

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
<b>WINDOW KING INSTALLATIONS, INC.</b>	:	<b>ORDER</b>
<b>AND PHILIP VACCARO</b>	:	<b>DTA NOS. 823841</b>
	:	<b>AND 823842</b>
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period June 1, 2001 through May 31, 2007.	:	

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Petitioners, Window King Installations, Inc., and Philip Vaccaro, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through May 31, 2007.

On November 2, 2010, the Division of Tax Appeals issued to petitioners notices of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petitions did not appear to have been filed in a timely manner. On November 24, 2010, the Division of Taxation filed a letter requesting an extension of time within which to file its response. The Division of Tax Appeals granted an extension until January 10, 2011 for the parties to respond to the notices of intent to dismiss petition. The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal. Petitioners responded by letter on January 11, 2011, which date commenced the 90-day period for issuance of this order.

After due consideration of the documents and arguments submitted by the parties, Donna M. Gardiner, Administrative Law Judge, renders the following order.

## ***ISSUE***

Whether petitioners timely filed their petitions with the Division of Tax Appeals following the issuance of the conciliation orders.

## ***FINDINGS OF FACT***

1. Each petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The requests were in response to notices of determination, dated September 14, 2008, issued by the Division of Taxation (Division) assessing additional sales and use taxes due against petitioners for the period June 1, 2001 through May 31, 2007.

2. BCMS scheduled a conciliation conference held on June 8, 2009 in Rye Brook, New York. Petitioners appeared by Allen Lokensky. By its conciliation orders dated December 18, 2009, BCMS denied petitioners' requests and sustained the statutory notices. On September 3, 2010, the Division of Tax Appeals received the petitions in this matter.

3. As outlined above, on November 2, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued each petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petitions, on the basis that the petitions had not been timely filed.

4. The Division submitted the affidavits of Bruce Peltier and Robert Farrelly, each sworn to on January 4, 2011 and both employees of the Division. The affidavits of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such

mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

5. The BCMS Data Management Services Unit prepared and forwarded 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, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

6. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

7. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

8. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed 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.

9. It was the general office practice that the BCMS clerk stamped “POST OFFICE Hand write total # of pieces and initial. **Do Not** stamp over written areas,” and also stamped “**MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT**” on the last page of the CMR.

10. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “12-18-09” was written in the upper right corner of each page of the CMR.

11. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

12. Mr. Farrelly attested to the truth and accuracy of the copy of the 8-page CMR, which contained a list of the 78 conciliation orders issued by the Division on December 18, 2009. The CMR also listed 78 certified control numbers. Each such certified control number was assigned to an item of mail listed on the eight pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

13. Information regarding the conciliation orders issued to petitioners was contained on page two of the CMR.

Corresponding to certified control number 7104 1002 9730 1705 7383 was reference number 000226606, along with the name and address of petitioner Window King Installations, Inc., P.O. Box 307, West Nyack, NY 10994-0307. This was the address listed on its request for conciliation conference, i.e., its last known address.

Corresponding to certified control number 7104 1002 9730 1705 7369 was reference number 000226606, along with the name and address of petitioner's former representative, Allen Lokensky, Allen Lokensky & Associates, 209 Brittany Court, Valley Cottage, NY 10989.

Corresponding to certified control number 7104 1002 9730 1705 7352 was reference number 000226607, along with the name and address of petitioner Philip Vaccaro, 6 Opal Court, Pomona, NY 10970-2827. This was the address listed on his request for a conciliation conference, i.e., his last known address.

Corresponding to certified control number 7104 1002 9730 1705 7376 was reference number 000226607, along with the name and address of petitioner's former representative, Allen Lokensky, Allen Lokensky & Associates, 209 Brittany Court, Valley Cottage, NY 10989.

14. The affidavits of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

15. Here, the postal employee affixed a postmark date of December 18, 2009 to each page of the eight-page CMR. The postal employee also wrote her full name and the number "78" near the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page eight of the

CMR, 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 CMR, indicating that 78 pieces of mail were actually received.

16. Mr. Peltier stated 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 was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

17. Based upon his review of the affidavits of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on December 18, 2009, an employee of the Mail Processing Center delivered pieces of certified mail addressed to: Window King Installations, Inc., P.O. Box 307, West Nyack, NY 10994-0307, Philip Vaccaro, 6 Opal Court, Pomona, NY 10970-2827, and two pieces of certified mail to Allen Lokensky, Allen Lokensky & Associates, 209 Brittany Court, Valley Cottage, NY 10989, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on December 18, 2009 for the records of BCMS. He asserted that the procedures described in his affidavit were 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 petitioners and their representative on December 18, 2009.

### **CONCLUSIONS OF LAW**

A. There is a 90-day statutory 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 3000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 689(b), the conciliation orders and underlying assessments in this case would be binding upon petitioners unless they each 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 the timeliness of a taxpayer's petition following 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 (*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 to the taxpayer's 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, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [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 conciliation orders to petitioners at their last known addresses (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier 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 orders in issue were actually mailed to petitioners and their representative by certified mail on December 18, 2009, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the conciliation orders issued to petitioners. Petitioners' names and addresses, as well as the numerical information on the face of the orders, appear on the CMR, which bears a USPS date stamp of December 18, 2009. There are 78 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "78" near her signature, that the post office received 78 items for mailing. In short, the Division established that it mailed the orders to petitioners by certified mail on December 18, 2009 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

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 orders were properly mailed when they were delivered into the custody of the USPS on December 18, 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 December 18, 2009 date of mailing was March 18, 2010, and in order to be considered timely, petitioners' protests had to have been filed on or before such date.

Petitioners' protests were not filed until they were received on August 11, 2010, or 236 days late.

As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioners' protests (*Matter of Sak Smoke Shop*).

E. This determination, made pursuant to the notices of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioners from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion "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."

Petitioners submitted no credible evidence that the petitions were filed within the time frame required, i.e., by March 18, 2010. Moreover, petitioners have failed to directly challenge the Division's proof of mailing of the conciliation orders with any credible evidence. Rather, petitioners' arguments focus on the merits of the underlying case. Unfortunately, without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioners have failed to meet their burden of proof.

F. The petitions of Window King Installation, Inc., and Philip Vaccaro are dismissed.

DATED: Troy, New York  
March 24, 2011

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE