” The USPS response confirmed delivery of the certified mail item 7104 1002 9730 0059 7025 on November 14, 2016 at 1:56 p.m. in Hackensack, NJ 07601.

### ***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 (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). This deadline is strictly enforced and protests filed even one day late 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 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. Thus, the Division of Tax Appeals issued a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4).

B. The standard of review for a notice of intent to dismiss petition is the same as that for a motion for summary determination (*Matter of Victory Bagel Time*, Tax Appeals Tribunal,



September 13, 2012). A summary determination “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]).

Section 3000.9(c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination “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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As the Tribunal noted in *Matter of United Water New York*:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion for summary judgment, the opponent must produce “evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992], *quoting Zuckerman*). Regardless of the sufficiency of the opposing papers, however, the failure of the proponent of the motion to make a prima facie showing of entitlement to judgment as a matter of law requires denial of the motion (*Winegrad* at 853).

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 mailed (*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 24, 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 registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

D. 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. In this case, the CMR, along with the affidavits of Mr. Farrelly and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) 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 thus established that the Conciliation Order was mailed as addressed to petitioner on November 10, 2016. The address to which the Conciliation Order was mailed is the same address as that listed on the notice of deficiency issued to petitioner

and his Request filed in protest of the same. Moreover, the Division has confirmed petitioner's actual receipt of the Conciliation Order on November 12, 2016 (*see* Finding of Fact 21). As such, the address used satisfies the "last known address" requirement.

F. While the Tax Law does not specifically provide for service of the Conciliation Order on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v Frank*, 43 NY2d 168 [1977]). Petitioner's Request was filed by his then representative, Scott E. Fink (*see* Finding of Fact 2). However, in her affidavit in support of the notice of intent to dismiss petition, the Division's representative, Ms. Lane, asserts that a copy of the conciliation order was served upon petitioner's representative, Frank Agostino, at his address of record. A copy of the power of attorney appointing Mr. Agostino as petitioner's representative to appear at the BCMS conciliation conference was not attached to Ms. Lane's affidavit. As such, there is insufficient evidence in the record to establish that the conciliation order was sent to petitioner's duly appointed representative (*Matter of Hyatt Equities, LLC*). Thus, a material issue of fact exists and the petition may not be dismissed as untimely upon accelerated determination.

G. The Notice of Intent to Dismiss Petition, dated March 10, 2017, is withdrawn, and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York  
August 10, 2017

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE