

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WAREFORCE CORPORATION	:	ORDER
		DTA NO. 824513
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 September 1, 2005 through August 31, 2008.	:	

Petitioner, Wareforce Corporation, 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 September 1, 2005 through August 31, 2008.

On September 20, 2011, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On October 3, 2011, petitioner, appearing by Ferdinand Alfajora, employee, filed written comments to the Notice of Intent, along with other documents. On October 14, 2011, the Division of Taxation, by Mark F. Volk, 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 October 14, 2011. After due consideration of the documents and arguments submitted, Donna M. Gardiner, 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, Wareforce Corporation, timely filed a request for a conciliation conference dated April 15, 2010 with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Determination # L-033378042 dated March 1, 2010.

2. Petitioner's conciliation conference was held on January 7, 2011. A Conciliation Order (CMS No. 239677) dated February 25, 2011 denied petitioner's request and recomputed the amount of tax due in the Notice of Determination.

3. On July 22, 2011, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated February 25, 2011.

4. On September 20, 2011, the Petition Intake 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 Conciliation Order in this matter was issued on February 25, 2011, but that the petition was not filed until July 22, 2011, or 147 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on February 25, 2011, and a copy of the subject February 25, 2011 Conciliation Order.

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

7. The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, and forwards them 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.

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 (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 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 via a printer located in BCMS 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 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.

11. On the last 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 “02/25/11” 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.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR attached to his affidavit, which contains a list of the conciliation orders issued by the Division on February 25, 2011. This CMR lists 47 certified control numbers and there are no deletions from the list. 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 CMS number, the name and address of the addressee, and postage and fee amounts.

15. Information regarding the Conciliation Order issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0510 6437 is reference/CMS number 000239677, along with petitioner’s name and address as set forth on the request for conciliation conference.

16. The affidavit of Bruce Peltier, 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 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 signs or initials the CMR indicating receipt by the post office.

17. In this particular instance, the postal employee affixed a postmark dated February 25, 2011 to each page of the five-page CMR. The postal employee also wrote his or her initials and the number "47" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

18. 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. Peltier'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. Peltier states that on February 25, 2011, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Wareforce Corporation, 19 Morgan 104, Irvine, CA 92618-2005, to a branch of the USPS in Albany, New York, in a sealed envelope 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 February 25, 2011 for the records of BCMS. Mr. Peltier 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 petitioner on February 25, 2011.

20. Petitioner does not dispute that it received the conciliation order. Rather, petitioner argues that it filed a timely petition with the Division of Tax Appeals on March 18, 2011.

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 in this case and the underlying notice of determination 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). In this case, since it appeared upon receipt of the subject petition by the Division of Tax Appeals that it was filed late, a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

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 (*id.*). 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. Peltier, 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 on February 25, 2011. Specifically, this document lists the certified control number with the corresponding name and address of petitioner and bears a USPS postmark dated February 25, 2011. Additionally, a postal employee wrote “47” next to the total pieces received heading and initialed 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. Petitioner does not dispute that it did not receive the conciliation order. Rather, petitioner argues that it filed a timely petition with the Division of Tax Appeals. In support of its argument, petitioner points to a letter dated February 11, 2011 addressed to BCMS wherein petitioner states that it wants to avail itself of its right to appeal the notice of determination. Moreover, petitioner submits a copy of a petition dated March 18, 2011 along with a computer printout of a FedEx delivery transaction. Lastly, petitioner claims that its petition has merits and should be addressed.

With respect to the correspondence dated February 11, 2011, this correspondence cannot be construed as a timely petition to the Division of Tax Appeals. At the time that this letter was sent, petitioner was awaiting the decision by BCMS concerning its conference held on January 7, 2011. As set forth above, the conciliation order was issued to petitioner on February 25, 2011. Therefore, the correspondence dated February 11, 2011 addressed to BCMS clearly does not rise to the level of a petition.

Petitioner claims to have filed a petition with the Division of Tax Appeals on March 18, 2011. In support of its argument, petitioner has submitted a document printed from the FedEx web site entitled Detailed Results. Such printout indicates that a delivery was made to “ALBANY, NY” on March 21, 2011 at 10:29A.M. Without any further documentation, it cannot be determined what was sent and to whom. The offices of the Division of Tax Appeals are located in Troy, New York, and the printout does not indicate that a delivery was made to our offices in Troy, New York.

G. As noted previously, petitioner’s petition was filed on July 22, 2011. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of a Conciliation Order and was therefore untimely (*see* Tax Law § 170[3-a][a]). As such, the Division of Tax Appeals lacks jurisdiction to address it.

H. The petition of Wareforce Corporation is hereby dismissed.

DATED: Troy, New York
January 5, 2012

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE