

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| MAPLEWOOD VILLAGE, INC. | : | ORDER |
| | : | DTA NO. 823391 |
| 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, 2002 through May 31, 2003. | : | |

Petitioner, Maplewood Village, Inc., 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, 2002 through May 31, 2003.

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). The Division of Taxation was granted an extension of time to respond until March 31, 2010, and the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Petitioner was granted an extension of time to respond until April 30, 2010, and petitioner's representative, Lusy Brutyan, EA, submitted a statement in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced April 30, 2010. After due consideration of the documents and arguments submitted, Thomas C. Sacca, 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, Maplewood Village, Inc., filed a request for a conciliation conference, dated October 31, 2008, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Deficiency L-030706192-9 pertaining to the period June 1, 2002 through May 31, 2003. The request was received by BCMS on November 6, 2008.

2. Petitioner's request for conciliation conference listed its address as Attn: Joseph Zito, 1538 10th Street, W. Babylon, New York 11704-3836. The request further indicated that petitioner's representative was John E. Helldorfer, CPA, whose address was indicated as P.O. Box 241, Nesconset, New York 11767.

3. By a conciliation order (CMS No. 226902) dated July 24, 2009, BCMS recomputed the Notice of Deficiency to tax due of \$108,360.00, plus interest computed at the applicable rate. Penalties were canceled.

4. Petitioner, by its new representative, American Tax Relief, 8383 Wilshire Boulevard, Suite 900, Beverly Hills, California 90211, petitioned the Division of Tax Appeals seeking an administrative hearing to review the aforementioned conciliation order. The letter, dated November 13, 2009, was received by the Division of Tax Appeals on November 20, 2009. The envelope in which the letter was sent indicates that it was sent by United States Postal Service (USPS) Priority Mail and the envelope bears a USPS postmark of November 18, 2009. Petitioner subsequently filed a petition dated November 24, 2009, which was received by the Division of Tax Appeals on December 7, 2009. The envelope in which the petition was sent indicates that it was sent by USPS certified mail and the envelope bears a USPS postmark of December 3, 2009.

5. 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 July 24, 2009, but that the petition was not filed until November 18, 2009, or 117 days later.

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, Robert Farrelly and Heidi Corina, all employees of the Division. The affidavits of Mr. VanDerZee and Mr. Farrelly concerned the mailing procedures followed by the Division in mailing conciliation orders. Ms. Corina's affidavit pertained to correspondence between her and the U.S. Postal Service. 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 July 24, 2009, and a copy of the subject July 24, 2009 conciliation order. The CMR indicates a conciliation order, number 000226902, was issued to petitioner and its representative by certified mail with certified numbers 7104 1002 9730 1497 8247 and 7104 1002 9730 1497 8254, respectively. The postal employee did apply a USPS postmark dated July 24, 2009 to each page of the CMR, but did not write the total number of pieces received on the final page of the CMR.

7. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

8. Attached to Ms. Corina's affidavit are two copies of the Form 3811-A, which was requested for petitioner and its representative. These forms request information regarding pieces of mail bearing certified control numbers 7104 1002 9730 1497 8230 and 7104 1002 9730 1497 8254 addressed to Maplewood Village, Inc., ATTN: Joseph Zito, 1538 Tenth Street, West Babylon, NY, 11704-3836 and John Helldorfer, P.O. Box 241, Nesconset, NY 11767, respectively. Also attached to Ms. Corina's affidavit are the Postal Service's responses to the Form 3811-A requests, letters on USPS letterhead dated February 22, 2010. The letter regarding certified control number 7104 1002 9730 1497 8230, relating to petitioner, states in part: "The delivery record shows that this item was delivered on 07/29/2009 at 11:20 AM in WEST BABYLON, NY 11704." The letter also contains a scanned image of the recipient as "Joseph Zito" above the handwritten name "Joseph Zito." The address of the recipient is shown as "1538 10th Street." The letter regarding certified control number 7104 1002 9730 1497 8254 relating to petitioner's representative states in part: "The delivery record shows that this item was delivered on 07/27/2009 at 2:51 PM in NESCONSET, NY 11767." The letter also contains a scanned image of the recipient as "John Helldorfer" above the handwritten name "John Helldorfer." The address of the recipient is shown as "P.O. Box 241, Nesconset, NY 11767."

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 it 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 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. However, on the last page of the CMR, the number of pieces received has not been circled nor has the number of pieces indicated as received been handwritten by a USPS employee. The presence of the USPS postmark on the pages of the CMR is insufficient to show that the items of mail listed were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected

page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address; nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to the taxpayer was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by circling the total number of pieces received or writing the total number of pieces received as requested by the Mail Processing Center. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (*see Matter of Cal-Burrito Co.*, Tax Appeals Tribunal, July 30, 1998, *see also Matter of Roland; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). Therefore, it is concluded that the Division has not met its burden of establishing proper mailing of the conciliation orders.

D. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). The affidavit of Heidi Corina, request for delivery information/return receipt after mailing form (USPS Form 3811-A) and the response of the USPS indicate that the conciliation order was received by petitioner on July 29, 2009. Therefore, running the statute of limitations from the date of receipt of the notice by petitioner, the 90-day period ended on October 27, 2009.

E. The conciliation order was received by petitioner on July 29, 2009. The 90-day period to file the request expired on October 27, 2009. The protest to the Division of Tax Appeals was mailed on November 18, 2009, or 22 days late. Since petitioner's protest of the conciliation order 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.

F. The petition of Maplewood Village, Inc. is dismissed with prejudice.

DATED: Troy, New York
July 22, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE