

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**JEREMY WIESEN** : DECISION  
for Redetermination of a Deficiency or for Refund or : DTA NO. 827455  
Personal Income Tax under Article 22 of the Tax Law and :  
the New York City Administrative Code for the Years :  
2009 and 2011. :

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Petitioner, Jeremy Wiesen, filed an exception to the determination of the Administrative Law Judge issued on July 14, 2016. Petitioner appeared pro se and by Brian Gordon, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq. of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply letter brief. Oral argument was denied. By decision dated April 10, 2017, this matter was remanded to the Administrative Law Judge for the issuance of a supplemental determination, based on the existing factual record, with relevant findings of fact and conclusions of law addressing the issue of whether the Division of Taxation met its burden to prove mailing of the conciliation order at issue. The Tax Appeals Tribunal retained jurisdiction over petitioner's original exception during this process.

A supplemental determination was issued on August 24, 2017. Petitioner filed a supplemental exception and a supplemental letter brief. The Division of Taxation filed a supplemental letter brief in opposition. Petitioner filed a supplemental reply letter brief. Each party was also permitted to file an additional written submission in response to petitioner's

request that this Tribunal consider a document that was not in evidence before the Administrative Law Judge. The six-month period for the issuance of this decision began on March 30, 2018, the date that the last such additional submission was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the petition in this matter is properly subject to dismissal.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge in the supplemental determination, except that we have modified finding of fact 4 to more fully reflect the record. As so modified, those facts are set forth below.

1. Petitioner, Jeremy Wiesen, filed a petition with the Division of Tax Appeals on January 26, 2016. Attached to the petition were a conciliation order (CMS number 265328) dated October 2, 2015, a one-page letter from petitioner dated January 25, 2016, and a one-page letter from Jack B. Goldhaber, CPA, dated January 25, 2016.

2. The conciliation order sustained a notice of deficiency, number L-042253882, dated December 5, 2014, that was issued to petitioner for the tax years 2009 and 2011.<sup>1</sup>

3. In his letter attached to his petition, petitioner acknowledged that he missed the deadline for the timely filing of his petition. Petitioner asserts that he has relied on his accountant for over 30 years and his accountant was out of the country during the months leading

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<sup>1</sup> The record does not contain a complete copy of the notice of deficiency (assessment ID L-042253882). Both petitioner and the Division of Taxation have offered an incomplete copy of the notice of deficiency in their filings with the Division of Tax Appeals. Both such incomplete copies show a deficiency for 2009. The conciliation order, however, indicates that petitioner's request involves assessment L-042253882 and tax years 2009 and 2011.

up to the deadline for petitioning the conciliation order issued to him. Additionally, there is a one-page letter from his accountant, which sets forth the weeks he was out of the country.

4. On February 26, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent advised that the petition was subject to dismissal on the basis that:

“Pursuant to § 170(3-a)(e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS conciliation order.

In this case, the conciliation order, CMS No. 265328, was issued to petitioner on October 2, 2015. However, the petition in this matter was not filed with the Division of Tax Appeals until January 26, 2016, or one hundred and sixteen (116) days later.”

5. In petitioner’s response to the notice of intent to dismiss petition, he argues that the Division of Tax Appeals should exercise its jurisdiction to review the notice of intent to dismiss if it believes there is a justifiable excuse. Petitioner requests that the two letters attached to his petition be considered in “waiving [his] failure to meet the petition deadline.” Additionally, petitioner argues the substantive issues underlying the issuance of the notice of deficiency.

6. The Division of Taxation (Division) submitted an affidavit of the Division’s attorney, which referenced the attached affidavits of two Division employees, Robert Farrelly, Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (BCMS) and Bruce Peltier, a supervisor since 1999 and currently the Principal Mail and Supply Clerk in the Division’s mail room, along with their respective attached supporting exhibits in response to the notice of intent to dismiss.

7. The affidavit of Robert Farrelly, dated March 29, 2016, sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of orders by the United States Postal Service (USPS) certified mail and confirmation

of the mailing through BCMS's receipt of a postmarked copy of the "Certified Record for Presort Mail - BCMS Cert Letter" (CMR).

8. In order to commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and accompanying cover letter, predated with the intended date of mailing, and forwards both 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.

9. Next, 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 indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR. 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 using a printer located in BCMS, and then these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of his or her regular duties, associates and combines each individual and matching conciliation order, cover sheet and cover letter. The clerk then verifies the names and addresses of the relevant taxpayers and representatives using the information listed on the CMR and the appropriate cover sheet. Next, the clerk folds and places the cover sheet, cover

letter, and conciliation order, in that order, into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk 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 the pages of the CMR. In this particular case, “10-2-15” is written in the upper right corner of pages one through five of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of October 2, 2015.

14. The CMR, along with the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers 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 five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on October 2, 2015. This particular CMR lists computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number as well as the names and addresses of the addressees. There are no deletions from this list.

16. Information regarding the conciliation order relevant to this case is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0593 1558 is reference or CMS number 000265328, along with petitioner’s name and a West Palm

Beach, Florida, address that is identical to petitioner's address contained on his request for BCMS conference.

17. The Division also submitted the affidavit of Bruce Peltier, dated March 31, 2016. This affidavit 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. Further, after a conciliation order is placed in the specifically designated "Outgoing Certified Mail" basket in the Mail Processing Center, a staff member weighs, seals, and places postage and fee amounts on each envelope. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a staff member delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee then affixes a postmark and either his or her initials or signature to the CMR, thereby indicating receipt by USPS.

18. In this case, the postal employee affixed a postmark dated October 2, 2015 to, and also wrote his or her initials on, pages one through five of the CMR. The postal employee also wrote and circled the number "46" corresponding to the heading "Total Pieces and Amounts" as well as the preprinted number 46, contained on the fifth and last page of the CMR. The postal employee writes and circles the "Total Pieces and Amounts" number at the Division's specific request, and this is intended to indicate that all pieces of mail listed on the CMR were received at USPS, which, in this case, was 46.

19. Mr. Peltier's affidavit 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 a

relevant branch of the USPS by a member of Mr. Peltier's staff on the day following its initial delivery and is then delivered to the originating office, which, in this case, is BCMS.

Additionally, the CMR is maintained by BCMS in the regular course of its business.

20. Based upon his review of Mr. Farrelly's affidavit, the exhibits attached thereto, and the CMR, Mr. Peltier avers that on October 2, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his West Palm Beach, Florida, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He also states that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on October 2, 2015 for the records of BCMS. Mr. Peltier lastly asserts that the procedures described in this 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 October 2, 2015.

***THE SUPPLEMENTAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge found that the documents submitted by the Division established that the subject conciliation order was properly mailed to petitioner at his last known address using certified USPS mail on October 2, 2015, as claimed. Accordingly, the Administrative Law Judge concluded that the petition in this matter, filed on January 26, 2016, or 116 days later, was late-filed and must be dismissed.

***ARGUMENTS ON EXCEPTION***

Petitioner concedes that his petition was late-filed. He continues to assert that his long-time accountant was out of the country at the time his petition was due. Petitioner requests

that this Tribunal excuse his late filing and consider his substantive claims, which he argues in some detail.

The Division contends that the Administrative Law Judge properly dismissed the petition as untimely.

### ***OPINION***

The jurisdictional question presented in this matter arises from the Division of Tax Appeals' issuance of a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). That is, 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 . . ." (20 NYCRR 3000.9 [b] [1]).

"The proponent of a summary judgment [or summary determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In contrast, the opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan By Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1<sup>st</sup> Dept 1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where, as here, the timeliness of a taxpayer's petition is in question, the initial inquiry is

whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by “producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge's finding that the Division has established the existence of a standard mailing procedure 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 during the relevant period. We also agree with the Administrative Law Judge's finding that the CMR in the present matter has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Additionally, we agree with the Administrative Law Judge's conclusion that the Division properly used petitioner's last known address in mailing the conciliation order to petitioner on October 2, 2015 (*see* finding of fact 16). We thus conclude, as did the Administrative Law Judge, that the Division has met its burden to show that the conciliation order at issue was properly mailed to petitioner on October 2, 2015.

With exceptions not relevant here, a taxpayer has 90 days from the date of issuance of a conciliation order to further contest a statutory notice by filing a petition with the Division of Tax

Appeals (*see* Tax Law § 170 [3-a] [e]). It is well-established that the deadline for filing a petition is strictly enforced and that this Tribunal has no authority to extend the limitations period (*see Matter of Leibowitz*, Tax Appeals Tribunal, August 13, 2015). Furthermore, “extenuating circumstances do not provide a basis to excuse the late filing of a petition” (*id.*). In this regard, we have specifically rejected reliance on another to file a petition as an excuse for late filing (*see Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990). We thus reject petitioner’s excuse regarding his accountant’s absence. Accordingly, the petition in this matter, filed on January 26, 2016, or 116 days after the conciliation order was issued, must be dismissed.

We note also that, given the untimely petition, we are precluded from addressing petitioner’s arguments regarding the merits of his case (*see e.g. Matter of Modica*).

Finally, consistent with “our longstanding policy against considering evidence that was not made part of the record below,” we do not accept into the record the document submitted with petitioner’s supplemental reply letter brief and have not considered that document in the rendering of this decision (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014 citing *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeremy Wiesen is denied;
2. The supplemental determination of the Administrative Law Judge is affirmed; and
3. The petition of Jeremy Wiesen is dismissed.

DATED: Albany, New York  
September 28, 2018

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner