

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition<sup>1</sup> :  
of :  
**AMONA DELI CORP.** : **DECISION**  
 : **DTA NO. 828880**  
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, 2012 through November 30, 2014. :  
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Petitioner, Amona Deli Corp., filed an exception to the determination of the Administrative Law Judge issued on July 25, 2019. Petitioner appeared by Emad Mohamed, president. The Division of Taxation, appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner’s request for oral argument was denied. The six-month period for the issuance of this decision began on November 8, 2019, the date that petitioner’s reply brief was received.

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

***ISSUE***

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

***FINDINGS OF FACT***

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<sup>1</sup> The petition in this matter was filed under the name “Emad Mohamed/Amona Deli Corp.” and challenged several statutory notices, some in Mr. Mohamed’s name and others in the name of Mr. Mohamed’s business, Amona Deli Corp. The Division of Tax Appeals separated the protests by taxpayer and assigned the protested notices in Mr. Mohamed’s name DTA No. 828953 and the protested notices in Amona Deli Corp.’s name DTA No. 828880.

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. Petitioner, Amona Deli Corp., requested a copy of the Division of Tax Appeals petition form (TA-100) on or before April 25, 2018. The Division of Tax Appeals mailed a petition form and a copy of the New York State Tax Appeals Tribunal Rules of Practice and Procedure (Rules of Practice and Procedure) to petitioner on April 25, 2018.

2. Months later, petitioner's president, Emad Mohamed, called to inquire about the status of the case. The Division of Tax Appeals informed Mr. Mohamed that a petition had not been received. Mr. Mohamed claimed that a petition had been filed via United Parcel Service (UPS) on May 25, 2018. The Division of Tax Appeals instructed Mr. Mohamed to mail another copy of the petition, together with the proof of mailing for the May 25, 2018 filing.

3. Petitioner mailed a copy of the petition which was received by the Division of Tax Appeals on September 7, 2018. Petitioner also provided a copy of a Staples customer receipt indicating that a submission had been mailed to the Division of Tax Appeals via UPS on May 25, 2018. While the addressee information on the receipt is correct, the Division of Tax Appeals did not receive the May 25, 2018 submission. As petitioner provided proof of mailing, the filing date of the petition is deemed to be May 25, 2018.

4. The petition included a copy of a notice of determination and notice and demand for payment of tax due (notice and demand) bearing assessment number L-044465995, dated as issued to petitioner on February 25, 2016 and April 14, 2017, respectively.

5. Petitioner checked the box on the petition indicating that a conciliation conference had not been requested.

6. The petition challenges only the foregoing notices, and there were no other statutory notices attached to the petition.

7. On February 15, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent) with respect to the petition. The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notice of determination, the petition was not timely filed.

8. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) the affidavit of Adam Roberts, an attorney employed in the Office of Counsel of the Division; (ii) a copy of the request for conciliation conference, stamped as received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on May 9, 2016; (iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated March 20, 2019; (iv) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked October 14, 2016; (v) a copy of the conciliation order, cover letter and cover sheet, dated October 14, 2016, as well as a copy of the three-windowed mailing envelope used to mail the order; and (vi) an affidavit of Fred Ramundo, supervisor in the Division mail room - stores and mail operations supervisor, dated March 25, 2019.

9. Unknown to the Division of Tax Appeals, petitioner filed a request for conciliation conference resulting in the issuance of a conciliation default order on October 14, 2016 (CMS No. 270492). As such, this determination will address the timeliness of the petition following the issuance of the conciliation default order.

10. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the

mailing of the conciliation 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 CMR.

11. 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 orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

12. 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.

13. 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 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 (000). The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

14. The clerk's regular duties include associating each cover sheet, cover letter, and conciliation order. 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

15. The “Total Pieces and Amounts” is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps “MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT:” on the bottom left corner of the CMR.

16. 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 case, “10-14-16” was written in the upper right corner of each page of the CMR.

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

18. Mr. Farrelly attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by the Division on October 14, 2016. The CMR lists 44 certified control numbers. 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 reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

19. Information regarding the conciliation order issued to petitioner is contained on page 3 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0035 9456 is reference or CMS number 000270492, along with the name and last known address of petitioner. Specifically, the Bellerose, New York, address listed on the CMR is the same address referenced on the request for conciliation conference and the petition filed with the Division of Tax Appeals.

20. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room since December of 2013, and currently a stores and mail operations supervisor, 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 is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control 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.

21. In this instance, the postal employee affixed a postmark dated October 14, 2016, to each page of the five-page CMR. The postal employee wrote and circled the number “44” on page 1, circled the number “44” on page 5 and initialed page 5 to indicate the total pieces of mail received at the post office.

22. Mr. Ramundo 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 is picked up at the post office by a member of Mr. Ramundo’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.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on October 14, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at its Bellerose, New York, address to a branch of the USPS in Albany, New York, in sealed a postpaid 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 October 14, 2016, for the records of BCMS. Mr. Ramundo 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 October 14, 2016.

24. In its response to the notice of intent to dismiss petition, petitioner's president, Emad Mohamed, submitted a letter claiming, in pertinent part, that it is unclear how or why an assessment was issued against the business at a time when the business was not in operation.

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

The Administrative Law Judge noted that the standard of review in the present matter is the same as that of a summary determination motion. The Administrative Law Judge pointed out that such a motion may be granted where no material issue of fact exists.

The Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition following the issuance of a conciliation order. The Administrative Law Judge also observed that the Division bears the burden of establishing that it mailed the conciliation order to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge noted the well-established rule that the Division must establish its standard mailing procedure and that such procedure was followed in this specific case in order to meet this burden.

The Administrative Law Judge concluded that the Division met its burden and established that the subject conciliation order was properly mailed to petitioner on October 14, 2016. Specifically, the Administrative Law Judge found that the submitted affidavits and the

CMR establish both the Division's general mailing procedure and that such procedure was followed in the present case. The Administrative Law Judge also found that the address to which the conciliation order was mailed was petitioner's last known address. The Administrative Law Judge thus concluded that the petition in the present matter, deemed filed on May 25, 2018, was filed beyond the 90-day limitations period. Accordingly, he dismissed the petition.

#### ***ARGUMENTS ON EXCEPTION***

Petitioner's president asserts that he relied on his accountant to meet the business's sales tax obligations. Petitioner also continues to question the validity and accuracy of the assessment. Petitioner's president further asserts that the business has subsequently failed; that he has experienced significant financial difficulties and health problems; and that he is unable to afford representation on this appeal. Petitioner does not address the issue of the timeliness of the petition.

The Division asserts that the determination was correct and should be affirmed.

#### ***OPINION***

The Administrative Law Judge's dismissal of the petition was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). 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 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]). 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 v GTE Sylvania*, 182 AD2d 446, 449 [1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A taxpayer may protest a notice of determination by filing a request for a conciliation conference with BCMS (Tax Law § 170 [3-a] [a]). A conciliation conference may result in the issuance of a conciliation order. A conciliation order is issued when mailed (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). A conciliation order is binding upon a taxpayer unless the taxpayer files a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of the order, with exceptions not relevant here (Tax Law § 170 [3-a] [e]).

A petition filed following the issuance of a conciliation order must be timely to confer jurisdiction on the Division of Tax Appeals to consider the merits of the protest (*see e.g. Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Chimiak*, Tax Appeals Tribunal, September 19, 2019; Tax Law § 2006 [4]).

Where, as here, the timeliness of a taxpayer’s petition is in question, the Division has the burden to prove 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). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the 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).

The Division has met its burden here. The affidavits of Mr. Farrelly and Mr. Ramundo establish the Division’s standard mailing procedures in issuing conciliation orders. The CMR has been properly completed and thus shows that the Division’s standard mailing procedure was followed in this instance (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Furthermore, the cover sheet associated with the subject conciliation order bears petitioner’s correct address. Accordingly, we agree with the Administrative Law Judge’s conclusion that the conciliation order was properly mailed to petitioner on October 14, 2016, as claimed.

As noted, petitioner had 90 days from the October 14, 2016 mailing of the conciliation order to file a petition with the Division of Tax Appeals. The petition in the present matter, deemed filed on May 25, 2018, was filed well-beyond this time limit. While we are sympathetic to petitioner’s personal and financial circumstances, we may not consider the merits of the protest as we lack jurisdiction to do so (*Matter of Ahmed; Matter of Chimiak*).

The Administrative Law Judge thus properly dismissed the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Amona Deli Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Amona Deli Corp. is dismissed.

DATED: Albany, New York  
May 1, 2020

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner