

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>THOMAS STICKEL</b>	:	ORDER
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 2003 and 2004.	:	DTA NO. 823326

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Petitioner, Thomas Stickel, 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 2003 and 2004.

On January 29, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 3, 2010, March 10, 2010 and April 10, 2010, petitioner, appearing pro se, submitted letters and documents in opposition to dismissal. On March 23, 2010, 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 April 10, 2010.<sup>1</sup> After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

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<sup>1</sup> Petitioner's letters and documents in opposition were filed more than 30 days after issuance of the Notice of Intent to Dismiss. However, given that the Division's affidavits and documents in support of dismissal were likewise submitted beyond such 30-day period (per request and permission granted), petitioner's submissions have been, in the interest of completeness, included as a part of the documents and correspondence reviewed herein.

## ***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, Thomas Stickel, filed a request for a conciliation conference, dated April 29, 2008, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Assessment ID L-029875907 pertaining to the years 2003 and 2004. The conciliation conference request form, which is preprinted by the Division of Taxation (Division) and is included with its issuance of notices of tax deficiency to taxpayers, lists petitioner's address as follows:

Stickel-Thomas A. Jr  
2520 Vestal Pky E.  
Vestal, NY 13850-2075

Petitioner's request for a conciliation conference was received by BCMS on April 30, 2008.

2. The United Parcel Service (UPS) label on the envelope in which petitioner's conciliation conference request was filed sets forth petitioner's address as follows:

Thomas Stickel  
[telephone number]  
Suite 304  
2520 Vestal Parkway East  
Vestal, NY 13850

3. A conciliation conference was held on September 17, 2008, and by a Conciliation Order (CMS No. 223722) dated March 13, 2009, BCMS set forth the amount of tax due per Assessment ID L-029875907 as \$275,700.00 for the years 2003 and 2004, plus interest. The Conciliation Order reflects a reduction of the amount of penalty to zero (i.e., penalty cancellation).

4. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the aforementioned Conciliation Order and the underlying amount of tax plus interest. The petition, dated October 2, 2009, was received by the Division of Tax Appeals on October 26, 2009. The petition lists petitioner's address as follows:

2520 Vestal Pkwy E.  
# 304  
Vestal, NY 13850

5. The envelope in which the petition was mailed indicates that it was sent by United States Postal Service (USPS) Certified Mail, reflects the date of mailing as October 23, 2009, and includes a return address label listing petitioner's address as follows:

2520 Vestal Pkwy East  
Suite 304  
Vestal, NY 13850

6. Documents issued by the Division of Taxation to petitioner prior to (and presumably culminating in the filing of) his request for a conciliation conference, included a Notice and Demand for Payment, Statement of Consolidated Tax Liabilities, Collection Notice, and Payment Document. These documents were printed and issued by the Division, and in each instance included "Suite 304" or "# 304" as part of petitioner's Vestal, New York, address.

7. On January 29, 2010, 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 March 13, 2009, but that the petition was not filed until October 23, 2009, or 224 days later. The cover letter accompanying this Notice of Intent, as well as all additional correspondence issued by the Division of Tax Appeals to petitioner included "#304" as part of petitioner's Vestal, New York, address.

8. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation submitted the affidavit of its representative, John E. Matthews, Esq., along with the affidavits of Heidi Corina, James Steven VanDerZee and Robert Farrelly, employees of the Division. The Division also submitted a copy of the petition filed with the Division of Tax Appeals, 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 March 13, 2009, and a copy of the subject Conciliation Order dated March 13, 2009.

9. 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.

10. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predicated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards each order and covering letter to a BCMS clerk assigned to process the conciliation orders.

11. 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.

12. 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 via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

13. 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 folds and places the cover sheet, cover letter, and Conciliation Order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

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

15. 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 "3/13/09" is written in the upper right corner of each page of the CMR

16. 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.

17. 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 issued by the Division on March 13, 2009. This CMR lists 44 certified control numbers and each such certified control number is assigned to an item of mail listed on the first four pages of the five-page 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.<sup>2</sup>

18. Information regarding the Conciliation Order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1268 1811 is reference/CMS number 000223722, along with petitioner's address, set forth as follows:

Thomas A. Stickel, Jr.  
2520 Vestal Parkway E.  
Vestal, NY 13850-2075

19. The affidavit of James Steven VanDerZee, 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 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.

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<sup>2</sup> The fifth page of the CMR included no information with respect to particular individual conciliation orders, but rather simply sums the total number of such items (44) as listed on the preceding four pages, and set forth the total of postage and fee amounts pertaining to such items.

20. In this particular instance, the postal employee affixed a postmark dated March 13, 2009 of the Stuyvesant Plaza branch of the USPS to each of the first four pages of the CMR. The postal employee also wrote his or her initials and wrote the number "11" at the bottom of each of the four pages, 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 mail record.

21. 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.

22. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on March 13, 2009, an employee of the Mail Processing Center delivered a piece of certified mail addressed to petitioner at his Vestal, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 13, 2009 for the records of BCMS. 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 piece of certified mail to petitioner on March 13, 2009.

23. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for an item mailed by the Division under certified number 7104 1002 9730 1268 1811 on March 13, 2009 from the Stuyvesant Plaza branch office of the USPS to petitioner at the following address:

Thomas A. Stickel, Jr.  
2520 Vestal Parkway E.  
Vestal, NY 13850-2075

24. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 1268 1811 on March 16, 2009 at 11:47 AM as follows:

Signature of Recipient: Dave Hoppagh

Address of Recipient: 2520 V.P.E.

25. All of petitioner's correspondence with the Division in connection with the filing of his request for a conciliation conference, and thereafter with the Division of Tax Appeals in connection with the filing of his petition and including his correspondence regarding the subject Notice of Intent to Dismiss, has included either "Suite 304" or "#304" as a part of his Vestal, New York, address. This portion of his address has been included in handwritten correspondence from petitioner, as part of a stamped presentation of petitioner's address (or return address), and as part of the address listed on petitioner's letterhead in instances where such correspondence has been on letterhead paper. In contrast, none of the correspondence from BCMS to petitioner has included either "Suite 304" or "#304."

26. Correspondence in this matter includes a letter, dated May 5, 2009, from petitioner to the BCMS conciliation conferee who conducted the September 18, 2008 conference and signed the Conciliation Order and its accompanying cover letter issued to petitioner. The first paragraph of petitioner's May 5, 2009 letter states:

Reference is made to your letters to me dated January 29, 2009 and March 13, 2009. As you know, I was requesting that you explain the reasoning and actions on the "conciliation" so that a proper adjustment or an appeal can be processed. Thank you so much for agreeing with [the auditor] to waive all penalties.

The balance of the letter primarily addresses petitioner's position as to the outcome of the "reconciliation" (conciliation conference) and the merits of the underlying tax deficiency asserted by the Division. After noting that he was attempting to obtain additional records to support his position, petitioner states, in the fourth paragraph of the second page of his letter, the following:

An appeal should not be required. \* \* \* I am formally herein considering filing for a hearing. \* \* \* An option would be an extension of limits to file a petition.

27. The foregoing May 5, 2009 letter was mailed by petitioner to the Division of Tax Appeals, where it was received on May 8, 2009. In turn, by a letter dated May 8, 2009, petitioner was advised that his letter had been forwarded to BCMS. This letter from the Division of Tax Appeals to petitioner included materials needed to appeal the Conciliation Order (petition form, Rules of Practice and Procedure Handbook) as well as a paragraph reminding petitioner as follows:

**IMPORTANT NOTE:** You have **90 days** from the date the Conciliation Order was mailed to file a petition with the Division of Tax Appeals.

28. Petitioner's May 5, 2009 letter was received by BCMS (as forwarded). By a letter dated May 11, 2009, the conciliation conferee's supervisor responded to petitioner by providing

schedules showing how the amount of tax liability was computed for each of the years in issue.

The second paragraph of this letter set forth the following:

Please note I cannot extend the time for filing a petition to the Division of Tax Appeals. \* \* \* The conciliation conference proceedings were concluded and a Conciliation Order was issued on March 13, 2009. As was indicated in the letter that accompanied the order, you have ninety (90) days from the date of the order to file a petition with the Division of Tax Appeals if you wish to continue your appeal of this matter.

29. Also included in the correspondence in this matter is a letter, dated August 18, 2009, from petitioner to the Division of Tax Appeals. This letter references in its caption “CMS No.: 223772” (i.e., the Conciliation Order number), and states its purpose is to “explain a number of factors which has [sic] caused some delay from my end.” After noting certain matters pertaining to his medical circumstances, and to his efforts and outcomes regarding obtaining additional records concerning the underlying merits of the asserted tax deficiency at issue, petitioner states:

After I received the “CMS no. 223772 ”. I then faxed my handwritten letter to [the conciliation conferee], dated January 24, 2009.<sup>3</sup> Further, I wrote another letter dated May 5, 2009. In that letter I explain, again, these issues and how something has to be appealed or dealt with somehow under justice.

Petitioner’s August 18, 2009 letter goes on to conclude as follows:

I look forward to hearing from both of you [BCMS and the Division of Tax Appeals] so that we can determine whether the “Division of Tax Appeals” or the “Bureau of Conciliation and Mediation Services” will decide this matter. It may be that it is irrelevant under the circumstances, but **NO MATTER WHAT**, justice has not been done in the mediation and reconciliation process. These two letters [presumably the May 8, 2009 and May 11, 2009 letters], must themselves be reconciled. I am once again formally requesting an appeal, or conciliation, or mediation by the Department of Finance in New York State.

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<sup>3</sup> The date January 24, 2009 precedes the March 13, 2009 date of issuance of the Conciliation Order. Apparently, petitioner wrote a letter to the conciliation conferee on January 24, 2009 (i.e., prior to conclusion of the conciliation process, which occurred on March 13, 2009 with issuance of the Conciliation Order), and at some point after receiving “CMS no. 223722,” submitted or resubmitted this letter to the conciliation conferee.

30. Petitioner has raised no specific challenge to the evidence of mailing as provided by the Division in support of the claimed mailing date of March 13, 2009 for the Conciliation Order, nor does petitioner dispute that he mailed his petition in response thereto to the Division of Tax Appeals at any time prior to October 23, 2009. Rather, petitioner has raised a question as to his receipt of the order, noting specifically in his April 10, 2010 response to the Notice of Intent to Dismiss that the address used for the mailing of the order (and other correspondence from BCMS to petitioner) did not include “Suite 304” or “#304” as a part of petitioner’s address. Petitioner noted and provided certain documents to support his position that, during the period surrounding the date of issuance of the order, he was in the Midwest attending to matters concerning his parents’ illnesses while at the same time attending to his own serious medical issues. In this regard, petitioner stated that, “no order was sent or read to me on March 13, 2009. As I know you will recall I was personally in Illinois for the entire month of March.” Petitioner states that the “Conciliation Order was not in proper formal order,” and argues that the alleged failure to forward the Conciliation Order to him while he was out of New York State constituted “oversight . . . which prevented the timeliness of this appeal.” Petitioner states, in summary, that “[o]bviously, the question turns on whether I observed and/or read the [Conciliation Order] dated March 13, 2009. I say I did not see it, but [the Division] must think that I did receive it. I simply [do] not definitively know for certain but, either way, justice should be utilized from a substantive, not [*sic*] procedurally, point of view.”

31. Ultimately, petitioner does not specify the date on which he received the Conciliation Order, or actual notice thereof, but apparently maintains that he either filed his petition within 90 days thereafter, as required, or that his appeal should be considered, in the interest of justice, to have been timely filed in any event.

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

A. There is a strict 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) and Tax Law § 689(b) the conciliation order in this case and the underlying assessment 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 (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

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).

C. It is well established that the Division's burden includes proof of the date and fact of mailing (*see Matter of Katz*). The Division may meet this burden by showing a standard mailing procedure and that such procedure was followed in the particular instance in question (*see, Matter of Novar TV & Air conditioner Sales & Serv.*). Here, through the affidavits of Robert

Farrelly and James Steven VanDerZee, the Division has established a standard mailing procedure, and through the same affidavits, the CMR, and the Postal Service delivery information, has shown that the subject order was in fact mailed as claimed on March 13, 2009. Accordingly, and notwithstanding the portions of petitioner's responses to the subject Notice of Intent to Dismiss that address the merits of the underlying asserted tax liability, the only question is whether the Conciliation Order issued to petitioner was properly mailed to petitioner i.e., mailed to him at his last known address.

D. All of the notices and other correspondence issued by the Division to petitioner prior to the Conciliation Order (*see* Finding of Fact 6), except for the preprinted address on the Division's form by which petitioner requested a conciliation order (*see* Finding of Fact 1) and the additional correspondence issued thereafter by BCMS (*see* Findings of Fact 1, 18 and 23), have been consistent in including either "Suite 304" or "#304" as part of petitioner's address. Accordingly, at some point well in advance of issuance of the Conciliation Order, the Division was clearly apprised of petitioner's address with the inclusion of "Suite 304" or "#304" as a part thereof. Similarly, and consistent with the manner in which petitioner has communicated in writing with the Division, including BCMS, and with the Division of Tax Appeals, as well as the manner in which the Division of Tax Appeals has communicated with petitioner, "Suite 304" or "#304" has been included as part of petitioner's address (*see* Findings of Fact 2, 4, 5, 7 and 25). The record does not disclose why the portion of petitioner's address consisting of the suite number was not included in the mailing address used by BCMS.<sup>4</sup> Ultimately, the question of

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<sup>4</sup> More specifically, the record does not disclose why the Division's preprinted form sent to and used by petitioner to request a conciliation conference did not include the suite number portion of petitioner's address (*see* Finding of Fact 1), whereas all other correspondence between the Division (excluding BCMS) and petitioner did include this information.

proper mailing of the Conciliation Order devolves to determining whether the failure to include the suite number as part of petitioner's address constitutes a "consequential" error. If so, then the Division failed to mail the subject order to petitioner at his last known address (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994), the mailing would therefore not constitute a proper mailing, and the 90-day period for filing a petition would be tolled until such time as petitioner actually received notice of the order (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *Iv denied* 79 NY2d 759 [1992]).

E. The failure to include the suite number as part of petitioner's address is a consequential error. The record shows that the order was mailed to petitioner at 2520 Vestal Parkway E., Vestal, New York 13850-2075, and that the article was delivered to that address. The evidence does not show, however, that the order was delivered to the correct suite at 2520 Vestal Parkway East. In this regard, the USPS delivery record does not indicate a suite number, and the recipient of the delivered article of mail was clearly not petitioner (*see* Finding of Fact 24). Moreover, there is no evidence of the USPS's general procedure when no suite number is included on an address and there is no evidence of the USPS's delivery procedure in this particular instance. (*Cf., Clark v. Commr.*, 65 TCM 2150 [1993] [the omission of an apartment number on an address was "an inconsequential error" where a USPS employee testified as to the procedures followed in the delivery of the subject notice]). Furthermore, the Domestic Mail Manual requires a suite number, where applicable, as an element of an address.<sup>5</sup> Here, the address used by the Division in its dealings with petitioner, excepting only the BCMS mailings, included petitioner's

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<sup>5</sup> Domestic Mail Manual 300 (Mailing Standards of the USPS), 602 (Addressing), 1.3 (Address Elements) and 1.4.2(e) [Complete Address Elements] includes a secondary address unit designator (such as an apartment or suite number) as a required element of an address as applicable.

suite number, and the record discloses no explanation as to why the same was omitted on such BCMS mailings. While it may be likely that the USPS would seek to ascertain the correct suite number and thereby affect proper delivery, such likelihood is insufficient to countenance the Division's address error in this case and thereby deem such error inconsequential. Accordingly, the 90-day period within which a petition could be timely filed was tolled until petitioner's actual receipt of the order or of actual notice thereof (*Matter of Hyatt Equities, LLC*).

F. Notwithstanding the foregoing error in address, and the consequent tolling of the 90-day period for filing a petition, the balance of the information reveals that petitioner did in fact receive actual notice of the Conciliation Order, at the latest, by May 5, 2009. Accordingly, it is this date which ends the responding period toll, and from which the 90-day period for filing a petition commences. This conclusion is borne out by petitioner's letters dated May 5, 2009 and August 18, 2009. In turn, the 90<sup>th</sup> day after May 5, 2009 was August 3, 2009. As discussed hereafter, petitioner did not file a petition within such 90-day period (i.e., by August 3, 2009), as was required to continue his appeal.

G. Addressed first is petitioner's receipt of the Conciliation Order. In his May 5, 2009 letter to the conciliation conferee, petitioner specifically references "your [the conferee's] March 13, 2009 letter" and the "reasoning and actions on the 'conciliation'" (*see* Finding of Fact 26). The conferee's cover letter is signed and mailed together with the Conciliation Order, as is explained in detail in the affidavit of mailing submitted herein (*see* Findings of Fact 8, 10, 13, 14 and 16). Petitioner's reference in his May 5, 2009 letter can therefore only be to the conferee's March 13, 2009 cover letter, and to the accompanying Conciliation Order, which sets forth the "reasoning and actions" on the "conciliation." This conclusion is further supported by the language in petitioner's May 5, 2009 letter stating "[t]hank you so much for agreeing with [the

auditor] to waive all penalties” (*see* Finding of fact 26), a clear reference to the penalty waiver or cancellation set forth in the Conciliation Order (*see* Finding of Fact 3). The only reasonable conclusion to be drawn from this information is that petitioner received the March 13, 2009 cover letter and Conciliation Order on (if not before) May 5, 2009, and his May 5, 2009 letter was clearly in response thereto.

Additional support for the foregoing conclusion can be found in petitioner’s August 18, 2009 letter. In this letter, petitioner specifically references “CMS 223772,” which is the number assigned to and appearing on the face of the March 13, 2009 Conciliation Order (*see* Finding of Fact 3). More directly, petitioner states that “[a]fter I received the ‘CMS 223772’ . . . “[I] wrote another letter dated May 5, 2009.” (*See* Finding of Fact 29; emphasis added.) This statement clearly establishes that petitioner’s May 5, 2009 letter was written after, and in response to, his receipt of the Conciliation Order.

H. Petitioner’s May 5, 2009 letter can not reasonably be construed to constitute a petition or protest. First, the May 5, 2009 letter, though mailed to the Division of Tax Appeals, was directed to the conciliation conferee and not to the Division of Tax Appeals. This letter is clearly aimed at further discussing with the conferee the merits of petitioner’s arguments and the result of the conciliation conference as embodied in the Conciliation Order. Finally, petitioner states in his letter that “[a]n appeal should *not* be required,” “[I] am formally herein *considering* filing for a hearing,” and “[a]n option would be an extension of limits to file a petition.” (*See* Finding of Fact 26.) This language reveals that petitioner was considering but had not filed a petition. In contrast, petitioner’s August 18, 2009 letter can be viewed as constituting a petition, especially given its language that “justice has not been done in the mediation and reconciliation process” and that “I am once again formally requesting an appeal, or conciliation, or mediation by the

Department of Finance in New York State.” (*See* Finding of Fact 29.) Unfortunately, the statutory 90-day time limit on filing a petition ended, under the facts of this case, on August 3, 2009 (i.e., 90 days after May 5, 2009, as explained above). Petitioner’s August 18, 2009 letter falls beyond this date and, even if construed as constituting a petition, remains untimely. There is no evidence that a petition was filed at any point in time on or before August 3, 2009, and thus the Division of Tax Appeals is without jurisdiction to address the merits of petitioner’s claims.

I. The Notice of Intent to Dismiss Petition, dated January 29, 2010, is sustained and the petition of Thomas Stickel is hereby dismissed as untimely.<sup>6</sup>

DATED: Troy, New York  
June 10, 2010

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>6</sup> Petitioner is not entirely without recourse. That is, he may pay the disputed amount of tax and file a claim for refund of such payment. If petitioner’s claim for refund is disallowed, he may then file a request for a conciliation conference or a petition with the Division of Tax Appeals to contest such disallowance. (*See Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990.)