

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHERYL L. FALK	:	ORDER
		DTA NO. 823476
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for		
the Period December 1, 2004 through August 31, 2006.	:	

Petitioner, Sheryl L. Falk, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2004 through August 31, 2006.

On March 12, 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 April 9, 2010, petitioner, appearing by Robert S. Lisch, E.A., submitted a letter in opposition to dismissal, and 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 11, 2010. After due consideration of the documents and arguments submitted, Winifred M. Maloney, 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, Sheryl L. Falk, filed a request for a conciliation conference, dated January 23, 2009, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination L-030664415, L-030664416, L-030664417, L-030664418, L-030664419, L-030664420 and L-030664421, dated September 22, 2008 and pertaining to the period December 1, 2004 through August 31, 2006. The request was received by BCMS on January 29, 2009. Petitioner's request for conciliation conference listed her current address as Houston, Texas. The envelope in which the request for conciliation conference was mailed bore petitioner's handwritten return address in Houston, Texas, and a United States Postal Service (USPS) Certified Mail postmark of January 26, 2009.

2. By a Conciliation Order Dismissing Request (CMS No. 228155) dated February 13, 2009, BCMS denied petitioner's request as not timely filed.

3. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order Dismissing Request dated February 13, 2009. The petition, dated February 1, 2010, was received by the Division of Tax Appeals on February 5, 2010. The envelope in which the petition was mailed indicates that it was sent by USPS Express Mail and reflects the date of mailing as "FEB 04, 10."

4. On March 12, 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 indicates that the Conciliation Order Dismissing Request appeared to have been issued on February 13, 2009 and the petition appeared to have been filed on February 4, 2010, or over 300 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavit 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 petitioner's petition and the envelope in which it was sent to the Division of Tax Appeals, a copy of petitioner's Request for Conciliation Conference and the envelope in which it was sent to BCMS, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on February 13, 2009, and a copy of the subject February 13, 2009 Conciliation Order Dismissing Request.

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

7. 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 cover letter to a BCMS clerk assigned to process the conciliation orders.

8. 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.

9. 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 and the BCMS numbers are recorded on the CMR. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. 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 places the cover sheet, cover letter and conciliation order into a three-windowed envelope.

11. 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."

12. 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 "2/13/09" is written in the upper right corner of each page of the CMR.

13. 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.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR which contains a list of the conciliation orders issued by the Division on February 13, 2009. This CMR lists 34 computer-printed certified control numbers. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the four pages of the

CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

15. Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1205 7654 is CMS number 228155, along with petitioner's name and address in Houston, Texas.

16. The affidavit of James Steven VanDerZee, Principal 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 name 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 particular instance, the postal employee affixed a postmark dated February 13, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the four-page CMR. On page four, the postal employee also wrote his or her initials and wrote the number "34" above the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

18. 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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, 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 on February 13, 2009.

20. The letter in opposition to dismissal of the petition submitted by Mr. Lisch, on petitioner's behalf, does not challenge the Division's claim that the Conciliation Order Dismissing Request was mailed on February 13, 2009 or that her petition in response thereto was mailed on February 4, 2010. Rather, Mr. Lisch, in his letter, requests that Ms. Falk be allowed her "day in court" before the Division of Tax Appeals, where the issues raised in the petition may be addressed and resolved expeditiously and inexpensively, or, in the alternative, the matter be remanded to BCMS by the Division of Tax Appeals for even faster resolution.

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) and Tax Law § 1138(a)(1), the Conciliation Order Dismissing Request in this case and the underlying assessment would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The

Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Cato; Matter of DeWeese*).

B. Where, as here, the timeliness of a taxpayer's protest against a conciliation order is in question, the initial inquiry focuses 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 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 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

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 Dismissing Request to petitioner at her last known address (*see e.g. Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly

and James Steven VanDerZee, 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 February 13, 2009, 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 Farrelly and VanDerZee affidavits were followed with respect to the order issued to petitioner.

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 February 13, 2009, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the February 13, 2009 date of mailing was May 14, 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 February 4, 2010, or 266 days late. As a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. The petition of Sheryl L. Falk is hereby dismissed.

DATED: Troy, New York
June 3, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE