

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ANTHONY CLAY REALTY CORPORATION | : | ORDER |
| | : | DTA #823099 |
| for Redetermination of a Deficiency or for Refund of | : | |
| Corporation Franchise Tax under Article 9-A of the Tax | : | |
| Law for the Period June 1, 2003 through May 31, 2004. | : | |

Petitioner, Anthony Clay Realty Corporation, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period June 1, 2003 through May 31, 2004.

On June 25, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 19, 2009, petitioner's representative, Neil Hutchins, Esq., submitted a statement in opposition to dismissal. On July 24, 2009, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced July 27, 2009. After due consideration of the documents and arguments submitted, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Anthony Clay Realty Corporation, filed a request for a conciliation conference, dated January 30, 2008, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Deficiency L-029521230-3 pertaining to the period June 1, 2003 through May 31, 2004. The request was received by BCMS on February 6, 2008.

2. Petitioner's request for conciliation conference listed a Bronx, New York, address. The request further indicated that petitioner's representative was Neil Hutchins, Esq., whose address was also in the Bronx, New York.

3. By a conciliation order (CMS No. 222329) dated December 19, 2008, BCMS recomputed the Notice of Deficiency¹ to \$34,538.00, plus interest computed at the applicable rate. Penalties were canceled.

4. Petitioner, by its representative, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned conciliation order. The petition, dated June 9, 2009, was received by the Division of Tax Appeals on June 15, 2009. The envelope in which the petition was sent indicates that it was sent by United States Postal Service (USPS) Priority Mail and the envelope bears a USPS postmark of June 12, 2009.

5. On June 25, 2009, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the conciliation order in this matter was issued on December 19, 2008, but that the petition was not received until June 12, 2009, or 175 days later.

¹ The record does not contain a copy of the Notice of Deficiency (Notice No. L-029521230-3). Therefore, it is unclear as to the amount of tax, interest and penalty originally asserted in the Notice of Deficiency.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavits 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 a copy of the petition filed with the Division of Tax Appeals and the envelope in which it was mailed, petitioner's Request for Conciliation Conference, a copy of the certified mail record (CMR) containing a list of the conciliation orders allegedly issued by the Division on December 19, 2008, and a copy of the subject December 19, 2008 conciliation order.

7. 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 the orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. 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 covering letter to a BCMS clerk assigned to process the conciliation orders.

9. 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.

10. The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL." 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 conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering 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, covering letter, and conciliation order into a three-windowed envelope.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. On the last 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."

13. 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 "12/19/08" is written in the upper right corner of each page of the CMR

14. The CMR, along with the cover sheets, covering 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, covering letters and conciliation orders to the USPS.

15. A piece may be "pulled" for a number of reasons including, but not limited to, a discrepancy in the name or address. A piece of mail so "pulled" will be segregated from the remaining group of orders for correction or issuance at another time. In this case, a review of the

CMR indicates that two pieces of mail were pulled. The pieces of mail that were pulled are listed on pages one and two of the CMR, and a line was placed through the entries for these taxpayers by the clerk after the orders were pulled.

16. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR attached to his affidavit which contains a list of the conciliation orders issued by the Division on December 10, 2008. This CMR lists 57 certified control numbers and there are two deletions, on pages one and two thereof, from the list for a total of 55 pieces. Each such certified control number is assigned to an item of mail listed on the six 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.

17. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1098 2644 is reference/CMS number 000222329, along with the same Bronx, New York, address listed on the request for conciliation conference.

18. 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.

19. In this particular case, the postal employee affixed a postmark dated December 19, 2008 and wrote his or her initials on each page of the six-page CMR. On page six, the postal employee wrote and circled the number “55” to indicate the “Total pieces received at post office.”

20. 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 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.

21. While the affidavit of the Division’s representative, John E. Matthews, states that the CMR “also demonstrates that a copy of the conciliation order was also mailed to the petitioner’s representative, Neil Hutchins,” a review of the CMR does not support such assertion. Nowhere on the CMR is Mr. Hutchins’s name and address listed.

CONCLUSIONS OF LAW

A. 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]). Pursuant to Tax Law § 170(3-a)(e), the conciliation order in this case and the underlying Notice of Deficiency would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction

to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry is on the mailing of the conciliation order because a properly mailed conciliation 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 with the Division (*id*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

C. The 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 orders 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*; *Matter of Novar TV & Air Conditioner Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the subject conciliation order to petitioner at its last known address (*see e.g. Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of James Steven VanDerZee and

Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner, by certified mail, on December 19, 2008, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the 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 order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR which bears a USPS date stamp of December 19, 2008. After two pieces of certified mail were pulled, there remained 55 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing and circling the number "55" near his initials, that he received 55 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on December 19, 2008 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on December 19, 2008, and it is this date which triggered the 90-day period within which a protest had to have been filed (*Id*). In turn, 90 days after the December 19, 2008 date of mailing of the order was March 19, 2009 and in order to be considered timely, petitioner's protest had to have been filed on or before such

date. Petitioner's protest was not filed until it was mailed on June 12, 2009, a date which was well beyond the statutory period within which a timely protest had to have been filed.

E. Although it is concluded that the Division has established that it properly mailed the conciliation order to petitioner on December 19, 2008, it has also been established that the Division has provided no proof that it served a copy of the order on petitioner's representative. While the Tax Law does not specifically provide for service of the order on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29 1977]). Although these cases pertained to the service of the statutory notice on the taxpayer's representative, it is apparent from a reading of the opinion of the Court of Appeals of New York in *Matter of Bianca v. Frank*, that the same requirement should hold true for the service of a conciliation order, since the Court stated:

Indeed, once a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified (*Id.* at 173).

Clearly, the issuance and service of the conciliation order has a "legal effect on the proceeding" since, as previously noted, pursuant to Tax Law § 170(3-a)(e), the conciliation order (and, accordingly, the Notice of Deficiency or a recomputation thereof) in this case would be

binding upon petitioner unless it filed a timely petition with the Division of Tax Appeals.

Therefore, failure to serve a copy of the conciliation order on petitioner's representative would have the same effect as the failure to serve the representative with a copy of the statutory notice, i.e., the 90-day period for filing a petition with the Division of Tax Appeals is tolled.

F. The Notice of Intent to Dismiss Petition, dated June 25, 2009, is withdrawn. The Division of Taxation will have 75 days from the date of this Order to file its answer in this matter.

DATED: Troy, New York
October 8, 2009

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE