

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GUY AND MARYANN GUIDO** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 821476  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Years 2001 and 2002. :

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Petitioners, Guy and Maryann Guido, 15 Stonecrest Drive, Thiells, New York 10984, filed a petition 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 2001 and 2002.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated June 18, 2007 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners had 30 days, or until July 18, 2007, to file a response to the motion. Petitioners' response was filed on July 25, 2007 and was not, therefore, considered herein.<sup>1</sup> Accordingly, the 90-day period for the issuance of this determination began on July 18, 2007, the due date for petitioners' response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

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<sup>1</sup> Petitioners' response was from their representative, Allen Lokensky & Associates, Public Accountants, and did not address the merits of the Division of Taxation's motion but, instead, sought consolidation with a number of other matters being handled by this representative.

***ISSUE***

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order by the Division of Taxation's Bureau of Conciliation and Mediation Services.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation ("Division") is the timeliness of petitioners' petition to the Division of Tax Appeals following issuance of a Conciliation Order issued by the Bureau of Conciliation and Mediation Services ("BCMS") dated February 3, 2006.

2. Petitioners filed a timely request for a conciliation conference with BCMS in protest of notices of deficiency L-024965707 and L-024965718. The request was dated May 16, 2005 and was received by BCMS on May 19, 2005.

3. Petitioners' request for conciliation conference listed their address as 15 Stonecrest Dr., Thiells, NY 10984-1502, and listed the address of their representative, Allen Lokensky, Public Accountant, as 209 Brittany Court, Valley Cottage, NY 10989.

4. Mr. Lokensky appeared at the conciliation conference held at the Division's offices in Rye Brook, New York, on September 7, 2005.

5. BCMS subsequently issued a Conciliation Order (CMS No. 209519) to petitioners dated February 3, 2006, which denied petitioners' request and sustained notices of deficiency L-024965707 and L-024965718.

6. On December 21, 2006, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated February 3, 2006. The petition was signed by petitioners' representative, Allen Lokensky, on December 20, 2006. The

petition was filed in an envelope which bore a United States Postal Service (“USPS”) postmark of December 21, 2006.

7. In support of its motion, the Division submitted the affidavits of James Steven VanDerzee and Robert Farrelly, employees of the Division. The Division also submitted copies of petitioners’ request for a conciliation conference, the Conciliation Order dated February 3, 2006, the certified mail record (“CMR”) containing a list of conciliation orders allegedly issued by the Division on February 3, 2006, the petition and the envelope in which it was mailed and the Division’s answer to the petition.

8. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences 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 receipt of a postmarked copy of the CMR by BCMS.

9. The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards them to the conciliation conferee for signature. The conferee in turn forwards the order and cover letter 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). 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 and mailing address, BCMS number, certified control number and certified control number bar code.

11. The AFP Unit also generates a computer printout 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 via a printer located in BCMS, and these documents are delivered to the BCMS Clerk assigned to process the conciliation orders.

12. The clerk, as part of her regular duties, associates each cover sheet, conciliation order and cover letter. The clerk verifies the taxpayer's name and address 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 where the BCMS return address, certified control number, bar code and name and address of the taxpayer appear.

13. The "Total Pieces and Amounts Listed" is indicated on the last page of the CMR. The BCMS clerk stamps on the bottom left corner "Mail Room: Return Listing to: BCMS Bldg 9 Rm 180 Att: Conference Unit" and also stamps on the bottom right corner of the last page "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." The clerk then inserts on the top of each page the date that the conciliation orders were mailed. In this case "2/3/06" is written in the upper right corner of each page of the CMR. The CMR is kept by BCMS in the regular course of business.

14. The CMR along with envelopes containing the cover sheets, cover letters and conciliation orders are then picked up in BCMS by an employee of the Division's Mail Processing Center which is responsible for delivering the CMR and related documents to the USPS.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR attached to his affidavit which contains a list of the conciliation orders purportedly issued by the

Division on February 3, 2006. The CMR lists 51 certified control numbers and there are no deletions from the list. 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.

16. Information regarding the conciliation order issued to petitioners is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1143 2285 is reference/CMS number 000209519, along with the following address:

Guy & Maryann Guido  
15 Stonecrest Drive  
Thiells, NY 10984-1502.

17. Page two of the CMR also contains information regarding a conciliation order issued to petitioners' representative. Specifically, corresponding to certified control number 7104 1002 9730 1143 2315 is reference/CMS number 000209519 along with the name and address of petitioners' representative as follows:

Allen Lokensky  
209 Brittany Court  
Valley Cottage, NY 10989.

18. Mr. Farrelly attested to the fact that the procedures set forth herein were the normal and regular procedures of BCMS on February 3, 2006

19. 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 his staff weighs and seals each envelope and affixes 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. A member of the staff then delivers the sealed, stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and signs or initials the CMR indicating receipt by the post office.

20. In this particular matter, the postal employee affixed a postmark dated February 3, 2006 and initialed the last page (page 5) of the CMR. The postal employee also wrote the number "51" on page 5 of the CMR where it indicates "Total Pieces Received at Post Office."

21. 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 day following its initial delivery and is then delivered to the originating office which, in this case, is BCMS. The CMR is maintained by BCMS in the regular course of business.

22. Based upon his review of the CMR and the exhibits attached thereto, Mr. VanDerzee states that on February 3, 2006, an employee of the Division's Mail Processing Center delivered a piece of certified mail addressed to Guy and Maryann Guido, 15 Stonecrest Drive, Thiells, New York 10984-1502, and a piece of certified mail addressed to Allen Lokensky, 209 Brittany Court, Valley Cottage, New York 10989, to a branch of the USPS in Albany, New York in sealed postpaid envelopes for delivery by certified mail. 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 petitioners and their representative on February 3, 2006.

### **CONCLUSIONS OF LAW**

A. 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal

provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881).

“To defeat a motion for summary judgment, the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioners' untimely response to the Division's motion did not address the merits of the Division's motion and, therefore, did not dispute any of the assertions set forth therein; accordingly, they are therefore 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). Moreover, petitioners presented no evidence to contest the facts alleged in the Farrelly or VanDerzee affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania, supra*).

D. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A Conciliation Order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the Conciliation Order (Tax Law § 170[3-a][e]). A Conciliation Order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a Conciliation Order (*Matter of Cato, supra; Matter of DeWeese, supra*).

E. Where the 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 (*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 mailing evidence required of the Division 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, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. The affidavits of two Division employees, Robert Farrelly and James Steven VanDerzee, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. 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 Farrelly and VanDerzee affidavits were followed with respect to the Conciliation Order issued to petitioners and their representative. Petitioners' and their representative's names, addresses and the CMS No. appear on page two of the CMR which bears a USPS date stamp of February 3, 2006 along with the initials of a Postal Service employee. There are 51 certified control numbers listed on the CMR, and the USPS employee indicated that he received 51 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order to petitioners and their representative by certified mail on February 3, 2006 (*Matter of Cato, supra; Matter of DeWeese, supra*).

G. The petition was mailed on December 21, 2006. The statutory period for filing a petition to the Conciliation Order expired on May 4, 2006. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the

petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

H. Finally, it is noted that petitioners are not without recourse, for they may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If their request for a refund is denied, petitioners may then proceed with another petition requesting a hearing or conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division of Taxation's motion for summary determination is granted and the petition of Guy and Maryann Guido is dismissed with prejudice.

DATED: Troy, New York  
October 4, 2007

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE