

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>DRUG STORE, INC.,</b>	:	DECISION
<b>ANTOINETTE PELUSO</b>	:	DTA NOS. 822066, 822067
<b>AND NICHOLAS AVICOLLI</b>	:	AND 822068
for Revision of Determinations or Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period March 1, 2002 through February 28, 2005.	:	

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Petitioners, Drug Store, Inc., Antoinette Peluso and Nicholas Avicolti, filed an exception to the determination of the Administrative Law Judge issued on February 5, 2009. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation did not file a brief in opposition. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) issued to petitioner Drug Store, Inc., a Notice of Determination, assessment number L-028172589, asserting a sales tax deficiency of \$145,398.23 plus penalty and interest for the period March 1, 2002 through February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS).

A conference was scheduled but Drug Store, Inc., did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Drug Store, Inc., at its last known address of record: “Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848” found on its 2005 Annual Sales and Use Tax Return.

The Division issued to petitioner Antoinette Peluso a Notice of Determination, assessment number L-028211652, asserting a sales tax deficiency of \$57,649.05 plus penalty and interest for the period December 1, 2003 through February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with BCMS.

A conference was scheduled but Antoinette Peluso did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Antoinette Peluso at her last known address of record: “Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848” found on her 2005 New York State Nonresident Income Tax Return.

The Division issued to petitioner Nicholas Avicolli a Notice of Determination, assessment number L-028211651, for the period December 1, 2003 through February 28, 2005. Petitioner protested this notice by timely filing a Request for Conciliation Conference with BCMS.

A conference was scheduled but Nicholas Avicolli did not appear and a Conciliation Default Order was issued, dated September 28, 2007. The order was mailed to Nicholas Avicolli at his last known address of record: “Nicholas Avicolli, 668 Foothill Road, Bridgewater, NJ

08807-1848” found on his Request for Conciliation Conference in BCMS, dated February 15, 2007.

For all three of the petitioners herein, the Division submitted the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set 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 CMR.

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 covering letter to a BCMS clerk assigned to process the conciliation orders.

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.

The AFP Unit also produced a computer-generated CMR entitled “Assessments Receivable, 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 and the BCMS numbers were recorded on the CMR. The AFP Unit

printed the CMR and cover sheets and delivered them to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associated each cover sheet, conciliation order, and covering 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, covering letter, and Conciliation Order into a three-windowed envelope.

It was the general office practice that the BCMS clerk stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas,” and also stamped “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit” on the last page of the CMR.

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 “9/28/07” was written in the upper right corner of each page of the CMR.<sup>1</sup>

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

The CMR contained a list of the 50 conciliation orders issued by the Division on September 28, 2007. The CMR listed 53 certified control numbers with three deletions from the list. 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. Each page of the

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<sup>1</sup>Although the Division submitted three separate motions and each contained a CMR for each petitioner, the same CMR was submitted for each matter. Therefore, all references to the preparation and mailing of the CMR by Mr. Farrelly and Mr. VanDerZee refer to one and the same document and are equally pertinent to each petitioner.

CMR contained the postmark affixed by the United States Postal Service with the date September 28, 2007.

Information regarding the Conciliation Order issued to Drug Store, Inc., was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3583 was reference number 000217988, along with petitioner's name and address: Drug Store, Inc., Attn: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a notation that the certified mail was "unclaimed" and then "remailed" on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

Information regarding the Conciliation Order issued to Antoinette Peluso was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3606 was reference number 000217990, along with petitioner's name and address: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a notation that the certified mail was "unclaimed" and then "remailed" on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

Information regarding the Conciliation Order issued to Nicholas Aviccolli was contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0326 3590 was reference number 000217989, along with petitioner's name and address: Nicholas Aviccolli, 668 Foothill Road, Bridgewater, NJ 08807-1848. The CMR contained a notation that the certified mail was "unclaimed" and then "remailed" on November 2, 2007 by regular mail, the BCMS policy when orders are returned by the Postal Service.

The affidavit of James Steven VanDerZee, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, 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 was placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

Here, the postal employee affixed a postmark dated September 28, 2007 to each page of the five-page CMR. The postal employee also wrote his or her initials and the number “50” next to the printed statement “TOTAL PIECES RECEIVED AT POST OFFICE” on page five of the CMR, in compliance with the Division’s specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 50 pieces of mail were actually received.

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 Mr. VanDerZee’s 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.

Based upon his review of the affidavits of Robert Farrelly submitted for each of the matters herein and the exhibits attached thereto, including the CMR, Mr. VanDerZee stated that on September 28, 2007, an employee of the Mail Processing Center delivered a piece of certified mail to a branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by

certified mail addressed to: Drug Store, Inc., Attn: Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848; Antoinette Peluso, 662 Foothill Road, Bridgewater, NJ 08807-1848; and Nicholas Avicolti, 668 Foothill Road, Bridgewater, NJ 08807-1848. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on September 28, 2007 for the records of BCMS. Mr. VanDerZee asserted that the procedures described in his affidavits submitted for each of the petitioners herein 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 Drug Store, Inc., Antoinette Peluso and Nicholas Avicolti on September 28, 2007.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge reviewed the relevant statutory language and case law regarding the timely filing of a petition in response to a conciliation order issued to a taxpayer. The Administrative Law Judge noted that a timely petition is required in order for this agency to have jurisdiction over the merits raised in a petition.

Any inquiry into whether petitioners filed their petitions timely begins with the Division establishing that it properly mailed the conciliation orders to petitioners. 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 with respect to the conciliation orders in issue.

The Administrative Law Judge concluded that the Division has met its burden of establishing proper mailing. Since the conciliation orders were properly mailed when they were

delivered into the custody of the USPS on September 28, 2007, it is this date that commenced the 90-day period within which a protest had to have been filed. Ninety days after the September 28, 2007 date of mailing was December 27, 2007, and in order to be considered timely, petitioners' protests had to have been filed on or before such date. Petitioners' petitions were not filed until January 7, 2008 and were, therefore, untimely.

Lastly, the Administrative Law Judge noted that petitioners did not raise any arguments or submit any evidence in opposition to the Division's motion and he determined that, since there was no material or triable issue of fact presented, the Division was entitled to summary determination in its favor.

#### ***ARGUMENTS ON EXCEPTION***

In their exception, petitioners agree with the facts as determined, yet they disagree with the outcome. However, no further statement was made regarding why we should consider their late filed petitions as timely filed. Moreover, despite filing an exception, petitioners did not submit a brief in support of their exception.

#### ***OPINION***

Petitioners have not presented any argument that would have us modify the determination in any respect. Therefore, since we find that the Administrative Law Judge fully and adequately dealt with the issue presented, we affirm his determination for the reasons set forth therein.

ACCORDINGLY, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Drug Store, Inc., Antoinette Peluso and Nicholas Avicolli is denied;
2. The determination of the Administrative Law Judge is sustained; and

3. The petitions of Drug Store, Inc., Antoinette Peluso and Nicholas Avicolli are dismissed.

DATED:Troy, New York  
October 29, 2009

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner