

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOHN AND PATRICE CALLIES** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 823489  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 2004. :

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Petitioners, John and Patrice Callies, 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 year 2004.

On July 16, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5; 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated July 16, 2010, and annexed exhibits supporting the motion. Petitioners, appearing by Dino L. Reda, CPA, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on August 16, 2010,<sup>1</sup> the date on which petitioners' time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

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<sup>1</sup> August 15, 2010 is the 30<sup>th</sup> day from July 16, 2010. However, as August 15, 2010 fell on a Sunday, petitioners' response to the Division of Taxation's motion was required to be filed by Monday, August 16, 2010 (*see* General Construction Law §§ 20, 25-a).

***ISSUE***

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

***FINDINGS OF FACT***

1. On November 21, 2008, petitioners, John and Patrice Callies, filed a Claim for Refund of personal income tax for the year 2004. On March 6, 2009, the Division of Taxation (Division) issued a Notice of Disallowance to petitioners denying their claim.

2. Petitioners filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the Division's refund denial for the year 2004. The request was signed by their representative, Dino L. Reda, CPA. The request lists petitioners' address as 80 Sturges Highway, Westport, Connecticut 05880-2815, and Mr. Reda's address as Van Brunt, Dubiago & Company, LLC, 1100 Summer Street, Stamford, Connecticut 06905.

3. Following a conciliation conference on October 20, 2009, BCMS issued to petitioners a Conciliation Order (CMS No. 231066), dated November 13, 2009, denying their request and sustaining the refund denial.

4. Petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order. The petition was dated and signed by petitioners' representative on February 17, 2010, and was received by the Division of Tax Appeals on February 18, 2010. The envelope in which the petition was mailed indicates that it was sent by FedEx Priority Overnight mail and reflects a mailing date of "17FEB10."

5. The Division subsequently brought this motion, dated July 16, 2010, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis

that the Division of Tax Appeals lacks jurisdiction of the matter because petitioners' protest of the Conciliation Order was filed more than 90 days from the date of the issuance of the order.

6. In support of its motion for summary determination, the Division submitted a copy of petitioners' petition and a copy of the envelope in which it was sent to the Division of Tax Appeals; a copy of petitioners' request for conciliation conference; a copy of the Notice of Disallowance dated March 6, 2009; a copy of the "Certified Record for Presort Mail - BCMS Cert Letter" postmarked November 13, 2009; a copy of the "Certified Record for Non-Presort Manual Mail" postmarked November 13, 2009; a copy of the Division's Request for Delivery Information/Return Receipt After Mailing Form (USPS Form 3811-A); a copy of the Response to Request for Delivery Information received by the Division from the U.S Postal Service (USPS); a copy of the subject November 13, 2009 Conciliation Order; the affidavit of its representative, John E. Matthews, Esq.; and affidavits of James Steven VanDerZee, Robert Farrelly and Heidi Corina, employees of the Division.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through receipt by BCMS of a postmarked copy of the certified mail record (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 cover 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). 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 - 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 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 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.

12. 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."

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 "11/13/09" is written in the upper right corner of each page of the CMR.

14. 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.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR, which contains a list of the conciliation orders issued by the Division on November 13, 2009. This CMR lists 62 computer-printed certified control numbers. Each 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 and the name and address of the addressee.

16. There is one deletion, or pulled item, from the list of 62 computer-printed certified control numbers. This pulled item is shown on the CMR by a line drawn through the relevant certified control number and corresponding information. This pulled item appears on page six of the CMR and is unrelated to the conciliation order at issue in this matter. Consistent with this deletion, the computer-printed "total pieces" entry of "62" on page six of the CMR has been crossed out and "61" has been handwritten in its place.

17. Information regarding the conciliation order issued to petitioners is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1686 0625 is reference/CMS number 000231066, along with petitioners' name and address listed on their request for conciliation conference, i.e., petitioners' last known address.

18. The affidavit of James Steven VanDerZee, Head 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 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 instance, the postal employee affixed a postmark dated November 13, 2009 of the Stuyvesant Plaza branch of the USPS to each page of the six-page CMR. On page six, the postal employee also wrote his or her initials and wrote the number "61" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

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 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.

21. 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 piece of certified mail to petitioners on November 13, 2009.

22. A second affidavit of Mr. Farrelly sets forth the regular procedures followed by the Division's BCMS Data Management Services Unit in its preparation of conciliation orders, accompanying cover letters and certified mail records for manual mail.

23. 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.

24. The name, mailing address, order date and BCMS number for each conciliation order to be issued are sent to the Division's BCMS Data Management Services Unit that also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR NON-PRESORT MANUAL MAIL" (manual mail CMR). The BCMS Data Management Services Unit prints the manual mail CMR and it is delivered to the BCMS clerk assigned to process conciliation orders.

25. The clerk, as part of her regular duties, associates each conciliation order and cover letter. The clerk verifies the taxpayer's or representative's name and address with the information listed on the manual mail CMR, and for a representative, types the representative's name and address on an envelope. The clerk then folds and places the cover letter and conciliation order into the solid envelope. For each taxpayer or representative listed on the manual mail CMR, the BCMS clerk affixes a peel and stick certified control number to the manual mail CMR under the heading "Cert. No." and also affixes the certified control number sticker to the corresponding envelope.

26. On the last page of the manual mail 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.”

27. The manual mail CMR, along with the 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 manual mail CMR, along with the envelopes containing the cover letters and conciliation orders to the USPS.

28. Mr. Farrelly attested to the truth and accuracy of the copy of the one-page manual mail CMR, which contains a list of the conciliation orders allegedly issued by the Division on November 13, 2009. This manual mail CMR contains three certified control number stickers. There are no deletions from the list. Each certified control number is assigned to an item of mail listed on the one-page manual mail CMR. Specifically, corresponding to each certified mail number sticker is a notice number and the name and address of the addressee.

29. The CMR lists the conciliation number assigned to the case, 231066, the name and address of the addressee as “Dino Reda, Van Brunt, Dubiago & Company, LLC, 1100 Summer Street,” and a sticker bearing certified number 7003 1680 0005 1057 2991 affixed directly beneath Mr. Reda’s name and partial address. A postmark dated November 13, 2009 of the Colonie Center branch of the USPS appears on the one-page manual mail CMR along with the signature of the postal employee who received the three listed items and the handwritten number of items received.

30. A second affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center, was also submitted by the Division. This second affidavit set forth the same standard procedures for the Division’s Mail Processing Center that were outlined above. Mr. VanDerZee asserted that these standard

procedures were followed by the Division's Mail Processing Center in mailing the piece of certified mail to Mr. Reda.

31. 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 USPS for delivery information. Ms. Corina's affidavit describes the Division's request to the Postal Service for delivery information on the conciliation order mailed to petitioners' representative. Specifically, USPS Form 3811-A requests delivery information with respect to an article of mail bearing certified control number 7003 1680 0005 1057 2991. The USPS response to the Division's request indicates that certified control number 7003 1680 0005 1057 2991 was delivered on November 16, 2009 in Stamford, CT 06905. The scanned image of the recipient's signature as shown on the USPS response is Sylvia Zebrowski. The scanned address of the recipient indicates "1100 Summer St."

32. Petitioners did not respond to the Division's motion.

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

A. A motion for summary determination shall be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. In the instant matter, petitioners did not respond to the Division's motion. Therefore, petitioners are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). However, in determining a motion for summary determination, the evidence must be viewed in a

manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]; *see also Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461 [1964]).

C. 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 petitioners unless they 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).

D. 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 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

E. 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 petitioners at their 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 petitioners by certified mail on November 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 VanDerZee and Farrelly affidavits were followed with respect to the order issued to petitioners. Petitioners' names 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 November 13, 2009. After one piece of certified mail was pulled, there remained 61 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "61" near such initials, that 61 items were received for mailing. 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). In short, the Division established

that it mailed the order to petitioners, by certified mail, on November 13, 2009 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995) and 96 days before the February 17, 2010 mailing date of the petition.

F. While the Tax Law does not specifically provide for the service of a statutory notice 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 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]).

To prove that the Conciliation Order was served on Mr. Reda, petitioners' representative, the Division submitted second affidavits from Messrs. Farrelly and VanDerZee to establish the general procedure for mailing conciliation orders by certified mail for manual mail, and a copy of the computer-generated manual mail CMR. While these second affidavits establish that the Division has a standard procedure by which conciliation orders are issued, the balance of the evidence fails to establish that the Division adhered to that procedure in this instance. This manual mail CMR fails to include the full name and address of petitioner's representative and therefore, violates Postal Service rules concerning the preparation of Form 3877 (firm sheet). USPS Domestic Mail Manual § 503(5.2.3) allows a mailer, such as the Division, who is requesting a certificate of mailing for three or more pieces of mail being presented at one time, to use a facsimile form sheet containing "the same information as the postal-provided form." The firm sheet certificate "must show the names and addresses of the sender and addressee and may show the amount of postage paid. The mailer may also place identifying invoice or order numbers on the certificate." (*See* USPS Domestic Mail Manual § 503[5.2.5].)

Given the Division's failure to comply with the certificate of mailing mailer preparation requirements set forth in the USPS Domestic Mail Manual § 503(5.2.5) when it prepared the manual mail CMR, it cannot rely on that CMR to prove that it mailed the Conciliation Order to petitioners' representative on November 13, 2009.

G. Where proper mailing cannot be proved, demonstration of receipt of the Conciliation Order by petitioners' representative 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, the 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 petitioners' representative at his last known address on November 16, 2009. Therefore, running the statute of limitations from the date of receipt of the Conciliation Order by petitioners' representative, the 90-day period ended on February 14, 2010. As this date fell on a Sunday, and Monday, February 15, 2010 was Presidents' Day, the petition was due on Tuesday, February 16, 2010 (*see* General Construction Law §§ 20, 25-a). Petitioners' protest was not filed until it was sent by FedEx Priority Overnight mail on February 17, 2010, or one day beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioners' protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The Division of Taxation's motion for summary determination is granted, and the petition of John and Patrice Callies is hereby dismissed.

DATED: Troy, New York  
November 10, 2010

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE