

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN P. McALEESE	:	DETERMINATION DTA NO. 826435
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes Under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2006 through 2008.	:	

Petitioner, John P. McAleese, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2006 through 2008.

On September 12, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. By a letter dated October 8, 2014, the date by which the parties were allowed to submit responses to the notice of intent was extended to November 28, 2014. On November 26, 2014, petitioner, appearing by Leatha J. Sturges, Esq., filed an affirmation and documents in opposition to dismissal. On November 26, 2014, 2014, the Division of Taxation (Division), by Amanda Hiller, Esq. (Leo Gabovich, Esq., of counsel), submitted an affidavit and 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 determination commenced on November 28, 2014, the latest date by which responses to the notice of intent could be filed. After due

consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, John P. McAleese, filed a request for a conciliation conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The Request, dated October 25, 2013, was filed in response to three notices of deficiency issued by the Division against petitioner. The notices are dated August 1, 2012, November 2, 2012 and November 7, 2012, bear assessment numbers L-038075825, L-0380075826 and L-038075827, and assert additional personal income tax due for the years 2006, 2007 and 2008 in the amounts of \$1,250.00, \$1,335.00 and \$6,946.00, respectively, plus penalty and interest.

2. BCMS issued to petitioner a Conciliation Order Dismissing Request (CMS No. 259964), dated December 20, 2013 (Dismissal Order), dismissing petitioner's request as untimely filed.

3. On August 1, 2014, petitioner filed a petition with the Division of Tax Appeals challenging the Dismissal Order.

4. On September 12, 2014, Supervising Administrative Law Judge Daniel J. Ranalli issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition, on the basis that the petition had not been timely filed.

5. The Division submitted the affidavits of Robert Farrelly and Bruce Peltier, employees of the Division, sworn to on November 17 and 19, 2014, respectively. The affidavit of Robert

Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of such orders, including the Dismissal Order at issue, by the United States Postal Service (USPS), via certified mail, with confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

6. The process for issuance of conciliation orders begins when 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 conciliation orders.

7. 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are to be sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." 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.

9. The clerk's regular duties include associating 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. It is (and was) the general office practice that the BCMS clerk stamps on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR. The BCMS clerk also stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on the bottom right corner of the last page of the CMR.

11. 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 "12-20-14" was written in the upper right corner of each page of the CMR.

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

13. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which sets forth a list of the 55 conciliation orders issued by the Division on December 20, 2013. The CMR also listed 55 certified control numbers. Each such certified control number is assigned to an item of mail listed on the first five pages of the CMR. Specifically, corresponding to each

listed certified control number is a reference number, the name and address of the addressee, and postage and fee amounts.¹

14. Information regarding the Dismissal Order issued to petitioner is contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0107 8738 was reference number 000259964, along with the petitioner's name and address at 762 10th Ave., Apt. 4N, NY, NY, 10019. This is the address set forth by petitioner in his Request and in the petition filed herein, and petitioner does not argue that this is an incorrect address.

15. Information regarding the Dismissal Order issued to petitioner's representative is also contained on page one of the CMR. Corresponding to certified control number 7104 1002 9730 0107 8752 was the same reference number 000259964, along with the petitioner's representative's name and address at 1501 Broadway, Suite 12019, New York, New York, 10036. This is the address set forth for petitioner's representative in the Request, and there is no argument raised that this is an incorrect address.

16. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in 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. 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 mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the

¹ There are 11 separate items of mail listed and identified on each of the first five pages of the CMR. The sixth, and final, page of the CMR contains no such individual items of mail, but rather presents (sums) the total number of items of mail set forth on the preceding pages, the postage and fee amounts for such items, and sets forth additional information specific to establishing the mailing of such items.

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.

17. Here, the postal employee affixed a postmark date of December 20, 2013 to each page of the six-page CMR. The postal employee also wrote his or her initials each page of the CMR and circled the number "55" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page six 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 55 pieces of mail were actually received.

18. 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 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 and the exhibits attached thereto, including the CMR, Mr. Peltier states that on December 20, 2014, an employee of the Mail Processing Center delivered a piece of certified mail addressed, as above, to petitioner and to petitioner's representative, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier states 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 20, 2013 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 piece of certified mail to petitioner on December 20, 2013.

20. A BCMS clerk's handwritten notation next to petitioner's name on page one of the CMR indicates that the subject Dismissal Order was returned to BCMS as unclaimed, that petitioner's address was re-verified, and that the Dismissal Order was subsequently remailed. There is no such notation appearing next to petitioner's representative's name on page one of the CMR. Mr. Farrelly's affidavit indicates that the Dismissal Order was remailed to petitioner by regular USPS mail on May 13, 2014, in accordance with BCMS policy.

21. Petitioner maintains he did not receive the Dismissal Order allegedly mailed on December 20, 2013. Petitioner admits actual receipt of the Dismissal Order on May 19, 2014, and asserts that the petition filed in response thereto on August 1, 2014 was timely. Petitioner submitted with the petition a copy of the three-windowed envelope within which BCMS originally mailed the Dismissal Order, postage metered with the date of December 20, 2013 and bearing a certified mail label. The envelope is date stamped as received (back) by BCMS on May 12, 2014. A postal service sticker was affixed to the envelope that states "return to sender, unclaimed, unable to forward." The May 12, 2014 date is consistent with the representation of Mr. Farrelly concerning remailing as detailed in Finding of Fact 20.

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 4000.5[c]). Pursuant to Tax Law § 170(3-a)(e), the Dismissal Order would be binding upon petitioner unless a timely petition was filed 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 whether the conciliation order was properly issued. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 1, 2014; *Matter of Cato*; *Matter of DeWeese*). 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).

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*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the Dismissal Order to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the Dismissal Order in issue was actually mailed to petitioner, and that a copy of the Dismissal Order was likewise

actually mailed to petitioner's representative, as required (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008), by certified mail on December 20, 2013, 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 Farrelly and Peltier affidavits were followed with respect to the Dismissal Order issued to petitioner. Petitioner's name and address, and petitioner's representative's name 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 December 20, 2013. There are 55 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling and writing the number "55" on the line stating "total pieces received at post office," that the post office received 55 items for mailing. In short, the Division established that it properly mailed the Dismissal Order to petitioner and to petitioner's representative by certified mail on December 20, 2013 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. Petitioner's argument that the 90-day period did not begin until May 13, 2014, the date BCMS remailed the Dismissal Order via regular mail, must be rejected. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Dean; Matter of Cato; Matter of DeWeese*). In this case, the Dismissal Order was properly mailed when it was delivered into the custody of the USPS on December 20, 2013, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioner's noreceipt of such order does not act to toll the statute (*Matter of Dean*), nor does BCMS's practice of remailing unclaimed orders via regular mail act to restart the 90-day period within which to petition a properly issued order. Petitioner's petition contesting the dismissal of

his request for a conciliation conference was not filed until August 1, 2014, or some 224 days later. As a consequence, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).²

E. The petition of John P. McAleese, is dismissed.

DATED: Albany, New York
February 26, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

² Petitioner is not without recourse in this matter. He may pay the disputed liabilities and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law §§ 170[3-a][a]; 689[c]).