

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions :  
of :  
**WESTERN ARIES CONSTRUCTION, LLC** : DECISION  
for Revision of a Determination or for Refund of : DTA Nos. 823394  
Highway Use Tax under Article 21 of the Tax Law for the : and 823395  
period April 1, 2004 through December 31, 2007, and for :  
Revision of a Determination or for Refund of Tax on :  
Petroleum Businesses Under Article 13-A and Tax on :  
Fuel Use under Article 21-A of the Tax Law for the :  
Periods April 1, 2004 through December 31, 2006 and :  
April 1, 2007 through December 31, 2007. :  
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Petitioner, Western Aries Construction, LLC, filed an exception to the order of the Administrative Law Judge issued on July 22, 2010. Petitioner appeared by Kresses & Piasecki Legal (Brandon Piasecki, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief in support. The Division of Taxation did not file a brief in opposition. 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 timely petitions 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, Western Aries Construction, LLC, filed timely requests for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination L-030774238-3 and L-030911039-2. On each request for conciliation conference, petitioner's preprinted address was listed as 2919 Birch Avenue, Niagara Falls, New York 14305-2209.

After a conciliation conference held on July 22, 2009, BCMS issued two conciliation orders to petitioner. The first Conciliation Order (CMS No. 277938), dated September 11, 2009, recomputed Notice of Determination L-030774238 to tax due of \$1,230.23 plus interest and penalty. The second Conciliation Order (CMS No. 227342), dated September 11, 2009, denied petitioner's request and sustained Notice of Determination L-030911039.

Petitioner filed two petitions with the Division of Tax Appeals seeking administrative hearings to review the conciliation orders dated September 11, 2009. The petitions were dated December 10, 2009, and were received by the Division of Tax Appeals on December 14, 2009. The envelope in which the petitions were mailed indicates that it was sent by United States Postal Service (USPS) Certified Mail and reflects the date of mailing as "DEC 11, 09."

On January 22, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner two Notices of Intent to Dismiss Petition. Each notice indicates that the Conciliation Order appeared to have been issued on September 11, 2009 and the petition appeared to have been filed on December 11, 2009, or 91 days later.

In response to the issuance of the Notices of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The Division also submitted copies of petitioner's petitions and a copy of the envelope in which they were sent to the Division of Tax Appeals, copies of petitioner's requests for conciliation conference sent to BCMS, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on September 11, 2009, and copies of the subject September 11, 2009 conciliation orders.

The affidavit of Robert Farrelly, Assistant 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 orders by the USPS, via certified mail, and confirmation of the mailing through receipt by BCMS of a postmarked copy of the CMR.

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 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 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, 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. The AFP Unit prints the CMR and cover sheets and 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 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 "09/11/09" 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, which is responsible for delivering the CMR, along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR that contains a list of the conciliation orders issued by the Division on September 11, 2009. This CMR lists 51 computer-printed certified control numbers. There are no deletions from the list. Each 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 and the name and address of the addressee.

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 1514 6201 and 7104 1002 9730 1514 6218, respectively, are reference/CMS numbers 000227342 and 000227938, respectively, along with petitioner's name and address as preprinted on petitioner's requests for conciliation conference.

The affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, 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 letters. A clerk then counts the envelopes and verifies the name 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 September 11, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the five-page CMR. On page five, the postal employee also wrote his or her initials and wrote the number "51" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

Mr. VanDerZee 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 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 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 September 11, 2009.

In response to the issuance of the notices of intent to dismiss petitions, petitioner submitted the sworn statement of its owner, Wieslaw Walawender, and attached documents.

Mr. Walawender claims there are numerous defects in the Division's mailing evidence, and, therefore, the notices of intent to dismiss petitions should be withdrawn and hearings on the merits of the petitions should be scheduled. First, Mr. Walawender asserts that BCMS failed to adequately inform petitioner of its rights because the cover letters accompanying the conciliation orders referenced Tax Law § 170(3-a) instead of Tax Law § 170(3-a)(e), and in its paraphrasing of the applicable section, BCMS has changed the meaning of the statute. Specifically, Mr. Walawender maintains that BCMS changed the word "after" to "from" in its explanation of time period in which to file a petition with the Division of Tax Appeals following the issuance of the conciliation orders. He further maintains that "after" and "from" have different meanings with respect to the measurement of time. He argues that the time period for filing a petition should

not begin until the taxpayer has received a legal notification of the issuance of the conciliation order that satisfies the rules regarding the means of service of process, to wit: the taxpayer signs the PS Form 3811 and receives the conciliation order (certified mail) from the USPS employee. Second, Mr. Walawender contends that the mailing procedure is defective because there is no affidavit of the person who actually delivers the orders to the post office, i.e., no affidavit of service. Lastly, Mr. Walawender claims that the CMR is defective because there is no verifiable signature of the postal employee who could be identified or an affidavit from such person stating that the initials on the CMR are his or hers.

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

The Administrative Law Judge determined that the Division adduced sufficient evidence, in the form of the CMR and mailing affidavit, to prove that proper mailing procedures were followed in this case. The mailing of the Conciliation Order commenced the statutory 90-day period for petitioner to file a timely petition with the Division of Tax Appeals. As the petition was filed after the statutory period, the Administrative Law Judge held that the Division of Tax Appeals lacked jurisdiction to consider the substantive claim.

The Administrative Law Judge considered and rejected petitioners' arguments. Petitioner argued that, by changing the word "after" to "from," altered the meaning of the applicable statute (*see* Tax Law § 170[3-a][e]). The Administrative Law Judge rejected this argument because she determined that the language on the cover letters accompanying each of the conciliation orders clearly and unambiguously declare that petitioner had 90-days to protest the order. The Administrative Law Judge also rejected petitioner's attacks on the Division's evidence because these arguments were contravened by statute and wholly unsupported by case law.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner raises arguments identical to those raised below.

***OPINION***

We affirm the order of the Administrative Law Judge.

Pursuant to Tax Law § 170(3-a)(e), petitioner had 90-days from the issuance of the conciliation order to file a protest with the Division of Tax Appeals. A conciliation order is considered issued when it is mailed to the taxpayer (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005). Beyond the 90-day statutory period, the Division of Tax Appeals has no subject matter jurisdiction to consider the substance of the petition.

A conciliation order is mailed when it is delivered into the custody of the USPS for mailing (*see Matter of Cato, supra; see also Matter of Novar TV & Air Conditioner Sales and Serv.*, Tax Appeals Tribunal, May 23, 1991). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of determination to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

We find that the Division has met its burden to establish proper mailing of the conciliation order to petitioner on September 11, 2009 by submitting the CMR and affidavit describing its general mailing record and showing that it was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Petitioner adduced no evidence to challenge the presumption of proper mailing. We note that, contrary to petitioner's arguments, the submission of the CMR and aforementioned affidavit is sufficient to prove mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

The Administrative Law Judge properly rejected the balance of petitioner's arguments and properly determined that there is no subject matter jurisdiction to consider these claims.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Western Aries Construction, LLC is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petitions of Western Aries Construction, LLC are dismissed.

DATED: Troy, New York  
March 3, 2011

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

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

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner