

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RANDI E. PERELLE	:	DETERMINATION
		DTA NO. 821478
for Redetermination of a Deficiency or for Refund	:	
of New York State and New York City Personal		
Income Taxes Under Article 22 of the Tax Law	:	
and the New York City Administrative Code for		
the Years 2001 and 2002	:	

Petitioner, Randi E. Perelle, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2001 and 2002.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed June 19, 2007 seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached in support of the motion. Petitioner, appearing by Allen Lokensky, PA, had 30 days, or until July 19, 2007, to respond to the motion but did not do so until July 26, 2007.¹ Accordingly, the 90-day period for issuance of this determination commenced on July 21, 2007, i.e., the date on which petitioner's time to serve a response to the

¹ July 19, 2007 was a Saturday, and thus petitioner had until Monday, July 21, 2007 to respond to the subject motion. Petitioner's response to the motion was mailed on July 26, 2007 and was therefore not timely filed in any event.

motion expired. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On May 19, 2005 petitioner, Randi E. Perelle, filed requests for conciliation conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") for the years 2001 and 2002. With regard to the year 2001, a conciliation conference was held and, by a Conciliation Order (CMS No. 209509) dated February 3, 2006, BCMS advised petitioner that her Request for Redetermination or Revision of the Refund Denial was denied and the statutory notice (and refund claim denial) was sustained. With regard to the year 2002, BCMS issued a Conciliation Order Dismissing Request (CMS No. 209573) dated June 3, 2005, advising petitioner that her Request for Redetermination or Revision of the Notice of Deficiency was denied as untimely since it was mailed more than 90 days after the issuance of the statutory notice.

2. The Division of Tax Appeals received from petitioner, Randi E. Perelle, a petition filed on her behalf by her representative Allen Lokensky, PA. This petition pertains to the years 2001 and 2002, is signed by petitioner's representative, and is dated December 20, 2006. The envelope in which the petition was mailed bears the December 21, 2006 postmark of the Congers, New York branch of the United States Postal Service ("USPS"). The petition is stamped as received by the Division of Tax Appeals on December 26, 2006.

3. For the year 2001, the petition references Notice/Assessment Number L-021591453-1, Refund Claim Number X-462584110, and Conciliation and Mediation Services (“CMS”) Number 209509. For the year 2002, the petition references Notice/Assessment Number L-023834747 and CMS Number 209573. The petition states that the “amount of tax determined was \$4,851.12,” and “the amount of tax contested is ‘Refund For Tax Year 2001 Payment On 3/30/04 For Tax Warrant (\$4,540.41–E-115659276-100023 Tax Year 2*****’.”²

4. The record includes a Form IT-113-X (Claim for Credit or Refund of Personal Income Tax) filed by petitioner. This form is dated as signed on April 9, 2004, states that it pertains to the year 2001, and seeks a refund in the amount of \$4,540.41. The record also includes a second Form IT-113-X filed by petitioner, stating that it pertains to the year 2001, and differing from the earlier form in that it is dated December 20, 2006 (as is the petition at issue herein) and seeks a slighter higher refund amount of \$4,851.12.

5. The subject motion seeks dismissal of the petition or summary determination on the basis that the petition was not filed with the Division of Tax Appeals, as required by statute, within 90 days after the dates on which the above-described conciliation orders were issued. Hence, evidence concerning the dates of issuance of the subject conciliation orders is relevant and is set forth hereinafter.

6. There are two conciliation orders in this matter, as noted above, and each is signed by a different conciliation conferee. However, the steps undertaken in the generation and issuance of each order are the same. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of

² The last three digits of the year and a closing parenthesis mark are not visible on the petition, but the context of the preceding phrase and its specification of the year 2001 points to a conclusion that the missing digits, and hence the claim for refund, would be for the year “2001.”

mailing, to the particular conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and covering letter to a BCMS clerk assigned to process conciliation orders.

7. 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, the taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code.

8. The AFP Unit also produces a computer-generated document entitled Certified Record for Presort Mail - BCMS Cert Letter ("CMR"). The CMR sets forth a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers and BCMS numbers are recorded on the CMR. These documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. The BCMS clerk's regular duties include associating 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.

10. It is the general office practice that 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," on the last page of the CMR.

11. 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 "2/3/06" is written in the upper right corner of each page of the CMR pertaining to the Conciliation Order for the year 2001, and

“6/3/05” is written in the upper right corner of each page of the CMR pertaining to the Conciliation Order for the year 2002.

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

13. The five-page CMR pertaining to the Conciliation Order for the year 2001 lists 51 certified control numbers. The four-page CMR pertaining to the Conciliation Order for the year 2002 lists 37 certified control numbers. Each such certified control number was assigned to an item of mail listed on the pages of each such 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.

14. Information regarding the Conciliation Order issued to petitioner for the year 2001 is contained on pages two and three of the CMR. On page three, and corresponding to certified control number 7104 1002 9730 1143 2360 is reference number 209509, along with petitioner’s name and address, 16 State School Road, Warwick, New York 10990-3431, the same address as is listed on petitioner’s request for conciliation conference., i.e., her last known address.

Appearing next to petitioner’s name on the CMR is the handwritten legend “unclaimed–remailed 3/27/06.” It is BCMS standard policy to remail, by regular mail, any conciliation orders returned by the USPS, and BCMS did so in this case, as indicated by the foregoing handwritten legend, on March 27, 2006. On page two of the CMR, and corresponding to certified control number 7104 1002 9730 1143 2308 is reference number 209509, along with petitioner’s representative’s name, Allen Lokensky, and address, 209 Brittany Court, Valley Cottage, New York 10989, the same

address as was listed for petitioner's representative on petitioner's request for conciliation conference, i.e., her representative's last known address.

15. Information regarding the Conciliation Order issued to petitioner for the year 2002, is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9730 0665 3961 is reference number 209573, along with petitioner's address, which is the same address as is listed above (*see*, Finding of Fact "14"), and which appears on petitioner's request for conciliation conference. Also on page two of the CMR, and corresponding to certified control number 7104 1002 9730 0665 3954 is certified control number 209573, along with petitioner's representative's name and address, which is the same name and address as is listed above (*see*, Finding of Fact "14"), and which appears on petitioner's request for conciliation conference.

16. The Registry Unit of the Division's Mail Processing Center follows a series of regular procedures in the ordinary course of delivering outgoing mail to branch offices of the USPS. 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 affixes postage and fee amounts. 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.

17. In this matter, the postal employee affixed the postmark of the Stuyvesant Plaza branch office of the USPS, zip code 12203, dated February 3, 2006, to each page of the CMR pertaining to the year 2001, and the postmark from the same USPS branch office, dated June 3,

2005, to each page of the CMR pertaining to the year 2002. The postal employee also wrote his or her initials and “37 pieces” beneath the printed statement “TOTAL PIECES RECEIVED AT POST OFFICE” on page four of the CMR pertaining to the year 2001, and wrote “51” beneath the same statement on page five of the CMR pertaining to the year 2002, 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 CMR in order to indicate the number of pieces of mail actually received at the post office.

18. 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, each CMR is picked up at the post office by a staff member of the Mail Processing Center on the day following its initial delivery and is then delivered to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

19. The facts set forth above in Findings of Fact “6” through “18” were established through the affidavits of Robert Farrelly and James Steven VanDerzee. Mr. Farrelly is employed as the Assistant Supervisor of Tax Conferences for BCMS, his duties include supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. VanDerzee is employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center, and his duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

20. Petitioner failed to file a timely response to this motion. Petitioner offered no argument or evidence to support a claim that she filed any protest against either of the

conciliation orders within the requisite period of time for doing so, i.e., 90 days after issuance of such orders.

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. Petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Specifically, since petitioner presented no evidence to contest the facts alleged in the Farrelly and VanDerzee affidavits, those facts may, as a consequence, be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]), and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond such 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation orders and underlying

assessments and denials of refund claims in this case would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals contesting such conciliation orders.

D. It is the mailing date of a conciliation order which triggers the 90-day period for the filing of a petition. Where, as here, the timeliness of a petition is at issue, the Division bears the initial burden of proving proper mailing of a conciliation order (*see, Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517), because a properly mailed order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests, as noted, with the Division (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A conciliation order is mailed when it is delivered into the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a conciliation order is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. The mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard mailing procedure used by the Division provided by one with knowledge of the relevant procedure; 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*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the

conciliation orders to petitioner at her last known address (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by each CMR and the affidavits of Mr. VanDerzee and Mr. Farrelly, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the orders in issue were actually mailed to petitioner at her last known address by certified mail, specifically on February 3, 2006, the date appearing on the CMR pertaining to the year 2001, and on June 3, 2005, the date appearing on the CMR pertaining to the year 2002. The affidavits describe the various stages of producing and mailing orders, and attest to the authenticity and accuracy of the copies of the orders and of each CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the VanDerzee and Farrelly affidavits were followed with respect to the conciliation orders issued to petitioner. In short, the Division has established that it mailed the orders to petitioner by certified mail on these two respective dates (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. In the same manner as the foregoing, the record also establishes that the conciliation orders were served (mailed) as required to petitioner's duly authorized and recognized representative, Mr. Lokensky.

G. The Division has established that it properly mailed the conciliation orders in question to petitioner and to her representative on February 3, 2006, with regard to the order pertaining to the year 2001, and on June 3, 2005, with regard to the order pertaining to the year 2002. Accordingly, the Division is entitled to the presumption of receipt that follows such proper mailings. In turn, in order to be considered timely, any protest against the orders had to have been filed within 90 days thereafter, that is, by May 3, 2006 with regard to the Conciliation Order

pertaining to the year 2001, and by September 3, 2005 with regard to the Conciliation Order pertaining to the year 2002.

H. The petition in this matter was not filed until it was mailed on December 21, 2006, and was therefore clearly late with respect to both of the conciliation orders. Petitioner did not timely respond to the subject motion or otherwise provide any documents or other evidence to establish that any protest against either of the conciliation orders occurred within the requisite 90-day time period. Since a protest was not timely filed (i.e., within 90 days of the respective orders as required by statute), there is no jurisdiction to proceed with this matter (Tax Law § 170 [3-a][e]; 20 NYCRR 4000.5[c][4]).³

I. The Division of Taxation's motion for Summary Determination dated June 19, 2007 is granted and the petition of Randi Perelle is hereby dismissed.

DATED: Troy, New York
October 18, 2007

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ As noted in Finding of Fact "14", the CMR dated February 3, 2006 includes the handwritten legend "unclaimed-remained 3/27/06." In *Matter of Ruggerite v. State Tax Commn.* (97 AD2d 634, *aff'd* 64 NY2d 688), an item of certified mail was returned to the Division marked "Unclaimed," and the taxpayer successfully rebutted the presumption of receipt. In *Ruggerite*, the taxpayer denied receipt of the postal claim form informing him that he had certified mail at the specified post office, and further established that the USPS failed to comply with its own requirement for delivery of certified mail, to wit, that an addressee of certified mail be provided with two notices to claim the certified mail before it is returned to the sender as "Unclaimed." The Court concluded that the taxpayer rebutted the presumption of receipt by establishing that the USPS failed to follow its own procedures.

In contrast, in *Matter of American Cars "R" Us, Inc. v. Chu* (147 AD2d 797), the taxpayer was unable to rebut the presumption of receipt of the notice where certified mail was returned to the taxing authority marked "Refused," where the evidence indicated that the USPS had followed proper procedures but the taxpayer's manager refused to accept delivery. The Court held that a taxpayer cannot deliberately avoid service of a statutory notice.

In this case, petitioner did not respond to the Division's motion in a timely manner, and thus has not availed herself of the opportunity to present a direct case on the issue of receipt of the conciliation order pertaining to the year 2001. Accordingly, it cannot be determined whether, for example: (a) petitioner moved prior to February 3, 2006 and had notified the Division of a new address, or (b) there was any USPS error involved in petitioner's not claiming her mail or (c) that she simply chose not to pick up her mail from the post office. Such being the case, there is simply no information whatsoever in the record that might provide a basis for finding that petitioner rebutted the presumption of receipt.