

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ROBERT M. KLEIN** : DETERMINATION  
for Revision of a Determination or for Refund : DTA NO. 817500  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1991 through :  
May 31, 1998. :  
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Petitioner, Robert M. Klein, 7M Sebonac Road, P.O. Box 446, Southampton, New York 11968, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1991 through May 31, 1998.

On May 15, 2000, the Division of Taxation, by its representative Barbara G. Billett, Esq. (Christina L. Seifert, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to file a petition within 90 days after the issuance of a Conciliation Order. Petitioner, appearing *pro se*, had 30 days, or until June 14, 2000, within which to respond to the Division's motion. Petitioner did not respond to the Division's motion. The 90-day period for issuance of this determination commenced on June 14, 2000 pursuant to section 3000.5(d) of the Rules. After review of the motion papers, affidavits and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

***ISSUE***

Whether petitioner filed a petition within 90 days after the issuance of a Conciliation Order.

***FINDINGS OF FACT***

1. At issue in this matter is whether a certain petition was filed by petitioner with the Division of Tax Appeals within 90 days after the issuance of a Conciliation Order by the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). The petition in question is signed by Robert M. Klein and is hand dated January 4, 2000. The envelope in which the petition was mailed to the Division of Tax Appeals, by certified mail, bears the United States Postal Service ("USPS") postmark and cancellation stamp of the Fort Lauderdale, Florida post office dated January 5, 2000. The petition, as well as the envelope, bear the indate stamp of the Division of Tax Appeals dated January 10, 2000. The envelope carries a handwritten return address for "Robert Klein, P.O. Box 446, Southampton, New York 11968."

2. The Conciliation Order in response to which the above-described petition was filed is included among the attachments to the petition. This Order, titled a "Conciliation Order Dismissing Request," bears CMS No. 176448 and is dated September 10, 1999. The caption portion of the Order indicates that it pertains to five statutory notices (numbered L-008028694, L-010699935, L-015589488, L-015957575 and L-015589489). The text of the Order states the following:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on August 14, 1995, September 28, 1998 and December 17, 1998, but the request was not mailed until June 19, 1999, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

3. A September 10, 1999 explanatory letter addressed to Mr. Klein and apparently mailed with the Conciliation Order provides as follows:

Please take notice of the Conciliation Order enclosed herewith.

Your Request for Conciliation Conference has been dismissed because it was not filed within the time allowed by the Tax Law. If you wish to contest the timeliness of your filing, you may file a petition within 90 days from the date of this order with the Division of Tax Appeals. If a petition is not filed within such time, the enclosed order will become final. Petition forms and the Rules of Practice and Procedure may be obtained by writing to:

[address and telephone number of Division of Tax Appeals]

A request for petition forms and the rules is not considered the filing of a petition for hearing for purposes of the time limits, and does not extend the time limits for filing a petition.

4. In response to the petition the Division filed an answer dated March 16, 2000. The Division's answer asserts, *inter alia*, that the Conciliation Order in question was issued on September 10, 1999 and that the petition was not filed until January 5, 2000. Accordingly, the Division asserts in its answer that the petition should be dismissed as untimely since it was not filed within 90 days after the date of issuance of the Conciliation Order dismissing petitioner's request for a conciliation conference. On May 15, 2000, the Division brought the subject motion for summary determination on the same basis set forth in the answer, to wit, that the petition was not timely filed, and that petitioner was therefore barred from contesting the correctness of the dismissal of its request for a conciliation conference and the correctness of the underlying notices of determination.

5. In support of its motion, the Division submitted the affidavits of Michael J. Sampone and James Baisley, employees of the Division, as well as a copy of the certified mail record (“CMR”) containing a list of the conciliation orders allegedly issued by the Division on September 10, 1999 (including one issued to petitioner) and a copy of the Conciliation Order.

6. The affidavit of Michael J. Sampone, Assistant Director of BCMS, sets 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’ receipt of a postmarked copy of the CMR.

7. The word processing unit in BCMS prepares the conciliation orders and the CMR which are then forwarded to a BCMS clerk assigned to process the conciliation orders. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the sequential certified control number stickers to envelopes for each listed taxpayer and records, on the CMR, the certified control number from each envelope. The conciliation orders and the CMR are picked up, in BCMS, by an employee of the Division’s Mail Processing Center (“mailroom”). Each page of a CMR is a separate CMR for the conciliation orders listed on that page only and each page contains spaces to record the “Total Number of Pieces Listed by Sender” and the “Total Number of Pieces Received at Post Office” for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to initial.

8. The copy of the four-page CMR attached to Mr. Sampone’s affidavit contains a list of the conciliation orders assertedly issued by the Division on September 10, 1999 including, on page four, an order addressed to petitioner, Robert M. Klein, 7M Sebonac Road, Southampton,

New York 11968-2742. The certified control numbers on page four of the CMR run consecutively from Z 418 087 582 through Z 418 087 585 for a total of four items of certified mail. The certified control number corresponding to the entry listing petitioner's name and address is Z 418 087 583. On pages one through three of the CMR, the certified control numbers run consecutively from Z 418 087 537 through Z 418 087 581, with a total of 15 pieces of mail corresponding to each of the 15 certified control numbers listed on each of such pages.<sup>1</sup> Each page of the CMR, including specifically page four, is date stamped September 10, 1999 by the Colonie Center branch of the USPS in Albany, New York. At the bottom of page four, the page on which petitioner's name and certified control number are listed, the number "4" has been filled in as the "Total Number of Pieces listed by Sender" and the number "4" has also been filled in, together with the initials of the postal employee, to verify the receipt of four pieces of certified mail by the USPS.

9. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's mailroom, 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 piece of correspondence, including a statutory notice or a conciliation order is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the mailroom staff weighs and seals each envelope and places postage and fee amounts on the letters. 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 the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or

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<sup>1</sup> The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

signature to the CMR indicating receipt by the post office. Mr. Baisley's knowledge that the postal employee wrote in the number "4" and initialed the page to indicate the receipt of four pieces of certified mail is based on the fact that the Division's mailroom specifically requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the mail record.

10. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, the CMR is picked up at the post office by a member of Mr. Baisley's staff on the following day after its delivery and is then delivered to the originating office (here BCMS).

11. In addition to the foregoing, the Division also provided the affidavit of one Bruce Peltier, a supervisor in the Registry Unit of the Division's mailroom. The Registry Unit is the mailroom section specifically responsible for sending out and receiving all signature mail on behalf of the Division, including certified mail, USPS express mail and Federal Express Mail.

12. In an effort to establish that the Conciliation Order at issue was not only mailed to but was also received by petitioner, Mr. Peltier prepared a USPS Form 3811-A ("Domestic Return Receipt [After Mailing]"), a form available to a mailer to request return receipts with respect to registered, certified, insured and express mail after mailing. The Form 3811-A is sent to the USPS post office where the piece of mail in question was delivered, in this case to the Southampton, New York post office. Specifically, Mr. Peltier filled out petitioner's name and address, as well as the certified number (Z 418 087 583) and mailing date (09/10/99) for the piece of mail in question, as gleaned from the Division's CMR. On or about March 12, 2000, he forwarded the Form 3811-A to the Southampton, New York postmaster for response. This form

was returned to the Division. It reflects the “received” stamp of the Southampton post office dated March 15, 2000 and also bears the USPS postmark of March 15, 2000. The information section completed by the Southampton, New York post office indicates, at sections “8” and “9,” respectively, that the item of certified mail Z 418 087 583 was delivered to Robert M. Klein on 9/14/00. Section “11” reflects a checkmark in the box reserved to specify that “Delivery was made” (emphasis as in original), and section “12” includes the postal employee’s initials.

14. The Division’s representative, Ms. Seifert, also submitted her affidavit dated May 12, 2000. Ms Seifert states that upon review of the returned Form 3811-A, she recognized that an obvious clerical error had been made in completing the form, specifically that the delivery date was shown as September 14, 2000, a date in the future. Accordingly, on or about April 19, 2000, Ms. Seifert prepared and sent a second Form 3811-A, in the same manner as had been done by Mr. Peltier. The form was again completed by postal employees in the Southampton, New York post office, included the USPS postmark of April 24, 2000, and provided the same information as is detailed above, save for the fact that the delivery date is listed as 9/14/99 instead of 9/14/00 with an asterisk placed next to such delivery date. The asterisk refers to a letter to Ms. Seifert from the Postmaster at Southampton, New York providing as follows:

My apology with regard to the enclosed matter. Unfortunately, postal personnel did not comply with our regulations governing the delivery of the subject Certified Mail.

The certified article arrived for delivery on September 13, 1999, but the addressee was not home to receive delivery and a notice was left in the customer’s mail box advising of the delivery attempt.

The customer apparently came to the post office and acknowledged receipt of the certified letter using the notice left in his mailbox. The problem arises as there is no date of delivery on our record, nor any delivering employee signature, which is required by our regulations. The signed receipt “Robert M. Klein” was among all other receipts from 09/14/99.

I realize there may be legal and /or financial ramifications resulting from one of [sic] employee's failure to properly execute delivery of the item, however, there is not much I can do at this point to rectify this specific incident.

15. Attached to the postmaster's letter was a copy of USPS Form 3849 ("Delivery Notice/Reminder/Receipt") for the Southampton, New York post office. The front side reflects the sender's name for certified letter Z 418 087 583 to be "Tax & Finance," the customer to be Robert Klein at 7M Sebonac Road, the date of attempted delivery as 9/13, and the item in question (the certified letter) to be at the Southampton post office and available for pick-up on 9/14 from 8:00 to 5:00. The reverse side of the Form 3849 bears a signature of Robert Klein and the printed name Robert M. Klein appearing immediately beneath such signature. As noted in the postmaster's letter, the form does not bear a date or the initials of a postal employee.

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

A. In order to challenge a conciliation order, a petition must be filed with the Division of Tax Appeals within 90 days after the issuance of the conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). According to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(former[1]),<sup>2</sup> the order in this case and, as a consequence, the underlying notices of determination would be binding upon petitioner unless, within 90 days from the date of issuance of the order, a petition was filed with the Division of Tax Appeals contesting the order. Where a taxpayer fails to file a timely petition contesting a conciliation order, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case

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<sup>2</sup> Tax Law § 1138(a)(1) was amended for years beginning January 1, 1997 to state that the notice "shall be an assessment" unless a petition is filed within 90 days (*see* L 1996, ch 267, § 3). While the caption indicates that a portion of the period covered by the underlying notices in this case falls after January 1, 1997, the record does not provide sufficient information to determine the possible applicability of amended section 1138(a)(1) vis-a-vis payment of tax for such post January 1, 1997 period followed by the filing of a claim for refund.

(see, *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). There is no dispute that the petition in this matter was filed with the Division of Tax Appeals when it was mailed to the Division of Tax Appeals via USPS certified mail on January 5, 2000. The only question presented is whether such January 5, 2000 filing date was within 90 days after the issuance (mailing) of the Conciliation Order.

B. Where, as here, a taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). An order is mailed when it is delivered to the custody of the USPS (see, *Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When an order is found to have been properly mailed by the Division, a presumption arises that the order was received by the person to whom it was addressed (see, *Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188; *Matter of Katz, supra*). However, the “presumption of receipt” does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (see, e.g., *Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the mailing 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 notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (see, *Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

C. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Sampone and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders. Furthermore, the Division has offered adequate proof to establish the fact that the particular order at issue was actually mailed to petitioner on September 10, 1999, the date appearing on the face of the order. The affidavits generally describe the various stages of producing and mailing conciliation orders and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Sampone and Baisley affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appear on page four of the CMR which bears a USPS date stamp of September 10, 1999 and the initials of a postal service employee. There are four certified mail control numbers listed on page four, and the USPS employee who initialed the CMR indicated, by writing the number "4" near his initials, that he received four items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioner by certified mail on September 10, 1999 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. As noted, the Division's proof of proper mailing of the Conciliation Order gives rise to a rebuttable presumption that the Order was received by the person to whom it was addressed. In addition to this presumption of delivery, the Division has offered additional buttressing evidence of actual delivery to petitioner, via USPS Form 3811-A and Form 3849, which together support the presumption that the Order was delivered to petitioner, the intended recipient. As set forth in Findings of Fact "14" and "15" these forms, together with the letter from the Southampton

postmaster, explain that Form 3849 is left when a person is not home to accept delivery of certified mail, and that such form is used as a receipt for delivery when the piece of mail is later claimed at the post office. The presence of Form 3849, bearing petitioner's signature, as one of the receipts of the Southampton post office for September 14, 1999, certainly supports the presumption that the Order, mailed by certified mail as required, was claimed by petitioner, the intended recipient, at the Southampton post office on September 14, 1999.

E. In sum, the Conciliation Order No. 176448 denied petitioner's request for a conciliation conference on the basis that the request was not filed within 90 days of the issuance of the underlying statutory notices of determination. In order to challenge this denial of his request for a conference, petitioner was required to file a petition within 90 days after the issuance of the Conciliation Order. Since the Division has established September 10, 1999 as the issuance date of the order, any petition challenging such order had to have been filed by December 9, 1999 (i.e., within 90 days after September 10, 1999) in order to have been timely. Unfortunately, the petition was not filed until January 5, 2000, or in excess of 90 days after issuance of the conciliation order. Therefore, the petition was untimely and must be dismissed.

F. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. In fact, petitioner did not respond to the Division's motion for summary determination. Therefore, he is deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667,671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Petitioner

made no allegation that the order was improperly addressed or mailed, or was not received by him. Specifically with regard to the latter issue of receipt of the order, it was incumbent upon petitioner to challenge and provide evidence to overcome the presumption of receipt which arose upon the Division's demonstration of proper mailing of the order. Petitioner, however, presented no evidence to contest the facts concerning mailing and receipt as alleged in the Sampone, Baisley, Peltier and Seifert affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and pursuant to the foregoing discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor. That is, the Division has tendered evidence establishing proper mailing of the order, and there was no protest thereafter within 90 days as required, thus leaving the order fixed with no jurisdiction by the Division of Tax Appeals to address the underlying merits of the denial of the request for conference or the underlying notices of determination.

G. The Division's motion for summary determination is granted and the petition of Robert Klein is hereby dismissed.

DATED: Troy, New York  
August 3, 2000

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE