

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

**ROSALBA PEREZ** :

ORDER

DTA NO. 828579

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax Under Article 22 of the Tax Law and New York City Administrative Code for the Year 2013.

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Petitioner, Rosalba Perez, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and New York City administrative code for the year 2013.

On April 30, 2018, 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 ground that the petition did not appear to be timely filed. By request from the Division of Taxation, the 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to July 16, 2018. On July 16, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not respond to the notice of intent to dismiss petition. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order commenced on July 16, 2018. After due consideration of the documents and arguments 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. On September 22, 2017, petitioner, Rosalba Perez, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was filed in response to a notice of deficiency (notice), dated November 17, 2016, issued to petitioner by the Division of Taxation (Division) for the tax year 2013.

2. On October 20, 2017, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000300069, to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on November 17, 2016, but the request was not mailed until September 22, 2017, or in excess of 90 days, the request is late filed.”

3. On January 30, 2018, the Division of Tax Appeals received a petition seeking review of the conciliation order issued in this matter. The envelope in which the petition was sent bears a United States Postal Service (USPS) postmark of January 26, 2018.

4. On April 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent), which stated, in pertinent part:

“Pursuant to Tax Law § 2006 (4), a petition must be filed within ninety (90) days from the date a statutory notice is issued. Similarly, according to Tax Law § 170 (3-a) (e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a Bureau of Conciliation and Mediation Services' conciliation order.

The petition to the Conciliation Order in this matter was due to be filed, in accordance with Tax Law § 170 (3-a) (e) as set forth above, within ninety (90) days of the issuance of such order, which was October 20, 2017. However, it appears that the petition was not filed with the Division of Tax Appeals until January 26, 2018, or ninety-eight (98) days later. Therefore, it appears the petition was not timely filed.”

5. In response to the issuance of the notice of intent, the Division submitted the following: (i) an affidavit of Colleen McMahon, Esq., the Division’s representative, dated July 13, 2018; (ii) a copy of the petition and attachments; (iii) an affidavit, dated June 26, 2018, of Heidi Corina, a Legal Assistant 2 in the Office of Counsel for the Division; (iv) a Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS response to such request dated June 25, 2018; (v) an affidavit, dated June 29, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (vi) a “Certified Record for - DTF-962-F-E - Not of Def Follow UP” (CMR) postmarked November 17, 2016; (vii) a copy of the November 17, 2016 notice with the associated mailing cover sheet addressed to petitioner; (viii) an affidavit, dated July 9, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (ix) a copy of petitioner’s request for conciliation conference, dated September 22, 2017; (x) a copy of the conciliation order (CMS No. 000300069), dated October 20, 2017; and (xi) a copy of petitioner’s electronically filed 2015 New York State resident income tax return, filed on January 25, 2016.

6. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form

3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9735 3318 9698 on November 17, 2016, from the Colonie Center, New York, branch of the USPS to “Perez-Rosalba” at a Bronx, New York, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 3318 9698 on November 19, 2016 at 12:51 p.m. in Bronx, New York 10456. The scanned image of the recipient’s signature as shown on the USPS response is illegible. The scanned address of the recipient indicates the same Bronx, New York, address as listed on the notice.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division’s Case and Resource Tracking System (CARTS), the electronic system that the Division uses to issue and adjust assessments, record payments, and generate taxpayer notices of deficiency pursuant to article 22 of the Tax Law. As a result, Ms. Picard is familiar with CARTS and the Division’s past and present procedures as they relate to statutory notices. Attachments to Ms. Picard’s affidavit include, among other documents, a CMR dated November 17, 2016.

8. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room since December of 2013, and currently a Stores and Mail Operations Supervisor, describes the mail room’s general operations and procedures. Mr. Ramundo, in his affidavit, also attests that the standard procedures were followed with respect to the delivery to the USPS of pieces of certified mail on November 17, 2016.

9. The Division did not submit proof of mailing with respect to the subject conciliation order.

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

A. The petition filed in this matter seeks review of a conciliation order dismissing request. 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]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond such 90-day limits (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). 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 section 3000.9 (a) (4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. In *Matter of Victory Bagel Time, Inc.* (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.

C. 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]).

D. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. 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 conciliation 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 Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In the present matter, the Corina, Picard, and Ramundo affidavits do not address the procedures for issuance of conciliation orders including the subject conciliation order dismissing request. Additionally, the Division did not produce any proof of mailing of the subject conciliation order dismissing request. Since no evidence was presented to establish proper mailing of the subject conciliation order, the Division has not met its burden to show that the petition was untimely filed with respect thereto. Consequently, the notice of intent to dismiss petition is properly rescinded as to the conciliation order. This order does not address the timeliness of the request for conciliation conference, as there is no properly noticed motion for summary determination to that effect pending. However, this does not preclude the Division from bringing a motion to address the timeliness of the request for conciliation conference.

G. The notice of intent to dismiss petition is hereby rescinded. The Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York  
October 11, 2018

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE