

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DENNIS SCIALPI** : ORDER  
for Redetermination of Deficiencies or for Refund of : DTA NO. 823342  
New York State and New York City Personal Income Tax :  
under Article 22 of the Tax Law and the New York City :  
Administrative Code for Periods Ended June 30, 2005 :  
through September 30, 2007. :

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Petitioner, Dennis Scialpi, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for periods ended June 30, 2005 through September 30, 2007.

On February 17, 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 March 11, 2010, petitioner, appearing by Lester S. Caesar, CPA, submitted a letter in opposition to dismissal. On March 18, 2010, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted 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 on March 18, 2010. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

***ISSUE***

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

***FINDINGS OF FACT***

1. Petitioner, Dennis Scialpi, timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of deficiency numbered L030481679, L029842544, L029842545, L029842546, L029842547 and L029842548.

Petitioner's request forms reflected a preprinted Staten Island, New York, address.

2. Following a conciliation conference on January 12, 2009, BCMS issued to petitioner two conciliation orders (CMS Nos. 226603 and 223547), both dated July 10, 2009. Conciliation Order 226603 cancelled notice of deficiency numbered L030481679. Conciliation Order 223547 sustained notices of deficiency numbered L029842544, L029842545, L029842546, L029842547 and L029842548.

3. On November 10, 2009, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation order bearing CMS number 223547.

4. On February 17, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the relevant conciliation order was issued on July 10, 2009, but that the petition was not filed until November 10, 2009, or 123 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the

mailing of the orders by United States Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

6. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to give to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the 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 of Taxation'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, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produces a computer-generated certified mail record (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 using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. 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 where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. On each 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.”

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 “7/10/09” is written in the upper right corner of each page of the CMR.

12. 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.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter which contains a list of the conciliation orders issued by the Division on July 10, 2009. This CMR lists 50 computer-printed certified control numbers. 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.

14. There are two deletions, or pulled items, from the list of 50 computer-printed certified control numbers. These pulled items, are shown on the CMR by a line drawn through the relevant certified control numbers and corresponding information. These pulled items appear on pages one and three of the CMR and are unrelated to the conciliation orders at issue in this matter. Consistent with these deletions, the computer-printed “total pieces” entry of “50” on page five of the CMR has been crossed out and “48” has been handwritten in its place.

15. Information regarding the conciliation orders issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control numbers 7104 1002 9730 1479 5868 and 7104 1002 9730 1479 5875, respectively, are reference/CMS numbers 000223574 and

000226603, along with petitioner's name and address as preprinted on petitioner's requests for conciliation conference.

16. Information regarding the conciliation orders issued to petitioner's representative, Mr. Caesar, is contained on page one of the CMR. Specifically, corresponding to certified control numbers 7104 1002 9730 1479 5806 and 7104 1002 9730 1479 5813, respectively, are reference/CMS numbers 000223547 and 000226603, along with Mr. Caesar's name and a truncated version of his address. The mailing cover sheets associated with the conciliation order mailed to Mr. Caesar indicate that the orders were mailed to Mr. Caesar at Lester S. Caesar & Company, 462 Seventh Avenue, New York, NY 10018.

17. 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 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.

18. In this particular instance, the postal employee affixed a postmark dated July 10, 2009 to each page of the five-page CMR. The postal employee also wrote his or her signature or initials and wrote the number "48" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

19. 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.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on July 10, 2009, an employee of the Mail Processing Center delivered two pieces of certified mail addressed to petitioner at his Staten Island, New York, address and two pieces of certified mail addressed to petitioner's representative at the Seventh Avenue, New York City, address to a branch of the USPS in Albany, New York, in sealed envelopes 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 July 10, 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 pieces of certified mail to petitioner and his representative on July 10, 2009.

21. The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information. Ms. Corina's affidavit describes the Division's request to the Postal Service for delivery information on the two conciliation orders mailed to petitioner's representative. Specifically, PS Forms 3811-A request delivery information with respect to

articles of mail bearing certified control numbers 7104 1002 9730 1479 5806 and 7104 1002 9730 1479 5813. The USPS response to the Division's requests indicates that certified control number 7104 1002 9730 1479 5806 was delivered on July 28, 2009 in New York, NY 10016. The scanned image of the recipient's signature as shown on the USPS response appears to be the signature of Mr. Caesar. The scanned address of the recipient indicates "280 Madi/1003." With respect to certified control number 7104 1002 9730 1479 5813 the USPS response indicates delivery of this item on July 24, 2009 in New York, NY 10016. The scanned image of the recipient's signature as shown on the USPS response appears to be the signature of Mr. Caesar. The scanned address of the recipient indicates "280 Mad. Ave."

22. Petitioner's representative responded to the Notice of Intent to Dismiss by letter dated March 11, 2010, asserting that neither he nor petitioner received the subject conciliation order. Mr. Caesar asserts that as of the date the conciliation orders were issued, his New York City office had moved from 462 Seventh Avenue as addressed on the orders to 280 Madison Avenue, Suite 1003. He asserts that the conciliation conferee had ample notice of such change of address. Mr. Caesar also contends that as of the date of issuance of the conciliation orders, petitioner had moved from Staten Island to New Jersey and therefore did not receive the conciliation order at issue.

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

A. There is a 90-day statutory time limit for filing a petition 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 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 notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or 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 (*Matter of Katz*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory 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; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject conciliation order was mailed as addressed to petitioner and his representative on July 10, 2009. Specifically, this document lists certified control numbers with

corresponding names and addresses and bears U.S. Postal Service postmarks dated July 10, 2009. Additionally, a postal employee wrote “48” next to the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. In his letter filed in response to the notice of intent to dismiss, petitioner’s representative raises issues as to whether the orders were properly addressed and whether they were actually received.

With respect to the order issued to petitioner, petitioner does not dispute that his Staten Island address was his proper address, i.e., his last known address (*see* Tax Law § 691[b]), at the time he filed his request for conference. Petitioner’s mere contention that he moved to New Jersey is insufficient to establish such a move and insufficient to establish nonreceipt. Moreover, petitioner has not even alleged, much less offered proof, that he gave the BCMS any notice of his claimed change of address. It is concluded therefore that the subject conciliation order was properly addressed to petitioner and thus properly issued to petitioner on July 10, 2009.

As to the orders mailed to Mr. Caesar, the record shows that the subject order was addressed to Mr. Caesar at 462 Seventh Avenue in New York City. Even assuming that Mr. Caesar gave notice to BCMS of his address change as claimed, then BCMS failed to properly mail the subject order to Mr. Caesar. Under such circumstances the 90-day period for filing a petition is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the record shows that petitioner’s representative received actual notice of the subject conciliation order on July 28, 2009. Specifically, the

documentation provided to the Division by the USPS shows the recipient's signature in respect of the delivery of the subject order on July 28, 2009 to be that of Mr. Caesar. Such documentation also shows the address of the recipient as "280 Madi/1003," thereby indicating Mr. Caesar's current address of 280 Madison Avenue, Suite 1003. Mr. Caesar thus received actual notice of the subject order on July 28, 2009.

G. The 90-day period for filing a petition in this matter thus commenced, at the latest, on July 28, 2009. The petition was filed on November 10, 2009, more than 90 days later. The petition was thus untimely filed. It is well established that the deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). The law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition of Dennis Scialpi is hereby dismissed.<sup>1</sup>

DATED:Troy, New York  
June 14, 2010

/s/ Timothy Alston  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioner may not be without some remedy, for he may pay the disputed tax and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).