

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JSM SERVICE, INC.	:	DETERMINATION DTA NO. 826474
for Review of a Notice of Proposed Refusal to Renew a Certificate of Authority dated January 23, 2014.	:	

Petitioner, JSM Service, Inc., filed a petition for review of a notice of proposed refusal to renew a certificate of authority dated January 23, 2014.

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. Petitioner, appearing by its president, Jaspal Singh, filed a letter on October 9, 2014 in opposition to the notice of intent to dismiss the petition. On November 26, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich, Esq., of counsel), having been granted an extension of time to do so, 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 26, 2014. After due consideration of the documents and arguments submitted, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, JSM Service, Inc., filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was in response to a notice of proposed refusal to renew a certificate of authority dated January 23, 2014.

2. BCMS issued to petitioner a Conciliation Order Dismissing Request (CMS No. 261965), dated May 30, 2014, dismissing petitioner's request as untimely filed.

3. On September 5, 2014, petitioner filed a petition with the Division of Tax Appeals in this matter.

4. On September 12, 2014, Supervising Administrative Law Judge Daniel 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 of Taxation (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, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the Conciliation Order Dismissing Request 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).

6. 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.

7. 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.

8. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." 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.

9. 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.

10. It 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.

11. 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 "5-30-14" 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 were 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 4-page CMR, which contained a list of the 40 conciliation orders issued by the Division on May 30, 2014. The CMR also listed 40 certified control numbers. Each such certified control number was assigned to an item of mail listed on the four 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.

14. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Corresponding to certified control number 7104 1002 9730 0240 5649 was reference number 000261965, along with the name and address of petitioner and its president, JSM Service Inc., Jaspal Singh, Brooklyn, New York. This is the address used by petitioner in its request for conciliation conference and the petition filed herein. Moreover, petitioner does not argue that this is an incorrect address.

15. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in 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.

16. Here, the postal employee affixed a postmark date of May 30, 2014 to each page of the four-page CMR. The postal employee also wrote his or her initials on pages two, three and four of the CMR and both circled and wrote the number "40" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page four 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 40 pieces of mail were actually received.

17. 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.

18. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on May 30, 2014, an employee of the Mail Processing Center delivered a piece of certified mail addressed to JSM Service, Inc., in Brooklyn, New York, 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 May 30, 2014 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 May 30, 2014.

19. A BCMS clerk's handwritten notation next to petitioner's name on page two of the CMR indicates that the subject conciliation order dismissing request was returned to BCMS as unclaimed, that the address was then verified and the order was subsequently remailed. Mr. Farrelly's affidavit indicates that the order was remailed to petitioner by regular USPS mail on June 11, 2014, in accordance with BCMS policy.

20. Petitioner responded to the notice of intent to dismiss with a letter from its president, Jaspal Singh, which alleged it timely filed its petition, claiming that BCMS mailed the conciliation order on June 11, 2014. Submitted with its letter is a copy of the envelope postage metered with a date of May 30, 2014 within which BCMS originally mailed the order. The envelope is date stamped as received by BCMS on June 11, 2014. A postal service sticker was affixed to the envelope that states "return to sender, attempted unknown, unable to forward." The June 11, 2014 date is consistent with the representation of Mr. Farrelly as detailed in Finding of Fact 19.

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 conciliation order and the notice of proposed refusal to renew a certificate of authority would be binding upon petitioner unless it timely 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 the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly mailed. (*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 conciliation order to petitioner at its 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 order in issue was actually mailed to petitioner by certified mail on May 30, 2014, 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 conciliation order issued to petitioner. Petitioner'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 May 30, 2014, and this is the same address that appeared on the request for conference. There are 40 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling and writing the number "40" on the line stating "total pieces received at post office," that the post office received 40 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail at its last known address on May 30, 2014 (*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 June 11, 2014, the date BCMS remailed the 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 order was properly mailed when it was delivered into the custody of the USPS on May 30, 2014, and it is this date that commenced the 90-day period within which a protest had to have been filed. Petitioner's nonreceipt 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 petitioner's request for a conciliation conference was not filed until September 5, 2014, or 97 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*).

E. The petition of JSM Service. Inc., is dismissed.

DATED: Albany, New York
February 19, 2015

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE