

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TONYA DAKARI</b>	:	DECISION
	:	DTA NO. 822520
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2004 through 2006.	:	

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Petitioner, Tonya Dakari, filed an exception to the order of the Administrative Law Judge issued on January 22, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of conciliation orders.

***FINDINGS OF FACT***

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

Petitioner, Tonya Dakari, timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency numbered L028812345, L028759843, and L028812342. Petitioner wrote her Binghamton, New York, address on the request form under the entry for any change of address.

Following a conciliation conference on April 21, 2008, BCMS issued to petitioner two conciliation orders (CMS Nos. 221501 and 221201), both dated June 20, 2008. The conciliation orders sustained the notices of deficiency.

On September 19, 2008, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation orders dated June 20, 2008. The envelope in which the petition was delivered to the Division of Tax Appeals bore a United States Postal Service (USPS) postmark dated September 19, 2008.

On September 29, 2008, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the conciliation orders in this matter were issued on June 20, 2008, but that the petition was not filed until September 19, 2008, or 91 days later.

In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of

mailing, for the conciliation conferee for signature, who in turn, forwards the order and cover 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 are electronically sent to the Division's Advanced Function Printing Unit (AFP). 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, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." 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 zeros. These documents are delivered to the BCMS clerk assigned to process conciliation orders.

The clerk, as part of her regular duties, associates 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.

On each page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

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 "6/20/08" is written in the upper right corner of each page of the CMR.

The CMR, along with the cover sheets, cover letters, and conciliation orders, are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on June 20, 2008. This CMR lists 49 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

There are two deletions, or pulled items, from the list of 49 computer-printed certified control numbers. These pulled items are shown on the CMR by a line drawn through the relevant certified control numbers and corresponding information. These pulled items appear on pages three and five of the CMR and are unrelated to the conciliation orders at issue in this matter. Consistent with these deletions, the computer-printed "total pieces" entry of "49" on page five of the CMR has been crossed out and "47" has been handwritten in its place.

Information regarding the conciliation orders issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control numbers 7104 1002 9730 0760 3934 and 7104 1002 9730 0760 3941, respectively, are reference/CMS numbers 000221201 and 000221501, along with petitioner's name and address as written by petitioner on her requests for conciliation conference.

The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, 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 places postage and fee amounts on the envelopes. 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.

In this particular instance, the postal employee affixed a postmark dated June 20, 2008 to each page of the five-page CMR. The postal employee also wrote his or her signature and wrote and circled the number "47" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

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. VanDerZee'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.

Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on June 20, 2008, an employee of the Mail Processing Center delivered two pieces of certified mail addressed to petitioner to a branch of the USPS in Albany, New York in sealed envelopes 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 June 20, 2008 for the records of BCMS. Mr. VanDerZee 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 the pieces of certified mail to petitioner on June 20, 2008.

The covering letter that accompanied the conciliation orders at issue in this matter advised petitioner that the orders would be binding unless petitioner filed a petition with the Division of Tax Appeals within 90 days of the date of the order.

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge ordered that the petition be dismissed on the ground that it was not timely filed within the 90-day period prescribed by Tax Law § 170(3-a)(e). The Administrative Law Judge found that the petition was not filed until September 19, 2008 or 91 days after the conciliations orders were issued on June 20, 2008.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner admits that she misconstrued the statute by assuming that the ninety days within which to file an exception started from the date that the taxpayer actually received the conciliation order, not on the date that the Division mailed it out. However, she argues that the time frame within which to file an exception should begin when a taxpayer actually receives an order. Petitioner further argues that June 20, 2008 to September 20, 2008 is ninety days. Finally, petitioner states that if she lived in Albany or Troy, New York and delivered the petition personally, she would have personally delivered it on September 19, 2008.

***OPINION***

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 filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). When the timeliness of the petition is at issue, the Division must establish proper mailing of the conciliation order (*see, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioner on June 20, 2008, by submitting affidavits describing its general mailing procedure and the mailing record that showed that the procedure was followed in this case (*see, generally, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner’s petition was not filed until September 19, 2008. September 18, 2008 is the 90<sup>th</sup> day from June 20, 2008. Since petitioner did not file her petition until September 19, 2008, it was not timely filed. Despite the fact that the petition was filed only one day late, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see, Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003). Therefore, we affirm the conclusion of the Administrative Law Judge that since petitioner failed to file her petition protesting the conciliation order within 90 days of its issuance, such petition was untimely filed and properly dismissed.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Tonya Dakari is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Tonya Dakari is dismissed with prejudice.

DATED: Troy, New York  
August 6, 2009

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

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