

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THEODORE LIAROS : ORDER
 : DTA NO. 828659
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods ended :
February 28, 2015 through May 31, 2016, and for :
Review of a Notice of Proposed Driver's License :
Suspension Referral Issued on February 15, 2017 :
Pursuant to Tax Law § 171-v. :

Petitioner, Theodore Liaros, filed a petition for revision of a determination or for refund of sales and use taxes under article 28 and 29 of the Tax Law for the periods ended February 28, 2015 through May 31, 2016, and for review of a notice of proposed driver's license suspension referral issued on February 15, 2017 pursuant to Tax Law § 171-v.

On July 6, 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 basis that the petition did not appear to be timely filed. The Division of Taxation (Division), by Amanda Hiller, Esq. (Hannelore Smith, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by September 20, 2018, which date triggered the 90-day deadline for issuance of this order. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner, Theodore Liaros, filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of a proposed driver's license suspension notice (suspension notice), issued on February 15, 2017.

2. The request for conference sought a conference for the suspension notice based on collection case E-133510595.¹ A consolidated statement of tax liabilities for collection case E-133510595, dated February 15, 2017 accompanied the suspension notice. The February 15, 2017 consolidated statement of tax liabilities included as liabilities subject to collection action, the following assessments: L-043442002, L-043442000, L-043923167, L-044430374, and L-044695813. As of February 15, 2017, the date of the issuance of the suspension notice, the unpaid amount on collection case E-133510595, including penalty and interest, was \$136,628.46.

3. After a conciliation conference, BCMS issued a conciliation order, CMS No. 273805, on September 8, 2017 (conciliation order), sustaining the suspension notice.²

4. On February 21, 2018, the Department of Taxation and Finance issued an updated consolidated statement of liabilities for collection case E-133510595, with the assessments reference in finding of fact 2, and one additional assessment number, L-047775188. As of February 21, 2018, the unpaid amount on collection case E-133510595, including penalty and interest, was \$168,956.51.

¹ The request for conciliation conference form contains a typographical error in the collection case number. Although in petitioner's name, the request for conciliation conference form references collection case E-133510596, rather than E-133510595. Collection case E-133510596 pertains to petitioner's wife, Beth Liaros, which has been assigned a separate DTA number (828658). The correct collection case number for petitioner is E-133510595, and a copy of E-133510595 is attached to the request.

² Both the cover letter signed from James J. Koval, Jr., a conciliation conferee from BCMS and the conciliation order contain a typographical error in the last name of the petitioner. Both documents identify the petitioner as Theodore Llaros, rather than Theodore Liaros.

5. Petitioner filed a petition with the Division of Tax Appeals on March 30, 2018 in protest of the conciliation order and the February 21, 2018 consolidated statement of tax liabilities number E-133510595.³

6. On July 6, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition (notice of intent), on the basis that the petition did not appear to have been timely filed.

7. In response to the issuance of the notice of intent, the Division provided the following: (i) an affidavit of Hannelore Smith, an attorney employed by the Office of Counsel of the Division, dated September 11, 2018; (ii) a copy of the petition; (iii) a copy of the notice of intent to dismiss petition, dated July 6, 2018; (iv) a copy of the suspension notice (with the consolidated statement of liabilities attached) dated February 15, 2017; (v) a copy of the request for conciliation conference stamped by BCMS on February 27, 2017; (vi) a copy of the conciliation order dated September 8, 2017; (vii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated September 4, 2017; (viii) a certified mail record (CMR) containing a list of the conciliation orders issued by the Division on September 8, 2017 and; (xi) an affidavit of Fred Ramundo, supervisor of Division's mail room, dated September 4, 2018.

8. The affidavit of Robert Farrelly, Supervisor of Tax Conferences for BCMS, sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of conciliation orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a

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postmarked copy of the CMR.

9. 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 signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

10. 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.

11. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR is a listing of taxpayers 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 number is recorded under the heading "Reference No." and is preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. The clerk's regular duties include associating 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

13. 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 “MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the bottom left corner of the last page of the CMR.

14. 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 “9-8-17” was written in the upper right corner of each page of the CMR.

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

16. 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 pulled piece of mail is segregated from the remaining group of items being mailed, so as to allow for correction or 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.

17. The CMR in this case reflects that one piece of mail was pulled from the run, and this deletion is reflected in the change to the listing for total pieces received at the post office. The item specifically pulled appears on page four, and a line has been drawn through the entry on the CMR to indicate the particular item was pulled from the run. There is no such line drawn on the CMR pertaining to petitioner. The preprinted number “40,” 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 “39” to reflect the piece pulled from the run.

18. Mr. Farrelly attests to the truth and accuracy of the copy of the four-page CMR, which contains a list of the conciliation orders issued by BCMS on September 8, 2017. The CMR lists 39 certified control numbers. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee, and postage and fee amounts.

19. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0164 2670 is reference number 000273805, along with the name and last known address of petitioner, Theodore Liaros.⁴ Specifically, the Clarence, New York, address listed on the CMR is the same address to which the suspension notice was issued, the same address on petitioner's request for a conciliation conference, and the petition.

20. 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, 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 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

⁴ The CMR contains a typographical error in the last name of the addressee. The document identifies the addressee as Theodore Llaros rather than Theodore Liaros. Given the absence of any suggestion that petitioner did not actually receive the conciliation order, the difference is inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

Albany, New York. A postal employee affixes a postmark and his or her signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated September 8, 2017, to each page of the four-page CMR. The postal employee also wrote the number “39” and initialed page four to indicate the total pieces of mail received at the post office.

22. Mr. Ramundo 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 is picked up at the post office by a member of Mr. Ramundo’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.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo states that on September 8, 2017, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Theodore Liaros to a branch of the USPS in Albany, New York, in a sealed 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 September 8, 2017, for the records of the Division. Mr. Ramundo 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 these pieces of certified mail to petitioner on September 8, 2017.

CONCLUSIONS OF LAW

A. 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.

B. 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]).

C. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. 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 Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*).

D. 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 issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of

postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, 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 bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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 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 Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). 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 this case, the Division has met its burden of establishing proper mailing of the conciliation order. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish that the order in issue was actually mailed to petitioner by certified mail on September 8, 2017, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the

order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo affidavits were followed with respect to the conciliation order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of September 8, 2017. There are 39 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "39," that the post office received 39 items for mailing. In short, the Division established that it mailed the orders by certified mail on September 8, 2017 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the order was properly mailed when it was delivered into the custody of the USPS on September 8, 2017, properly addressed to petitioner at his last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which protests had to have been filed. In fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. Where 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, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed "within ninety days after the conciliation order is issued." As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*). Hence, the 90-day limitations period for the filing of a petition in this matter, with regard to the conciliation order, commenced as of the date of mailing, i.e., on September 8, 2017.

H. The petition also challenges collection case E-133510595. A specific statutory predicate underlying the suspension notice is the establishment of the existence of “delinquent tax liabilities,” specifically the existence of “past-due tax liabilities,” owed by the taxpayer in an aggregate amount equal to or greater than \$10,000.00. Tax Law § 171-v (1) defines the term “past-due tax liabilities” as “any tax liability or liabilities which have become fixed and final *such that the taxpayer no longer has any right to administrative or judicial review*” (emphasis added). The tax liabilities that underly the suspension notice, assessment numbers L-044695813, L-044430374, L-043923167, L-043442000, and L-043442002, were the subject of collection case E-133510595, as included on the consolidated statement of tax liabilities dated February 15, 2017. In order for the BCMS conferee to issue his conciliation order sustaining the suspension notice, he had to find the liabilities in collection case E-133510595 fixed and final. Hence, the status of the liabilities associated with collection case E-133510595, as included on the February 15, 2017 consolidated statement of tax liabilities, was incorporated into the conciliation order and petitioner’s challenge on that issue is likewise precluded as untimely.

I. The Division has established that the conciliation order was properly mailed as addressed to petitioner at his last known address on September 8, 2017. Since the petition was filed on March 30, 2018, or more than 90 days after the September 8, 2017 date of issuance of the conciliation order, the petition with regard to the suspension notice and its underlying liabilities is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. However, additional liabilities were identified after the issuance of the conciliation order, in an updated consolidated statement of liabilities, dated February 21, 2018. Specifically,

assessment number L-047775188 has been challenged here. It is unclear as to whether that liability is fixed and final. Thus, it remains at issue.

K. The notice of intent to dismiss is sustained and petition of Theodore Liaros is dismissed to the extent indicated in conclusions of law G through I. The notice of intent to dismiss is rescinded with regards to assessment number L-047775188, and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
December 13, 2018

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE